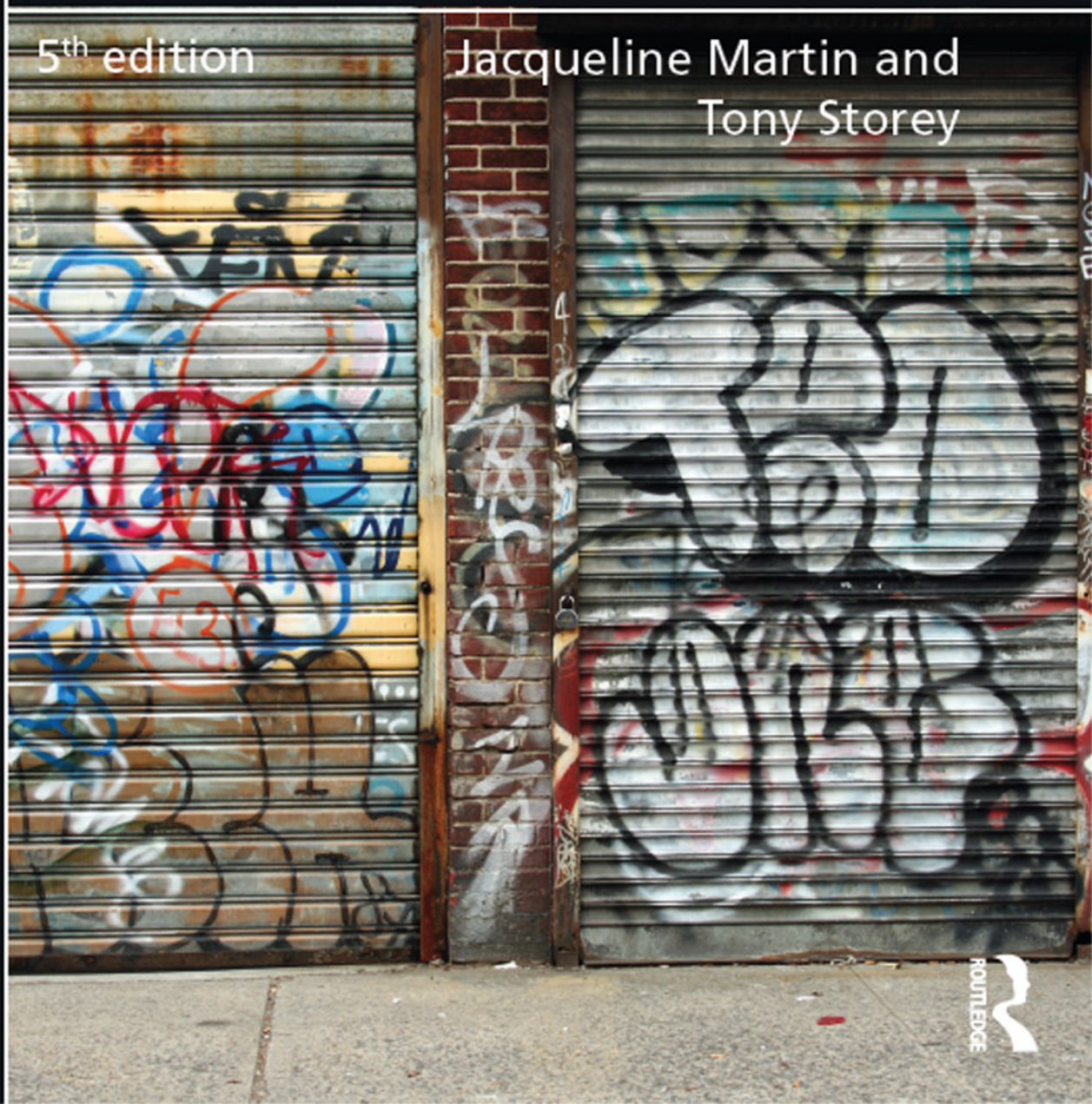
UNLOCKING THE LAW

UNLOCKING CRIMINAL LAW

5th edition

Jacqueline Martin and
Tony Storey



UNLOCKING THE LAW

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Jacqueline Martin
Tony Storey

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Contents

Acknowledgements xiv
Guide to the book xv
Preface xvii
List of figures xviii
Table of cases xix
Table of statutory instruments xxxv
Table of legislation xxxvi
Table of European instruments xlviii

PART I CONCEPTS IN CRIMINAL LAW 1

1 INTRODUCTION TO CRIMINAL LAW 3

1.1 Purpose of criminal law 3
1.1.1 Should the law enforce moral values? 4
1.1.2 Example of the changing nature of criminal law 6

1.2 Sources of criminal law 7
1.2.1 Common law offences 7
1.2.2 Statutory offences 8
1.2.3 Codification of the criminal law 8
1.2.4 Reform of the law 10

1.3 Defining a crime 10
1.3.1 Conduct criminalised by the judges 10
1.3.2 Retroactive effect of case law 11

1.4 Classification of offences 12
1.4.1 Classifying law by its source 12
1.4.2 Categories for purposes of police powers of detention 12
1.4.3 Classifying by the type of harm caused by the crime 13
1.4.4 Classification by where a case will be tried 13

1.5 Criminal justice system 14
1.5.1 Trials in the magistrates' courts 14
1.5.2 Trials in the Crown Court 14
1.5.3 Appeals from a magistrates' court 15
1.5.4 Appeals from trials in the Crown Court 16
1.5.5 The hierarchy of the courts 18

1.6 Sentencing 18
1.6.1 Purposes of sentencing 18

1.7 Elements of a crime 18

1.8 Burden and standard of proof 19
1.8.1 Presumption of innocence 19
1.8.2 Raising a defence 20
1.8.3 Standard of proof 21

1.9 Criminal law and human rights 21
1.9.1 The right to a fair trial 22
1.9.2 Burden of proof 22
1.9.3 No punishment without law 26
1.9.4 Other human rights 28
1.9.5 Human rights and criminal procedure 30

Further reading 32

2 *ACTUS REUS* 33

2.1 The physical element 33
2.1.1 Conduct and consequences 34
2.1.2 Circumstances 34
2.1.3 The physical element alone is not a crime 34
2.1.4 Omissions 35

2.2 Voluntary conduct 35

2.3 Omissions 35
2.3.1 Commission by omission 35
2.3.2 Imposition of a duty to act 36
2.3.3 Breach of duty to act 42
2.3.4 Reform 42

2.4 Causation 43
2.4.1 Factual causation 43
2.4.2 Legal causation 44

Sample essay questions 57

Further reading 60

3 *MENS REA* 61

3.1 The mental element 61

3.2 Intention 62
3.2.1 Direct intention 62
3.2.2 Oblique intention 62

3.3 Recklessness 67
3.3.1 The *Cunningham* test 67
3.3.2 The *Caldwell years*: 1981–2003 68
3.3.3 Back to *Cunningham: G and another* 69

3.4 Negligence 72

3.5 Dishonesty 72

3.6 Transferred malice 72

3.7 Coincidence of *actus reus* and *mens rea* 76

Sample essay question 79

Further reading 81

4 STRICT LIABILITY 83

4.1 Absolute liability 84

4.2 Strict liability 85
4.2.1 No due diligence defence 87
4.2.2 No defence of mistake 87
4.2.3 Summary of strict liability 89

4.3 Common law strict liability offences 89

4.4 Statutory strict liability offences 90
4.4.1 The presumption of *mens rea* 91
4.4.2 The *Gammon* criteria 91
4.4.3 Looking at the wording of an Act 92
4.4.4 Quasi-criminal offences 94
4.4.5 Strict liability and human rights 96
4.4.6 Issues of social concern 98
4.4.7 Promoting enforcement of the law 99
4.4.8 Twenty-first century cases 100

4.5 Justification for strict liability 107
4.5.1 Arguments against strict liability 108

4.6 Proposals for reform 109

Sample essay question 110

Further reading 112

5 PARTIES TO A CRIME 113

5.1 Principal offenders 113
5.1.1 Difficulties in identifying the principal 113

5.2 Innocent agents 114

5.3 Secondary parties 114
5.3.1 *Actus reus* of secondary parties: aiding, abetting, counselling or procuring 114
5.3.2 *Mens rea* of secondary parties 120
5.3.3 Joint enterprise 122

5.4 Withdrawal from participation 133
5.4.1 Pre-planned criminal activity 133
5.4.2 Spontaneous criminal activity 134

5.5 Assisting an offender 135

5.6 Reform 136

Sample essay question 139

Further reading 140

6 INCHOATE OFFENCES 141

6.1 Inchoate offences 141

6.2 Attempt 142
6.2.1 *Actus reus* of attempt 142
6.2.2 *Mens rea* of attempt 146
6.2.3 Impossibility 148
6.2.4 Excluded offences 150
6.2.5 Successful attempts 151
6.2.6 Reform 151

6.3 Conspiracy 152
6.3.1 *Actus reus* of statutory conspiracy 152
6.3.2 *Mens rea* of statutory conspiracy 154
6.3.3 Common law conspiracy 158
6.3.4 Impossibility 160

6.4 Assisting or encouraging crime 161
6.4.1 Background 161
6.4.2 Liability under the Serious Crime Act 2007 161
6.4.3 *Actus reus* elements 163
6.4.4 *Mens rea* elements 164
6.4.5 No requirement for substantive offence to be committed (s 49) 166
6.4.6 Defence of 'acting reasonably' (s 50) 166
6.4.7 Defence for victims (s 51) 167
6.4.8 Impossibility 167
6.4.9 Attempt liability 167
6.4.10 Evaluation of the Serious Crime Act 2007 168

Sample essay question 171

Further reading 172

7 CAPACITY 173

7.1 Children 174
7.1.1 Children under the age of ten 174
7.1.2 Child safety orders 175
7.1.3 Children aged ten and over 175

7.2 Mentally ill persons 178
7.2.1 Unfitness to plead 178
7.2.2 Insanity at time of offence 180
7.2.3 Diminished responsibility 180
7.2.4 Sentencing mentally ill offenders 180

7.3 Vicarious liability 181
7.3.1 Extended meaning of words 182
7.3.2 Delegation principle 182
7.3.3 Reasons for vicarious liability 185
7.3.4 Criticisms of vicarious liability 185

7.4 Corporate liability 186
7.4.1 Exceptions to the general rule of liability 186
7.4.2 The principle of identification 187
7.4.3 Vicarious liability 192
7.4.4 Breach of statutory duty 193

7.5 Corporate manslaughter 194
7.5.1 Previous law 194
7.5.2 Reform of corporate manslaughter 196
7.5.3 Corporate Manslaughter and Corporate Homicide Act 2007 197
7.5.4 Is the Act working? 199
7.5.5 Why make organisations criminally liable for manslaughter? 202
Sample essay question 206
Further reading 207

8 GENERAL DEFENCES 209

8.1 Duress 209
8.1.1 Sources of the duress 210
8.1.2 The seriousness of the threat 210
8.1.3 Threats against whom? 211
8.1.4 Imminence of the threat, opportunities to escape and police protection 212
8.1.5 Duress does not exist in the abstract 213
8.1.6 Voluntary exposure to risk of compulsion 214
8.1.7 Should D have resisted the threats? 217
8.1.8 The scope of the defence 220
8.1.9 The development of duress of circumstances 225
8.2 Necessity 228
8.3 Marital coercion 234
8.4 Mistake 234
8.4.1 Mistakes of fact 234
8.4.2 Mistakes of law 235
8.5 Self-defence and related defences 236
8.5.1 The necessity of force 237
8.5.2 The reasonableness of force 241
8.5.3 Intoxication, mistake and self-defence 244
8.5.4 'Grossly disproportionate' force in 'householder' cases 246
8.5.5 Should excessive force in homicide reduce murder to manslaughter? 248
8.6 Consent 250
8.6.1 Consent must be real 250
8.6.2 Consent and fraud 250
8.6.3 The scope of consent 253
8.6.4 The impact of the European Convention on Human Rights (1950) and the Human Rights Act 1998 263
Sample essay question 267
Further reading 268

9 MENTAL CAPACITY DEFENCES 271

9.1 Insanity 271
9.1.1 Procedure 271
9.1.2 The special verdict 272
9.1.3 The *M'Naghten* Rules 272
9.1.4 Situations not covered by the rules 279
9.1.5 Criticism and reform proposals 280

9.2 Automatism 285
9.2.1 What is automatism? 285
9.2.2 The need for an evidential foundation 285
9.2.3 Extent of involuntariness required 286
9.2.4 Self-induced automatism 288
9.2.5 Reflex actions 289
9.2.6 Reform 290

9.3 Intoxication 291
9.3.1 Intoxication is no defence if D still formed *mens rea* 292
9.3.2 Involuntary intoxication 293
9.3.3 Voluntary intoxication 296
9.3.4 'Dutch courage' 303
9.3.5 Intoxication and insanity 303
9.3.6 Intoxication and automatism 305
9.3.7 Intoxicated mistakes 305
9.3.8 Criticism and reform proposals 306

Sample essay questions 310

Further reading 313

PART II SPECIFIC OFFENCES 315

10 HOMICIDE 317

10.1 *Actus reus* of homicide 317
10.1.1 Human being: birth 317
10.1.2 Human being: death 318
10.1.3 Under the King or Queen's Peace 318
10.1.4 Within any county of the realm 318
10.1.5 The year and a day rule 319

10.2 Murder 320
10.2.1 Intention 320
10.2.2 Grievous bodily harm 320
10.2.3 Procedure in murder trials 320
10.2.4 Mercy killings and euthanasia 321

10.3 Voluntary manslaughter 323
10.3.1 Diminished responsibility 323
10.3.2 Loss of self-control 335
10.3.3 Suicide pacts 348

10.4 Involuntary manslaughter 349
10.4.1 Constructive manslaughter 349
10.4.2 Gross negligence manslaughter 355
10.4.3 Reckless manslaughter 361
10.4.4 Reform 362

10.5 Causing or allowing the death or serious physical harm of a child or vulnerable adult 362

10.6 Causing death by dangerous driving 364

10.7 Infanticide 365

10.8 Offences against a foetus 366
10.8.1 Child destruction 366
10.8.2 Procuring a miscarriage 367
10.9 Reform of the law of homicide 368
10.9.1 The structure of homicide offences 368
10.9.2 First-degree murder 368
10.9.3 Second-degree murder 369
10.9.4 Manslaughter 369
10.9.5 Intention 370
10.9.6 Duress 370
10.9.7 A single offence of criminal homicide? 370
Sample essay questions 374
Further reading 377

11 NON-FATAL OFFENCES AGAINST THE PERSON 379

11.1 Common assault 380
11.1.1 *Actus reus* of assault 380
11.1.2 *Actus reus* of battery 382
11.1.3 *Mens rea* of assault and battery 387
11.2 Section 47 388
11.2.1 *Actus reus* of s 47 389
11.2.2 *Mens rea* of s 47 390
11.2.3 Consent and s 47 391
11.3 Section 20 393
11.3.1 *Actus reus* of s 20 393
11.3.2 *Mens rea* of s 20 395
11.4 Section 18 396
11.4.1 *Actus reus* of s 18 397
11.4.2 *Mens rea* of s 18 397
11.5 Reform 399
11.6 Racially or religiously aggravated assaults 401
11.7 Administering poison 402
11.7.1 Administer 402
11.7.2 Noxious thing 402
11.7.3 Maliciously 403
Sample essay question 405
Further reading 406

12 SEXUAL OFFENCES 407

12.1 Rape 408
12.1.1 Penetration of the vagina, anus or mouth of another person, with the penis 409
12.1.2 The absence of consent 410
12.1.3 Intent to penetrate 423
12.1.4 Lack of reasonable belief 423
12.1.5 The marital exception to rape 425
12.1.6 Women as defendants 425

12.2 Assault by penetration 425
12.3 Sexual assault 427
12.4 Causing a person to engage in sexual activity 429
12.5 Other crimes under the Sexual Offences Act 2003 430
Sample essay question 432
Further reading 433

13 THEFT 435

13.1 Background 435
13.1.1 Theft 436
13.1.2 The elements of theft 437
13.2 Appropriation 437
13.2.1 Assumption of the rights of an owner 438
13.2.2 Consent to the appropriation 439
13.2.3 The decision in *Gomez* 440
13.2.4 Consent without deception 444
13.2.5 Appropriation of credit balances 446
13.2.6 Protection of innocent purchasers 448
13.3 Property 449
13.3.1 Things which cannot be stolen 450
13.3.2 Real property 451
13.3.3 Things in action 451
13.3.4 Other intangible property 452
13.4 Belonging to another 453
13.4.1 Possession or control 453
13.4.2 Proprietary right or interest 455
13.4.3 Property received under an obligation 456
13.4.4 Property got by a mistake 458
13.5 Dishonestly 459
13.5.1 Dishonesty 459
13.5.2 The *Ghosh* test 461
13.5.3 Problems with the *Ghosh* test 464
13.6 With intention to permanently deprive 466
13.6.1 Borrowing or lending 468
13.6.2 Conditional disposition 469
Sample essay question 472
Further reading 473

14 ROBBERY, BURGLARY AND OTHER OFFENCES IN THE THEFT ACTS 475

14.1 Robbery 475
14.1.1 The *actus reus* of robbery 476
14.1.2 Theft as an element of robbery 476

14.1.3 Force or threat of force 477
14.1.4 Force immediately before or at the time of the theft 479
14.1.5 Force in order to steal 480
14.1.6 *Mens rea* for robbery 480
14.1.7 Possible reform of law of robbery 481

14.2 Burglary 483
14.2.1 The *actus reus* of burglary 483
14.2.2 Entry 484
14.2.3 Building or part of a building 484
14.2.4 As a trespasser 485
14.2.5 *Mens rea* of burglary 487
14.2.6 Burglary of a dwelling 487

14.3 Aggravated burglary 488
14.3.1 Has with him 489

14.4 Removal of items from a place open to the public 490
14.4.1 *Actus reus* of removal of items from a public place 490

14.5 Taking a conveyance without consent 491
14.5.1 *Actus reus* of taking a conveyance 491
14.5.2 Without consent 492
14.5.3 Conveyance 493
14.5.4 *Mens rea* of taking a conveyance 493

14.6 Aggravated vehicle-taking 494
14.6.1 Dangerous driving 494
14.6.2 Injury or damage 495

14.7 Abstracting electricity 495

14.8 Blackmail 495
14.8.1 Demand 496
14.8.2 Unwarranted demand 496
14.8.3 Menaces 497
14.8.4 View to gain or loss 498

14.9 Handling stolen goods 499
14.9.1 Goods 500
14.9.2 Stolen 500
14.9.3 Handling 501
14.9.4 Undertaking or assisting 502
14.9.5 *Mens rea* of handling 503

14.10 Going equipped for stealing 504
14.10.1 *Actus reus* of going equipped 504
14.10.2 *Mens rea* of going equipped 507

14.11 Making off without payment 507
14.11.1 *Actus reus* of making off without payment 507
14.11.2 *Mens rea* of making off without payment 508

Sample essay question 511

Further reading 512

15 FRAUD 513

15.1 Background to the Fraud Act 2006 513

15.2 The need for reform 514
15.2.1 Proposals for reform 515

15.3 Fraud Act 2006 516

15.4 Fraud by false representation 516
15.4.1 False representation 516
15.4.2 False 520
15.4.3 Gain or loss 521
15.4.4 *Mens rea* of s 2 522

15.5 Fraud by failing to disclose information 524
15.5.1 Legal duty 525
15.5.2 *Mens rea* of s 3 525

15.6 Fraud by abuse of position 526
15.6.1 Occupies a position 526
15.6.2 Abuse of position 527
15.6.3 *Mens rea* of s 4 528

15.7 Possession of articles for use in fraud 529
15.7.1 *Mens rea* of s 6 529

15.8 Making or supplying articles for use in frauds 530
15.8.1 *Mens rea* of s 7 530

15.9 Obtaining services dishonestly 531
15.9.1 *Actus reus* of obtaining services dishonestly 531
15.9.2 *Mens rea* of obtaining services dishonestly 532

Sample essay question 535

Further reading 536

16 CRIMINAL DAMAGE 537

16.1 The basic offence 537
16.1.1 Destroy or damage 538
16.1.2 Property 540
16.1.3 Belonging to another 541
16.1.4 *Mens rea* of the basic offence 541
16.1.5 Without lawful excuse 545

16.2 Endangering life 549
16.2.1 Danger to life 549
16.2.2 Life not actually endangered 550
16.2.3 Own property 551
16.2.4 *Mens rea* 551

16.3 Arson 553

16.4 Threats to destroy or damage property 554

16.5 Possessing anything with intent to destroy or damage property 554

16.6 Racially aggravated criminal damage 555
Sample essay question 557
Further reading 558

17 PUBLIC ORDER OFFENCES 559

17.1 Riot 560
17.1.1 The *actus reus* of riot 560
17.1.2 *Mens rea* of riot 561
17.1.3 Trial and penalty 562

17.2 Violent disorder 562
17.2.1 Present together 562
17.2.2 *Mens rea* of violent disorder 563
17.2.3 Comparison with riot 563
17.2.4 Trial and Penalty 564

17.3 Affray 564
17.3.1 *Actus reus* of affray 564
17.3.2 *Mens rea* of affray 565
17.3.3 Trial and penalty 565

17.4 Fear or provocation of violence 566
17.4.1 *Actus reus* of a s 4 offence 566
17.4.2 Threatening, abusive or insulting 567
17.4.3 Towards another person 567
17.4.4 *Mens rea* of s 4 567

17.5 Intentionally causing harassment, alarm or distress 568
17.5.1 Defences 570

17.6 Harassment, alarm or distress 571
17.6.1 Defences 573
17.6.2 *Mens rea* of a s 5 offence 574

17.7 Racially aggravated public order offences 574

Sample essay question 578

Further reading 579

Appendix 1 ***580***
Appendix 2 ***582***
Glossary of legal terminology ***588***
Index ***590***

Acknowledgements

The books in the Unlocking the Law series are a departure from traditional law texts and represent one view of a type of learning resource that the editors always felt is particularly useful to students. The success of the series and the fact that many of its features have been subsequently emulated in other publications must surely vindicate that view. The series editors would therefore like to thank the original publishers, Hodder Education, for their support in making the original project a successful reality. In particular we would like to thank Alexia Chan for showing great faith in the project and for her help in getting the series off the ground. We would also like to thank the current publisher Routledge for the warm enthusiasm it has shown in taking over the series. In this respect we must also thank Fiona Briden, Commissioning Editor for the series for her commitment and enthusiasm towards the series and for her support.

Guide to the book

Unlocking the Law books bring together all the essential elements for today's law students in a clearly defined and memorable way. Each book is enhanced with learning features to reinforce understanding of key topics and test your knowledge along the way. Follow this guide to make sure you get the most from reading this book.

AIMS AND OBJECTIVES

Defines what you will learn in each chapter.

SECTION

definition
Find key legal terminology at a glance

Highlights sections from Acts.

ARTICLE

tutor tip
Provides key ideas from lecturers on how to get ahead

Defines Articles of the EC Treaty or of the European Convention on Human Rights or other Treaty.

CLAUSE

Shows a Bill going through Parliament or a draft Bill proposed by the Law Commission.

REGULATION

Defines a provision in a statutory instrument.

CASE EXAMPLE

Illustrates the law in action.

JUDGMENT

Provides extracts from judgments on cases.

Indicates that you will be able to test yourself further on this topic using the Key Questions and Answers section of this book on www.unlockingthelaw.co.uk.

QUOTATION

Encourages you to engage with primary sources.

KEY FACTS

Outlines important cases and principles.

ACTIVITY

Enables you to test yourself as you progress through the chapter.

student mentor tip

Offers advice from law graduates on the best way to achieve the results you want

SAMPLE ESSAY QUESTIONS

Provide you with real-life sample essays and show you the best way to plan your answer.

SUMMARY

Concludes each chapter to reinforce learning.

Preface

The 'Unlocking the Law' series on its creation was hailed as an entirely new style of undergraduate law textbooks and many of its ground-breaking features have subsequently been emulated in other publications. However, many student texts are still very prose dense and have little in the way of interactive materials to help a student feel his or her way through the course of study on a given module.

The purpose of the series has always been to try to make learning each subject area more accessible by focusing on actual learning needs, and by providing a range of different supporting materials and features.

All topic areas are broken up into manageable sections with a logical progression and extensive use of headings and numerous sub-headings as well as an extensive contents list and index. Each book in the series also contains a variety of flow charts, diagrams, key facts charts and summaries to reinforce the information in the body of the text. Diagrams and flow charts are particularly useful because they can provide a quick and easy understanding of the key points, especially when revising for examinations. Key facts charts not only provide a quick visual guide through the subject but are also useful for revision.

Many cases are separated out for easy access and all cases have full citation in the text as well as the table of cases for easy reference. The emphasis of the series is on depth of understanding much more than breadth of detail. For this reason each text also includes key extracts from judgments where appropriate. Extracts from academic comment from journal articles and leading texts are also included to give some insight into the academic debate on complex or controversial areas. In both cases these are highlighted and removed from the body of the text.

Finally the books also include much formative 'self-testing', with a variety of activities ranging through subject specific comprehension, application of the law, and a range of other activities to help the student gain a good idea of his or her progress in the course. Appendices with guides on completing essay style questions and legal problem solving supplement and support this interactivity. Besides this a sample essay plan is added at the end of most chapters.

A feature of the most recent editions is the inclusion of some case extracts from the actual law reports which not only provide more detail on some of the important cases but also help to support students in their use of law reports by providing a simple commentary and also activities to cement understanding.

The first part of this book covers important concepts which underpin the criminal law. These include *actus reus*, *mens rea* and strict liability, participation in crime, capacity, inchoate offences and general defences. The second part covers the most important offences. These include fatal and non-fatal offences against the person, sexual offences, offences against property and the main offences against public order.

The book is designed to cover all of the main topics on undergraduate and professional criminal law syllabuses.

Note that all incidental references to 'he', 'him', 'his', etc., are intended to be gender neutral.

The law is stated as we believe it to be on 1 September 2014.

Jacqueline Martin
Tony Storey

List of figures

1.1 Sources of criminal law 7
1.2 Appeal routes from a magistrates' court 16
1.3 Appeals from the Crown Court 17
1.4 Elements of an offence 19
2.1 Does D have a duty to act? 41
2.2 Causation 55
3.1 *Mens rea* 75
3.2 Coincidence 78
4.1 Contrasting the cases of *Prince and Hibbert* 86
4.2 The *Gammon* criteria 92
5.1 Secondary liability 122
5.2 Joint enterprise 136
6.1 *Mens rea* of attempt 150
6.2 Conspiracy 158
7.1 Flow chart on vicarious liability 184
7.2 Corporate liability 193
8.1 Can D plead duress? 221
8.2 The defence of consent 262
9.1 Insanity 280
9.2 Venn diagram on mental capacity defences 310
10.1 Diminished responsibility 336
10.2 Loss of self-control 347
11.1 Assault and battery 388
11.2 Flow chart on non-fatal offences against the person 398
12.1 Rape 426
12.2 Assault by penetration 428
13.1 The elements of theft 437
13.2 Property in the law of theft 452
14.1 Flow chart on robbery 482
14.2 Flow chart on blackmail 499
14.3 Flow chart on handling stolen goods 505
15.1 The offences of fraud in the Fraud Act 2006 528
15.2 Flow chart for obtaining services dishonestly 533
16.1 Offences of criminal damage 552
17.1 Flow chart on riot 561
17.2 Sections 4, 4A and 5 of the Public Order Act 1986 575

Table of cases

UNITED KINGDOM

A (a Juvenile) v R [1978] Crim LR 689 ..... 539, 553
A (Children) (Conjoined Twins: Surgical Separation), Re [2000] EWCA Civ 254; [2000] 4 All ER 961 ..... 41, 220, 226, 228, 230, 231, 238, 266
A & Others [2010] EWCA Crim 1622; [2011] QB 841 124
A [2012] EWCA Crim 434; [2012] 2 Cr App R 8 210
Abdul-Hussain and Others [1999] Crim LR 570 ..... 212, 220, 226
Abu Hamza [2006] EWCA Crim 2918; [2007] QB 659 161
AC [2012] EWCA Crim 2034 411–2
Adams [1957] Crim LR 365 51
Adams v Camfoni [1929] 1 KB 95 182
Adomako [1995] 1 AC 171; [1994] 3 All ER 79 ..... 27, 37, 57, 69, 355, 356, 358, 359, 360, 361
Ahluwalia [1992] 4 All ER 869 ..... 327, 339, 340, 374
Ahmad [1986] Crim LR 739 ..... 36, 57
Airedale NHS Trust v Bland [1993] AC 789; [1993] 1 All ER 821 ..... 6, 40, 56, 322
Aitken and others [1992] 1 WLR 1006; (1992) 95 Cr App R 304 ..... 258, 263, 267, 299, 301, 393
Ali [1995] Crim LR 303 ..... 215, 221, 227
Ali [2008] EWCA Crim 716 216
Allan [1965] 1 QB 130 117
Allan [1988] Crim LR 698 293–4
Allen [1985] 2 All ER 641 508–9
Allen v Whitehead [1930] 1 KB 211 ..... 183, 184, 186
Alphacell Ltd v Woodward [1972] 2 All ER 475 94
Altham [2006] EWCA Crim 7; [2006] 2 Cr App R 8; [2006] Crim LR 633 ..... 28, 30, 230
Anderson [1986] AC 27; [1985] 2 All ER 961 154–5
Anderson and Morris [1966] 2 QB 110 ..... 130, 131, 139
Anderton v Ryan [1985] AC 560; [1985] 2 All ER 355 ..... 149, 500
Andrews [2002] EWCA Crim 3021; [2003] Crim LR 477 351
Andrews v DPP [1937] AC 576 ..... 72, 357, 358, 360, 361, 373
Antoine [2000] UKHL 20; [2001] 1 AC 340; [2000] 2 All ER 208 ..... 179, 324
Armstrong v Strain [1952] 1 All ER 139 190
Asmelash [2013] EWCA Crim 157, [2014] QB 103 ..... 345, 346
Assange v Sweden [2011] EWHC 2849 ..... 410, 412, 413, 416
Atakpu and Abrahams [1994] Crim LR 693 438–9
Atkin v DPP [1989] Crim LR 581 567
Attorney-General of Hong Kong v Chan Nai-Keung [1987] 1 WLR 1339 452
Attorney-General of Northern Ireland v Gallagher [1963] AC 349 ..... 303, 310
Attorney-General's Reference (No 1 of 1974) [1974] 2 All ER 899 501
Attorney-General's Reference (No 1 of 1975) [1975] QB 773; [1975] 2 All ER 684 ..... 115, 119, 138
Attorney-General's Reference (Nos 1 and 2 of 1979) [1979] 3 All ER 143 ..... 146, 171, 487
Attorney-General's Reference (No 4 of 1979) [1981] 1 All ER 1193 500–1
Attorney-General's Reference (No 6 of 1980) [1981] 2 All ER 1057 ..... 254, 257, 262, 263, 267, 391
Attorney-General's Reference (No 1 of 1983) [1985] 3 All ER 369 ..... 458, 459, 470
Attorney-General's Reference (No 2 of 1983) [1984] QB 456 ..... 239, 249
Attorney-General's Reference (No 1 of 1992) [1993] 2 All ER 190 ..... 144, 146
Attorney-General's Reference (No 3 of 1992) [1994] 2 All ER 121 ..... 147, 171
Attorney-General's Reference (No 3 of 1994) [1997] 3 WLR 421 ..... 73, 318, 372
Attorney-General's Reference (No 2 of 1999) [2000] 3 All ER 187 ..... 193, 196, 206
Attorney-General's Reference (No 4 of 2002) [2004] UKHL 43; [2005] 1 All ER 237 ..... 22, 23, 25, 30
Attorney-General's Reference (No 4 of 2004) [2005] EWCA Crim 889; [2005] 2 Cr App R 26 ..... 17, 575
Attorney-General v Whelan [1934] IR 518 220
Ayeva [2009] EWCA Crim 2640 430

B (a minor) v DPP [2000] 1 All ER 833; [2000] Cr App R 65.....91, 99, 100, 102, 103, 104, 105, 111
B (Consent to Treatment: Capacity), Re [2002] EWHC 429 (Fam); [2002] 2 All ER 449.....40
B [2006] EWCA Crim 400.....417
B [2006] EWCA Crim 2945; [2007] 1 WLR 1567; [2006] All ER (D) 173 (Oct).....253, 415, 416
B [2013] EWCA Crim 3, [2014] Crim LR 312.....411, 424, 425
Bailey [1961] Crim LR 828.....325–6, 334
Bailey [1983] 1 WLR 760.....294
Bainbridge [1960] 1 QB 129.....121, 122
Baker [1994] Crim LR 444.....134, 139
Baker and Ward [1999] EWCA Crim 913; [1999] 2 Cr App R 335.....215, 216, 227
Baker and Wilkins [1996] EWCA Crim 1126; [1997] Crim LR 497.....210, 227, 548, 558
Ball [1989] Crim LR 730.....351
Bamonadio [2005] EWCA Crim 3355.....429
B and R v DPP [2007] EWHC 739 (Admin).....478
B and S v Leathley [1979] Crim LR 314.....485, 487, 512
Bantekas (2008) 73 JoCL 251.....429
Barnard (1837) 7 C & P 784.....517, 518
Barnard (1980) 70 Cr App R 28.....152
Barnes [2004] EWCA Crim 3246; [2005] 1 WLR 910; [2005] 2 All ER 113.....256–7, 263, 267, 392
Bassett [2008] EWCA Crim 1174; [2009] 1 WLR 1032.....431
Bateman (1925) 19 Cr App R 8.....358, 361, 373
Beasley (1981) 73 Cr App R 44.....394
Becerra and Cooper (1975) 62 Cr App R 212.....134, 136, 138, 139
Beckford [1988] AC 130.....235, 236, 238, 239, 244, 249
Benge (1865) 4 F & F 504.....46
Bennett [1995] Crim LR 877.....299
Bentham [2005] UKHL 18; (2005) *The Times* 11 March.....478
Betts and Ridley (1930) 22 Cr App R 148.....585
Betty (1964) 48 Cr App R 6.....130, 131
Bevans [1988] Crim LR 236.....498
Billinghurst [1978] Crim LR 553.....255, 263
Bilton (2005) *The Guardian*, 20 December.....281
Bingham [2013] EWCA Crim 823, [2013] 2 Cr App R 29.....421, 422, 423, 430
Bird [1985] 2 All ER 513.....239, 240, 242, 249
Blackman [2014] EWCA Crim 1029.....318
Blackshaw; Sutcliffe [2011] EWCA Crim 2312; [2012] 1 WLR 1126.....162–3
Blake [1997] 1 All ER 963.....98, 99, 111
Blake v DPP [1993] Crim LR 586.....539, 547
Bland *see* Airedale NHS Trust v Bland [1993]; Inglis and Bland [1993]
Blaue [1975] 3 All ER 446.....50, 51, 59, 353
Bloxham [1982] 1 All ER 582.....502
Bogacki [1973] 2 All ER 864.....491
Boggeln v Wiliams [1978] 2 All ER 1061.....462
Bolduc and Bird (1967) 63 DLR (2d) 82.....263
Bollom [2003] EWCA Crim 2846; [2004] 2 Cr App R 6.....395
Bonner [1970] 2 All ER 97.....455, 459
Bounekhla [2006] EWCA Crim 1217.....429
Bourne (1952) 36 Cr App R 125.....120
Bow [1977] Crim LR 176.....491–2
Bowen [1996] Crim LR 577.....219, 220, 223, 227, 266
Boyea [1992] Crim LR 574.....259, 408
Boyle and Boyle [1987] Crim LR 111.....143, 150, 151
Bradshaw (1878) 14 Cox CC 83.....256
Bradshaw v Ewart-Jones [1983] 1 All ER 12.....183
Bratty v Attorney-General of Northern Ireland [1963] AC 386; [1961] 3 WLR 965.....35, 272, 275, 284, 285, 286, 297, 299, 309, 312
Bravery v Bravery [1954] 3 All ER 59.....257
Bree [2007] EWCA Crim 804; [2008] QB 131.....419–20, 433
Bristow and others [2013] EWCA Crim 1540, [2014] Crim LR 457.....350, 352, 355
Broad [1997] Crim LR 666.....152

Bromley (1992) 142 NLJ 116 272
Broome v Perkins [1987] Crim LR 271 287
Brown [1985] Crim LR 167 ..... 484, 487, 511
Brown [2011] EWCA Crim 2796; [2012] Crim LR 223 ..... 327, 329
Brown and others [1994] 1 AC 212; [1993] 2 All ER 75 ..... 5, 6, 250, 253, 254, 256, 258, 260, 261, 262, 263, 264–5, 266, 267, 268, 351, 383, 391, 392, 584
Brutus v Cozens [1972] 2 All ER 1297 ..... 461, 567
Buckoke v GLC [1975] Ch 655 230–1
Bunch [2013] EWCA Crim 2498 ..... 330, 335
Bundy [1977] 2 All ER 382 507
Burgess [1991] 2 QB 92 ..... 276, 277, 281, 284, 309, 312
Burns (1974) 58 Cr App R 364 295
Burns [2006] EWCA Crim 1451 429
Burrell v Harmer [1967] Crim LR 169 ..... 250, 268
Burstow and Ireland *see* Ireland and Burstow [1998] AC 147; [1997] 4 All ER 225
Byrne [1960] 2 QB 396 ..... 62, 279, 326, 327, 328, 334, 374
Byrne v Kinematograph Renters Society Ltd [1958] 2 All ER 579 486

C [1992] Crim LR 642 300
C [2007] EWCA Crim 1862 ..... 286, 288, 290, 309
Cahill [1993] Crim LR 141 ..... 466, 470
Cairns [1999] EWCA Crim 468; [1999] 2 Cr App R 137 ..... 217, 218, 223, 224, 227
Cakman and others (2002) *The Times*, 28 March 554
Caldwell *see* Metropolitan Police Commissioner v Caldwell [1982] AC 341; [1981] 1 All ER 961
Calhaem [1985] 1 QB 808 ..... 62, 118, 122
Callow v Tillstone (1900) 83 LT 411 ..... 86, 87, 93, 108
Campbell [1991] Crim LR 268 ..... 144, 146, 150, 151, 170
Campbell [1997] 1 Cr App R 199; [1997] Crim LR 227 327
Campbell [1997] Crim LR 495 324
Camplin (1845) 1 Den 89 418
Canns [2005] EWCA Crim 2264 ..... 243, 244, 249
Carey and others [2006] EWCA Crim 17; [2006] Crim LR 842 ..... 350, 353, 376
Carpenter [2011] EWCA Crim 2568; [2012] 1 Cr App R 11 133
Carr-Briant [1943] 2 All ER 156 21
Carroll v DPP [2009] EWHC 554 (Admin) 300
Castle [2004] EWCA Crim 2758 ..... 71, 551, 552, 553
Cato [1976] 1 All ER 260 ..... 47, 59, 350, 354, 355, 373, 376, 402–3
Chan Fook [1994] 2 All ER 552 389
Chan Wing-Siu and others [1985] 1 AC 168 ..... 123, 125, 130, 138, 139, 585
Cheshire [1991] 3 All ER 670; 1 WLR 844 ..... 52, 53, 57, 59, 372
Chief Constable of Avon v Shimmen (1986) 84 Cr App R 7 71
Chrastny [1992] 1 All ER 189 153
Church [1965] 2 All ER 72; [1966] 1 QB 59 ..... 77, 349, 351, 353, 355, 362, 376
Ciccarelli [2011] EWCA Crim 2665; [2012] 1 Cr App R 15 ..... 417–8, 431
Clarence (1888) 22 QBD 23 ..... 250, 251, 263, 384
Clarke [1972] 1 All ER 219 ..... 273, 281, 284
Clarke [2009] EWCA Crim 921 ..... 288, 290, 309
Clarkson and others [1971] 1 WLR 1402 117
Clear [1968] 1 All ER 74 497–8
Clegg [1995] 1 AC 482 ..... 248, 249, 318, 340
Cleps [2009] EWCA Crim 894 517
Clerk to the Croydon Justices, ex parte Chief Constable of Kent [1989] Crim LR 910 193
Clinton [2012] EWCA Crim 2; [2012] 2 All ER 947 ..... 338, 340, 341–2, 344, 345, 346, 348
Clouden [1987] Crim LR 56 ..... 477, 481
Cogan and Leak [1976] QB 217 ..... 114, 119
Cole [1993] Crim LR 300 297
Cole [1994] Crim LR 582 ..... 213–4, 221
Coles [1995] 1 Cr App R 157 ..... 70, 71
Coley, McGhee & Harris [2013] EWCA Crim 223 ..... 285, 289, 290, 299, 304, 305, 306, 309

Collins [1972] 2 All ER 1105 ..... 484, 485, 486, 487, 488, 511
Collins v Wilcock [1984] 3 All ER 374 ..... 262, 263, 267, 380, 382, 386
Collister and Warhurst (1955) 39 Cr App R 100 496
Concannon [2001] EWCA Crim 2607; [2002] Crim LR 213 128
Coney and others (1882) 8 QBD 534 ..... 116, 254, 263, 267, 268
Constanza [1997] Crim LR 576 381
Conway [1988] 3 All ER 1025 ..... 211, 220, 225, 226, 227
Cooke [1986] 2 All ER 985 159
Coomber [2005] EWCA Crim 1113 427
Cooper [2004] EWCA Crim 1382 ..... 71, 551, 552
Cooper and Schaub [1994] Crim LR 531 ..... 36, 410
Coppen v Moore (No 2) [1898] 2 QB 306 ..... 182, 185, 192, 193
Corbett [1996] Crim LR 594 48–9
Corbett v Corbett [1971] P 83 257
Corcoran v Anderton (1980) Cr App R 104; [1980] Crim LR 385 ..... 438, 472, 477, 481
Cotswold Geotechnical Holdings Ltd [2011] EWCA Crim 1337 ..... 200, 201, 202
Court [1989] AC 28 408
Cousins [1982] QB 526 236
Coutts [2006] UKHL 39; [2006] 1 WLR 2154 ..... 132, 320
Cox [1968] 1 WLR 308 325
Cresswell v DDP; Currie v DPP [2006] EWHC 3379 (Admin) 450, 548, 557
Crutchley (1831) 5 C & P 133 220
Cuerrier [1998] 2 SCR 371 ..... 251–2, 253, 263
Cundy v Le Cocq (1884) 13 QBD 207 ..... 88, 94
Cunliffe [2006] EWCA Crim 1706 427
Cunningham [1957] 2 QB 396; [1957] 2 All ER 412 ..... 67, 68, 69, 70, 75, 79, 307, 395, 396, 398, 402, 403, 544, 553, 562
Cunningham [1982] AC 566 372
C v DPP [1995] 2 All ER 43 175

Dalby [1982] 1 All ER 916 ..... 47, 354, 355, 373
Dalloway (1847) 2 Cox CC 273 44
Dang and others [2014] EWCA Crim 348, [2014] 2 Cr App R 157
Dao, Mai & Nguyen [2012] EWCA Crim 1717 210
Davidge v Bunnett [1984] Crim LR 297 457
Davies [1975] QB 691 344
Davis (1881) 14 Cox CC 563 303
Davison [1992] Crim LR 31 565
Dawes [2013] EWCA Crim 322, [2014] 1 WLR 947 ..... 338, 341, 342, 343
Dawson (1985) 81 Cr App R 150 ..... 350, 352, 353, 355, 373, 376
Dawson and James (1976) 64 Cr App R 170 ..... 477, 481
Day, Day and Roberts [2001] EWCA Crim 1594; [2001] Crim LR 984 132
Deal [2006] EWCA Crim 684 429
Dear [1996] Crim LR 595 51
Dehal v DPP [2005] EWHC 2154 (Admin) 30, 31, 569, 570
Denton [1982] 1 All ER 65 ..... 546, 557
Devonald [2008] EWCA Crim 527 ..... 421, 422, 430
Deyemi (Danny) EWCA Crim 2060 106
Dhaliwal [2006] EWCA Crim 1139; [2006] All ER (D) 236 390
Dias [2001] EWCA Crim 2986; [2002] 2 Cr App R 96 ..... 47, 354, 355, 402
Dica [2005] EWCA Crim 2304, CA; [2004] EWCA Crim 1103; [2004] QB 1257 ..... 252, 253, 262, 263, 267, 268, 395, 415
Dickie [1984] 3 All ER 173 272
Dietschmann [2003] UKHL 10; [2003] 1 AC 1209 ..... 327, 331, 332, 333, 335, 374
Din (Ahmed) [1962] 1 WLR 680; (1962) 46 Cr App R 269 325
Dix (1982) 74 Crim LR 302 326
Dixon [1993] Crim LR 579 565
Dobson v General Accident Fire and Life Insurance Corp [1990] 1 QB 354 ..... 440, 443
Doherty (1887) 16 Cox CC 306 358
Donoghue v Stevenson [1932] AC 562 ..... 356, 360

Donovan [1934] 2 KB 498 ..... 250, 260, 262, 263, 268, 389, 391
Doughty (1986) 83 Cr App R 319 341
Doukas [1978] 1 All ER 1061 ..... 506, 527
Dowds [2012] EWCA Crim 281; [2012] 3 All ER 154 ..... 329–30, 335, 374
Doyle [2010] EWCA Crim 119 ..... 411, 431
DPP, ex parte Kebilene [2000] 2 AC 326; [1999] 4 All ER 801 97
DPP [2006] All ER (D) 250 (May); [2006] EWHC 1375 (Admin) 569, 572
DPP of Northern Ireland v Maxwell [1978] 1 WLR 1350 ..... 121, 122
DPP v Bailey [1995] 1 Cr App R 257 ..... 236, 239
DPP v Beard [1920] AC 479 ..... 297, 299, 308
DPP v Bell [1992] Crim LR 176 225
DPP v Camplin [1978] AC 705 ..... 341, 345
DPP v Davis; DPP v Pittaway [1994] Crim LR 600 225
DPP v Doot [1973] AC 807 152
DPP v Gohill and another [2007] EWHC 239 (Admin) 463, 472
DPP v H [1997] 1 WLR 1406 271
DPP v Johnson [2008] All ER (D) 371 (Feb) 576
DPP v K (a minor) [1990] 1 All ER 331 ..... 69, 384
DPP v K & C [1997] Crim LR 121 ..... 115, 425
DPP v Kent and Sussex Contractors Ltd [1944] KB 146 187
DPP v Lavender [1994] Crim LR 297 ..... 466, 467, 470
DPP v M (minor) [2004] EWHC 1453 (Admin); [2004] 1 WLR 2758 575
DPP v Majewski [1977] AC 443; [1976] 2 All ER 142 ..... 71, 235, 288, 291, 293, 294, 296, 298, 299, 300, 301, 302, 305, 307, 308, 310, 311, 387
DPP v Morgan [1976] AC 182 ..... 234, 235, 236, 266, 297, 423, 432
DPP v Newbury and Jones [1977] AC 500 ..... 350, 354, 355, 373, 375, 376
DPP v Nock [1978] AC 979 160
DPP v Orum [1988] 3 All ER 449 571
DPP v P [2007] EWHC 946 (Admin) 176
DPP v Pal [2000] Crim LR 756 401
DPP v Parmenter *see* Savage, DPP v Parmenter [1992] AC 699; [1991] 4 All ER 698
DPP v Ray [1973] 3 All ER 131 ..... 514, 518, 520
DPP v Santana-Bermudez [2003] EWHC 2908 (Admin) 35, 36, 384, 385
DPP v Smith (Michael) [2006] 2 All ER 16; [2006] 2 Cr App R 1 389
DPP v Smith [1961] AC 290 ..... 63, 320, 372, 395
DPP v Stonehouse [1978] AC 55; [1977] 2 All ER 909 142
Dudley and Stephens (1884) 14 QBD 273 ..... 220, 222
Du Cros v Lambourne [1907] 1 KB 40 ..... 117, 163
Duke of Leinster *see* Leinster (Duke of) [1924]
Dunbar [1958] 1 QB 1 ..... 324, 335
Durante [1972] 3 All ER 962 299
Dyson [1908] 2 KB 454 319
Dytham [1979] QB 722 ..... 42, 56, 57

Eagleton (1855) Dears 515 ..... 142, 151
Easom [1971] 2 All ER 945 ..... 146, 468
Eatch [1980] Crim LR 650 294
Egan [1992] 4 All ER 470 ..... 331, 332
Eifinger [2001] EWCA Crim 1855 328
Elbekkay [1995] Crim LR 163 423
Elliott v C (a minor) [1983] 1 WLR 939; [1983] 2 All ER 1005 ..... 70, 71, 543, 551
Elvidge [2005] EWCA Crim 1194 429
Emmett [1999] EWCA Crim 1710; (1999) *The Times*, 15 October 263
English [1997] UKHL 45; [1999] AC 1; [1997] 4 All ER 545 ..... 120, 124–5, 130, 136, 137, 138, 139
Enoch (1833) 5 C & P 539 317
Erskine [2009] EWCA Crim 1425; [2009] 2 Cr App R 29 ..... 327, 334
Esop (1836) 7 C & P 456 235
Evans [2009] EWCA Crim 650; [2009] 1 WLR 1999 ..... 39, 57, 357, 373
E v DPP (2005) *The Times*, 9 February 2005 ..... 28–9, 31

Fagan v Metropolitan Police Commissioner [1969] 1 QB 439; [1968] 3 All ER 442 ... 76, 78, 79, 380, 383
Fallon [1994] Crim LR 519 ... 64
Fancy [1980] Crim LR 171 ... 539
Faulkner v Talbot [1981] 3 All ER 468 ... 383
Feely [1973] 1 All ER 341 ... 461–2, 464
Fenton (1975) 61 Cr App R 261 ... 329, 332, 335, 349
Fenton [1830] 1 Lew CC 179 ... 349
Fiak [2005] EWCA Crim 2381 ... 539
Fitzmaurice [1983] QB 1083; [1983] 1 All ER 189 ... 167, 169, 170
Fitzpatrick [1977] NI 20 ... 214, 227
Flattery (1877) 2 QBD 410 ... 420
Forrester [2006] EWCA Crim 1748 ... 429
Forsyth [1997] Crim Law 846 ... 503, 504
Fotheringham (1989) 88 Cr App R 206 ... 299, 300, 305, 306, 309, 423–4
Foye [2013] EWCA Crim 475 ... 25, 26, 324, 335
Francis [1982] Crim LR 363 ... 489
Franklin (1883) 15 Cox CC 163 ... 349, 355, 373, 376
Fritschy [1985] Crim LR 745 ... 440, 441
Fryer (1843) 10 Cl & F ... 279
F v DPP [2013] EWHC 945, [2014] 2 WLR 190 ... 413, 414, 416
F v West Berkshire Health Authority [1989] 2 All ER 545 ... 383

G [2006] 1 WLR 2052; [2006] EWCA Crim 821 ... 106
G [2008] UKHL 37; [2008] 1 WLR 1379 ... 22, 29, 30, 31, 97, 111, 433
Gale [2008] EWCA Crim 1344 ... 528
Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong [1984] 2 All ER 503 ... 91–2, 94, 95, 98, 99, 110, 111
G and another [2003] UKHL 50; [2003] 3 WLR 1060, HL; reversing, sub nom Gemmell and Richards [2002] EWCA Crim 192, CA ... 69, 70, 71, 177, 543, 544, 551, 552, 553
Garwood [1987] 1 All ER 1032 ... 498
Gay [2006] EWCA Crim 820 ... 350
Gayford v Chouler [1898] 1 QB 316 ... 538
Geddes [1996] Crim LR 894 ... 144, 145, 146, 150, 151, 170
Gemmell and Richards *see* G and another [2003] UKHL 50; [2003] 3 WLR 1060, HL; reversing, sub nom Gemmell and Richards [2002] EWCA Crim 192, CA
Ghosh [1982] 2 All ER 689, CA ... 72, 160, 462, 463, 464–6, 472, 495, 504, 532
Giannetto [1997] 1 Cr App R 1; [1996] Crim LR 722, CA ... 114, 116
Gibbins and Proctor (1918) 13 Cr App R 134 ... 37, 38, 56, 57, 151
Gibson and Sylveire [1990] 2 QB 619; [1991] 1 All ER 439 ... 7, 90, 159
Gilks [1972] 3 All ER 280 ... 458–9, 470
Gill [1963] 2 All ER 688 ... 213, 220, 221, 227
Gillard [1998] Crim LR 53 ... 402
Gillick v West Norfolk and Wisbech AHA [1986] AC 112 ... 120
Gilmartin [1983] 1 All ER 829 ... 519
Gilmour [2000] 2 Cr App R 407 ... 131
Gittens [1984] 3 All ER 252 ... 327, 330–1, 332, 335, 374
Gnango [2011] UKSC 59; [2012] 1 AC 827 ... 73, 79, 116
Golding [2014] EWCA Crim 889 ... 395
Golds [2014] EWCA Crim 748 ... 329, 334
Goldstein [2005] UKHL 63; [2005] 3 WLR 982 ... 27, 31
Gomez (1964) 48 Cr App R 310 ... 327
Gomez [1993] 1 All ER 1 ... 439, 440–4, 469, 472, 480, 490, 583, 584, 586, 587
Goodfellow [1986] Crim LR 468 ... 350, 354, 355, 376
Gore [2007] EWCA Crim 2789 ... 366
Gotts [1992] 2 AC 412, HL, affirming [1991] 2 All ER 1, CA ... 171, 221, 224, 225, 228, 266, 370
Gough v DPP [2013] EWHC 3267 (Admin) ... 574
Governor of Brixton Prison, ex parte Levin [1997] 3 All ER 289 ... 447, 586
Governor of Pentonville Prison, ex parte Osman [1989] 3 All ER 701 ... 446–7, 586, 587
Graham [1982] 1 All ER 801 ... 217, 218, 219, 221, 223, 227, 266

Grant and others [2014] EWCA Crim 143 ..... 74, 79
Grant [1960] Crim LR 424 325
Greater London Metropolitan Police Commissioner v Streeter (1980) Cr App R 113 501
Great North of England Railway Co (1846) 9 QB 315 192
Greatrex [1999] 1 Cr App R 126 ..... 127, 139
Greenburg [1972] Crim LR 331 507
Groark [1999] EWCA Crim 207; [1999] Crim LR 669 ..... 302, 307
Gullefer [1990] 3 All ER 882 ..... 143, 144, 146, 150, 170
G v United Kingdom (Admissibility) (37334/08) [2012] Crim LR 46 ..... 22, 29

Hale [1979] Crim LR 596 ..... 479, 480, 481, 584, 586, 587
Hall [1972] 2 All ER 1009 ..... 456, 457, 459, 470
Hall [1985] Crim LR 377 503
Hamilton [2008] EWCA Crim 2518 517
Hancock and Shankland [1986] AC 455 ..... 64, 80
Hardie [1985] 1 WLR 64 ..... 295, 308, 309
Hardman v Chief Constable of Avon and Somerset Constabulary [1986] Crim LR 330, CND 539
Harmer [2001] EWCA Crim 2930; [2002] Crim LR 401 ..... 215, 216
Harrow LBC v Shah and Shah [1999] 3 All ER 302 ..... 87, 93, 94, 108, 109, 182, 185
Harry [1974] Crim LR 32 498
Harvey (1981) 72 Cr App R 139 497
Harvey (2012) 176 J P 265 573
Hasan [2005] UKHL 22; [2005] 2 AC 467 ..... 210, 212, 215, 216, 218, 221, 227, 266
Hatton [2005] EWCA Crim 2951; [2006] 1 Cr App R 16; [2006] Crim LR 353 ..... 245, 249, 308, 309
Haughton v Smith [1975] AC 476 148
Haystead v Chief Constable of Derbyshire [2000] Crim LR 758 384
Hayward (1908) 21 Cox CC 692 50
Heard [2007] EWCA Crim 125; [2008] QB 43 ..... 292, 293, 298, 299, 300, 306, 310
Heath [1999] EWCA Crim 1526; [2000] Crim LR 109 ..... 215, 216, 221, 227
Hegarty [1994] Crim LR 353 219
Hendy [2006] EWCA Crim 819; [2006] 2 Cr App R 33 ..... 327, 331, 332, 335, 374
Hennessy [1989] 1 WLR 287 ..... 272, 274, 275, 277, 281, 284, 309, 312
Hibbert [1869] LR 1 CCR 184 ..... 85, 86
Hichens [2011] EWCA Crim 1626; [2011] Crim LR 873 ..... 240, 241
Hill (1985) 81 Cr App R 206 403
Hill and Hall (1988) 89 Cr App R 74; [1989] Crim LR 136 ..... 547, 557
Hill v Baxter [1958] 1 QB 277 ..... 285, 286–7, 309
Hinks [2000] 4 All ER 833 ..... 444, 445, 465, 469, 472, 526, 586, 587
Hinton-Smith [2005] EWCA Crim 2575 161
HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1956] 3 All ER 624 ..... 187, 189, 190, 193
HM Coroner for East Kent, ex parte Spooner (1989) 88 Cr App R 10 192
Hobson [1998] 1 Cr App R 31 ..... 326, 327, 334, 374
Holland (1841) 2 Mood & R 351 51
Holloway [1994] QB 302 361
Hood [2003] EWCA Crim 2772 37
Horne [1994] Crim LR 584 219
Horseferry Road Magistrates' Court, ex parte K [1996] 3 All ER 719 271
Howard [1965] 3 All ER 684 250
Howe and Bannister [1987] AC 417, HL; affirming [1986] QB 626, CA 217, 218, 220, 221, 222, 223, 224, 225, 227, 228, 266, 370
Howells [1977] QB 614 ..... 95, 99
Howker v Robinson [1972] 2 All ER 786 183
Hudson and Taylor [1971] 2 QB 202 ..... 210, 212, 213, 220
Huggins (1730) 2 Strange 883 181
Hughes [2013] UKSC 56, [2013] 1 WLR 2461 ..... 44, 45, 46, 56, 58
Hughes v DPP [2012] EWHC 606 (Admin) 568
Hui Chi-Ming [1992] 1 AC 34 ..... 125, 130
Humphreys [1995] 4 All ER 1008 ..... 341, 342
Hunt (1977) 66 Cr App R 105 ..... 546, 557
Hussain and others [2010] EWCA Crim 94; [2010] Crim LR 428 ..... 237, 248

Hyde, Sussex and Collins [1991] 1 QB 134 ..... 125, 130, 139

I, M and H v DPP [2001] UKHL 10 564
Iama [2004] EWCA Crim 960 327
Ibrams and Gregory (1981) 74 Cr App R 154 ..... 339, 340
ICC v Eisenhower [1983] 3 All ER 230 394
ICR Haulage Ltd [1944] KB 551 ..... 187, 206
Ikram and Parveen [2008] EWCA Crim 586; [2008] 4 All ER 253 ..... 114, 363
Inglis [2010] EWCA Crim 2637; [2011] 1 WLR 1110 ..... 318, 320, 321–2
Inglis and Bland [1993] AC 789 322
Inseal [1992] Crim LR 35 332
Instan [1893] 1 QB 450 ..... 37–8, 57
Invicta Plastics Ltd v Clare [1976] Crim LR 131 164
Ireland and Burstow [1998] AC 147; [1997] 4 All ER 225 ..... 211, 381, 390, 394, 395
Isitt (1978) 67 Cr App R 44 ..... 286, 287
Ismail [2005] EWCA Crim 397 ..... 409, 410

Jackson, Golding and Jackson [1985] Crim LR 442 156
Jaggard v Dickinson [1980] 3 All ER 716 ..... 299, 306, 308, 309, 546, 557, 558
Janjua and Choudury [1998] EWCA Crim 1419; [1998] Crim LR 675 320
Jennings [1990] Crim LR 588 349
Jewell [2014] EWCA Crim 414 338
Jheeta [2007] EWCA Crim 1699; [2008] 1 WLR 2582 ..... 412, 422, 423
JMW Farms Ltd (unreported, 8 May 2012) 200, 202
Jogee [2013] EWCA Crim 1433 123
John M [2003] EWCA Crim 3452 179
Johnson [1994] Crim LR 376 236
Johnson [2007] EWCA Crim 1978 ..... 278, 282, 284
Johnson v Youden and others [1950] 1 KB 544 121
Johnstone [2003] UKHL 28 24
Jones (Margaret) [2004] EWCA Crim 1981; [2004] 4 All ER 955 ..... 547, 557
Jones [1973] Crim LR 710 425
Jones [1990] 3 All ER 886 ..... 143, 144, 146, 151
Jones [2007] EWCA Crim 1118; [2007] 3 WLR 907 ..... 149, 150, 161, 170, 171
Jones and others (1986) 83 Cr App R 375; [1987] Crim LR 123 ..... 258, 263, 267, 393
Jordan (1956) 40 Cr App R 152 ..... 54, 59
JTB [2009] UKHL 20 176
Julien [1969] 1 WLR 839 239

K [2001] 3 All ER 897 ..... 96, 99, 104
Kaitamaki [1984] 2 All ER 435 ..... 36, 410
Kai-Whitewind [2005] EWCA Crim 1092; [2006] Crim LR 348 366
Kanwar [1982] 2 All ER 528 ..... 502, 503
Kapitene [2010] EWCA Crim 2061 ..... 521, 522
Kay v Butterworth (1945) 173 LT 191 288
Keane *see* McGrath; Keane [2010] EWCA Crim 2514; [2011] Crim LR 393
Kelly and Lindsay [1998] 3 All ER 741 ..... 449, 450
Kemp [1957] 1 QB 399 ..... 274, 277, 281, 284
Kennedy [1998] EWCA Crim 2545; [1999] Crim LR 65 402
Kennedy [2007] UKHL 38; [2008] 1 AC 269 ..... 47, 57, 59, 354, 355, 357, 376
Kenning and others [2008] EWCA Crim 1534; [2008] 3 WLR 1306 156–7
Khan [1990] 2 All ER 783 ..... 147, 148, 171
Khan [2009] EWCA Crim 1569 ..... 327, 328, 334
Khan and Khan [1998] EWCA Crim 971; [1998] Crim LR 830 ..... 36, 37, 373
Khan and others [2009] EWCA Crim 2; [2009] 1 Cr App R 28 363–4
Kimber [1983] 3 All ER 316 234–5
Kimsey [1996] Crim LR 35 46
Kingston [1995] 2 AC 355 ..... 292, 293, 308, 309
Kite and OLL (1994) *The Independent*, 9 December 202–3
Klass (1998) 1 Cr App R 453 490

Klineberg and Marsden [1999] Crim LR 419 ..... 457, 459, 470
Knuller (Publishing, Printing & Promotions) Ltd v DPP [1973] AC 439 159
Kohn (1979) 69 Cr App R 395 452
Konzani [2005] EWCA Crim 706; [2005] 2 Cr App R 14 ..... 252, 253, 262, 263, 267, 268, 415
Kopsch (1925) 19 Cr App R 50 279
Kumar [2004] EWCA Crim 3207 ..... 104, 105

Lamb [1967] 2 QB 981; [1967] 2 All ER 1282 ..... 349, 351, 355, 381
Lambert [2001] UKHL 37; [2002] 1 All ER 2 24
Lambert [2009] EWCA Crim 2860 ..... 496, 497, 498
Lambie [1981] 2 All ER 776 ..... 514, 515, 518
Lane and Lane (1986) 82 Cr App R 5, CA 113–4
Larkin [1943] 1 All ER 217 ..... 349, 355, 373, 376
Larsonneur (1933) 24 Cr App R 74 84
Larter and Castleton [1995] Crim LR 75 417
Latimer (1886) 17 QBD 359 ..... 73, 79
Lavercombe [1988] Crim LR 435 156
Laverty [1970] 3 All ER 432 514
Lawrence [1982] AC 510 ..... 68, 69
Lawrence v Commissioner of Metropolitan Police [1972] AC 626; (1971) Cr App R 64 ..... 439, 440, 441, 442, 443, 469, 472, 586
Le Brun [1991] 4 All ER 673 ..... 77, 78, 79
Lee [2000] Crim LR 991 ..... 235, 236
Leinster (Duke of) [1924] 1 KB 311 ..... 182, 185
Lemon and Whitehouse v Gay News [1979] 1 All ER 898 90
Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 ..... 187, 190
Levin *see* Governor of Brixton Prison, ex parte Levin [1997] 3 All ER 289
Le Vine v DPP [2010] EWHC 1129 Admin 570
Lewis [1974] Crim LR 647 394
Lewis v Lethbridge [1987] Crim LR 59 ..... 457, 458
Lidar (2000) (unreported) 361
Light (1857) D & B 332 382
Lim Chin Aik v The Queen [1963] AC 160 ..... 99, 111
Linekar [1995] 3 All ER 69 ..... 420, 421
Linnett v Metropolitan Police Commissioner [1946] 1 All ER 380 ..... 183, 184, 186
Lion Steel Equipment Ltd (unreported, 20 July 2012) 200, 201, 202
Lipman [1970] 1 QB 152 ..... 235, 288, 290, 299, 305, 308, 309
Litchfield [1997] EWCA Crim 3290; [1998] Crim LR 507 ..... 356, 358, 360
Lloyd (1989) 11 Cr App R (S) 36 258
Lloyd [1967] 1 QB 175 ..... 328, 374
Lloyd [1985] 2 All ER 661 ..... 468, 470
Lockley [1995] Crim LR 656 ..... 480, 481, 490, 584, 586
Lodgon v DPP [1976] Crim LR 121 380–1
Lovesey and Peterson [1970] 1 QB 352 ..... 130, 131
Lovick [1993] Crim LR 890 153
Lowe (2005) *The Times*, 19 March 281
Lowe [1973] QB 702 ..... 36, 350, 355, 373, 376
Luffman [2008] EWCA Crim 1739 118
Lyddaman [2006] EWCA Crim 383 427
Lynch v DPP of Northern Ireland [1975] AC 653 ..... 209, 210, 215, 227

M & M [2012] EWCA Crim 2293, [2013] 1 WLR 1083 ..... 350, 353
MacAngus & Kane v HM Advocate [2009] HCJAC 8 ..... 48, 59
Malcherek, Steel [1981] 2 All ER 422 ..... 53, 54, 55, 318
Mallet [1972] Crim LR 260 349
Malone [1998] EWCA Crim 142; [1998] 2 Cr App R 447 ..... 418, 419
Mandair [1994] 2 All ER 715 394
Marchant and Muntz [2003] EWCA Crim 2099; [2004] 1 WLR 442 ..... 44, 119, 364, 365
Marcus [1981] 2 All ER 833 403
Marjoram [2000] Crim LR 372 ..... 48, 59

Marsh [1997] Crim LR 205 495
Marshall [1998] 2 Cr App R 282 467
Marshall [2009] EWCA Crim 2076 ..... 527, 528
Martin (1832) 5 C & P 128 49
Martin (1881) 8 QBD 54 384
Martin (Anthony) [2001] EWCA Crim 2245; [2002] 2 WLR 1 ..... 242–3, 244, 248, 249
Martin [1989] 1 All ER 652 ..... 211, 220, 225, 227
Martin [2010] EWCA Crim 1450 118
Masterson v Holden [1986] 3 All ER 39 567
Matheson [1958] 2 All ER 87 ..... 325, 326
Matthews and Alleyne [2003] EWCA Crim 192; [2003] 2 Cr App R 461; [2003] Crim LR 553 ..... 39, 65, 80
Maxwell v DPP of Northern Ireland [1978] 1 WLR 1350 ..... 121, 122
McAllister [1997] Crim LR 233 408
McDavitt [1981] Crim LR 843 508
McFall [1994] Crim LR 226 411
McGill (1970) 54 Cr App R 300 492
McGrath; Keane [2010] EWCA Crim 2514; [2011] Crim LR 393 ..... 237, 238, 240
McKnight v Davies [1974] RTR 4 493
McNally [2013] EWCA Crim 1051, [2014] 2 WLR 200 ..... 414, 415, 416
Meade [1909] 1 KB 895 297
Meeking [2012] EWCA Crim 641 ..... 350, 376
Meli (Thabo) and others [1954] 1 All ER 373 ..... 77, 78, 79
Mellor [1996] 2 Cr App R 245 ..... 53, 57
Mendez & Thompson [2010] EWCA Crim 516, [2011] QB 876 129
Meredith [1973] Crim LR 253 454
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 All ER 918 190
Merrick [1995] Crim LR 802 ..... 71, 551
Metropolitan Police Commissioner v Caldwell [1982] AC 341; [1981] 1 All ER 961 ..... 68, 69, 70, 71, 79, 298, 299, 306, 310, 398, 543, 544, 550, 551, 553
Metropolitan v Charles [1976] 3 All ER 112 519
Metropolitan v Wilson [1984] AC 242 394
M'Growther (1746) Fost 13 210
Millar (Robert) Contractors Ltd [1971] 1 All ER 577 187
Miller [1954] 2 QB 282 11
Miller [1983] 2 AC 161; [1983] 1 All ER 978 ..... 19, 35, 39, 57, 357, 385, 553
Millward [1994] Crim LR 527 ..... 119, 122
Minor v DPP [1988] Crim LR 55 ..... 505, 506
Misra and Srivastava [2004] EWCA Crim 2375; [2005] 1 Cr App R 21 ..... 27, 31, 57, 359, 360, 361
Mitchell [1983] QB 741 ..... 35, 73, 79, 349, 354, 355, 375, 376
Mitchell [2008] EWCA Crim 2552 ..... 135, 139
Mitchell and King [1998] EWCA Crim 2444; [1999] Crim LR 496, CA 134, 135, 139
MM [2011] EWCA Crim 1291 424
M'Naghten (1843) 10 Cl & F 200 278
MNS Mining Ltd (unreported, 19 June 2014) 200, 201
Mohan [1976] QB 1, [1975] 2 All ER 193 ..... 150, 171
Moloney [1985] AC 905; [1985] 1 All ER 1025 ..... 64, 80, 320, 397
Moore (1898) 14 TLR 229 256
Moore v I Bresler Ltd [1944] 2 All ER 515 187
Morphitis v Salmon [1990] Crim LR 48, DC 540
Morris [1983] All ER 288 ..... 438, 440, 441, 443, 472, 583, 586, 587
Morrison (1989) 89 Cr App R 17 398
Mowatt [1967] 3 All ER 47 ..... 396, 397
Moyle [2008] EWCA Crim 3059 ..... 327, 334
Muhamad [2002] EWCA Crim 1856 ..... 94, 95, 99, 100, 105, 109, 111
Mujuru [2007] EWCA Crim 2810; [2007] 2 Cr App R 26 363

Narbrough [2004] EWCA Crim 1012 287–8
Nash [1998] EWCA Crim 2392; [1999] Crim LR 308 ..... 145, 146
National Coal Board v Gamble [1959] 1 QB 11 ..... 120, 122

National Rivers Authority v Alfred McAlpine Homes (East) Ltd (1994) 158 JP 628 192
Nedrick [1986] 3 All ER 1 ..... 64, 65, 66, 80, 146, 397
Nethercott [2001] EWCA Crim 2535; [2002] Crim LR 402 217
Nettleship v Weston [1971] 3 All ER 581 358
Ngan [1998] 1 Cr App R 331 ..... 446, 447
Nicholls (1874) 13 Cox CC 75 37
Nicklinson v Ministry of Justice [2013] EWCA Civ 961, [2014] 2 All ER 32; [2014] UKSC 38; [2014] 3 WLR 200 ..... 231, 232, 233, 266, 322
Nika [2005] EWCA Crim 3255 429
Norfolk Constabulary v Seekings and Gould [1986] Crim LR 167 ..... 485, 487, 512
NW [2010] EWCA Crim 404 ..... 562, 563

O'Brien [1995] Crim LR 734 130
O'Connell [1997] Crim LR 683 292
O'Connor [1991] Crim LR 135 ..... 245, 249, 308
O'Flaherty and others [2004] EWCA Crim 526; [2004] 2 Cr App R 20 ..... 127, 135, 139
O'Grady [1987] QB 995 ..... 245, 249, 266, 308, 309
O'Leary (1986) 82 Cr App R 341 489
OLL Ltd (1994) *The Independent*, 9 December 195, 202–3
Olugboja [1982] QB 320 ..... 410, 421
Ortiz (1986) 83 Cr App R 173 ..... 211, 227
Osman *see* Governor of Pentonville Prison, ex parte Osman [1989] .....
Osmani [2006] EWCA Crim 816 429
Owino [1996] 2 Cr App R 128 ..... 241–2, 244, 249, 267
Oxford v Moss [1979] Crim LR 119 452
Oye [2013] EWCA Crim 1725, [2014] 1 All ER 902 ..... 243, 244, 249

P & O European Ferries (Dover) Ltd (*The Herald of Free Enterprise*) (1991) 93 Cr App R 72 ..... 189, 194, 199, 206
Pace and Rogers [2014] EWCA Crim 186; [2014] 1 Cr App R 34 ..... 147, 148
Pagett (1983) 76 Cr App Rep 279; [1983] Crim LR 393 ..... 43, 47, 57, 59, 372, 376
Palmer [1971] AC 814 ..... 241, 242, 248, 249, 267
Parks (1992) 95 DLR (4d) 27 276
Parsons [2009] EWCA Crim 64 132
Pearce [1973] Crim LR 321 492
Peart [1970] 2 All ER 823 493
Pembliton [1874-80] All ER Rep 1163; (1874) LR 2 CCR 119 ..... 74, 542, 543
Perman [1996] 1 Cr App R 24 ..... 125, 139
Pharmaceutical Society of Great Britain v Storkwain Ltd [1986] 2 All ER 635 ..... 83, 84, 92, 95, 99, 109
Philips (1987) 86 Cr App R 18 153
Pilkington v Scott [1846] 12 Digest (Repl.) 232 226
Pitchley [1972] Crim LR 705 ..... 502, 503
Pitham v Hehl [1977] Crim LR 285 ..... 438, 443, 472
Pittwood (1902) 19 TLR 37 ..... 37, 56, 57, 360
Pommell [1995] 2 Cr App R 607 ..... 213, 220, 221, 226, 227
Pooley (2007) *The Daily Mail*, 12 January 281
Pordage [1975] Crim LR 575 ..... 297, 299
Poulton (1832) 5 C & P 329 317
Powell [1999] AC 1; [1997] 4 All ER 545; [1997] UKHL 45 585
Preddy [1996] 3 All ER 481 ..... 436, 513–4
Press & Thompson [2013] EWCA Crim 1849 ..... 293, 299, 306
Pretty *see* R (on the application of Pretty) v DPP [2001] .....
Price [2003] EWCA Crim 2405; (2003) *The Times*, 20 August 408
Prince [1875] LR 2 CCR 154 ..... 85, 86, 102, 104
Pritchard (1836) 7 Car & P 303 ..... 178, 180
P v DPP [2012] 477, 481

Quayle and others [2005] EWCA Crim 1415; [2005] 1 WLR 3642; [2006] Crim LR 149 ..... 28, 226, 229, 230

Quick [1973] QB 910....272, 274, 275, 276, 277, 281, 284, 290–1, 309

R (on the application of Leeson) v DPP [2010] EWHC 994 Admin....565
R (on the application of Pretty) v DPP [2001] UKHL 61; [2002] 1 AC 800....40–1, 263
R (on the application of Ricketts) v Basildon Magistrates' Court [2010] EWHC 2358 (Admin)....455
R (on the application of T) v DPP [2003] Crim LR 622....389
R (Stephen Malcolm) (1984) 79 Cr App R 334....70, 71, 551
R [1992] 1 AC 599; [1991] 2 All ER 257....425
Rabey (1980) 114 DLR (3d) 193....277
Race Relations Board v Applin [1973] 2 All ER 1190....164
Rafferty [2007] EWCA Crim 1846....128–9, 130, 138, 139
Rahman and Others [2008] UKHL 45; [2009] 1 AC 129....123, 124, 127, 129, 130, 137, 138, 139
Rai [2000] Crim LR 192....524
Ralston [2005] EWCA Crim 3279....429
Rashford [2005] EWCA Crim 3377; [2006] Crim LR 547....238
Rashid [1977] 2 All ER 237....506
Reed [1982] Crim LR 819....155, 156
Reid (1975) 62 Cr App R 109....130, 131, 353
Renouf [1986] 2 All ER 449....236
Reynolds [1988] Crim LR 679....327
Richardson [1998] EWCA 1086; [1998] 2 Cr App R 200....251, 263, 267, 268
Richardson and Irwin [1998] EWCA Crim 3269; [1999] 1 Cr App R 392; [1999] Crim LR 494....301, 302, 307, 308, 310, 311, 393
Roberts [1971] Crim LR 27....390
Roberts [1972] Crim LR 242....49, 57, 59
Roberts [1993] 1 All ER 583....125–6
Roberts [1998] 1 Cr App R 441....156
Robinson [1977] Crim LR 173....476, 481
Robinson [2011] UKPC 3....115
Robson [2006] EWCA Crim 2749....331, 332
Roe v Kingerlee [1986] Crim LR 735....538, 539, 553
Rogers (Philip) [2007] UKHL 8....575
Rook [1993] 2 All ER 955....134, 138, 139
Ross v HM Advocate 1991 SLT 564....294
Rowbotham [2011] EWCA Crim 433....299, 300, 301
Rubie v Faulkner [1940] 1 KB 571....117
Ruffell [2003] EWCA Crim 122....373
Ruse v Read [1949] 1 KB 377....299
R v Codere (1916) 12 Cr App R 21....281
R v DFF, ex p Kebilene [2000] 2 AC 326....24
R v Ellames [1974] 3 All ER 130....506, 507, 530
R v Francis (2007) *The Times*, 17 January....570
R v H [2005] EWCA Crim 732; [2005] 2 All ER 859; [2005] 1 WLR 2005; (2005) *The Times*, 8 February....429
R v R [1991] 4 All ER 481....11
R v Raphael and another [2008] EWCA Crim 1014....467
R v T and others [2009] EWCA Crim 1035....15
R v Webster [2010] EWCA Crim 2819....25
Ryan [1996] Crim LR 320....484, 487, 511

S [2012] EWCA Crim 389; [2012] 1 Cr App R 31....219
Sadique & Hussain [2011] EWCA Crim 2872; [2012] 1 WLR 1700....168
Sadique (No. 2) [2013] EWCA Crim 1150, [2014] 1 WLR 986....168, 169
Safi and others [2003] EWCA Crim 1809; [2003] Crim LR 721....212, 218, 220, 226, 227
Saik [2006] UKHL 18; [2007] 1 AC 18....152, 156, 157, 158, 160, 170, 523
Salisbury [1976] VR 452....394
Salomon v Salomon & Co Ltd [1897] AC 22....186
Sanchez [1996] Crim LR 527....565
Sander (1982) Cr App R 84....502

Sangha [1988] 2 All ER 385 550
Saunders [1985] Crim LR 230 ..... 320, 395
Savage, DPP v Parmenter [1992] AC 699; [1991] 4 All ER 698 ..... 69, 307, 390–1, 396
Scalley [1995] Crim LR 504 65
Scott (1979) 68 Cr App R 164 153
Scott v MPC [1975] AC 818 159
Secretary of State for the Home Department, ex p Simms [1999] 3 WLR 328 105
Seers (1984) 79 Cr App R 261 ..... 327, 334, 374
Seray-White [2012] EWHC 208 Admin 542, 543, 545
Seymour [1983] 2 AC 493 69
Shannon (1980) Cr App R 192 ..... 241, 249
Sharp [1987] 3 All ER 103 ..... 214, 215, 227
Shaw v DPP [1962] AC 220 ..... 10, 159
Shayler [2001] EWCA Crim 1977; [2001] 1 WLR 2206 ..... 220, 226, 228
Sheehan [1975] 1 WLR 739 ..... 292, 308, 309, 310
Sheldrake v DPP [2004] UKHL 43; [2005] 1 All ER 237 ..... 22, 23, 25, 30
Shepherd [1987] Crim LR 686 ..... 216, 227
Sherras v De Rutzen [1895] 1 QB 918 ..... 88, 93, 94, 111
Shivpuri [1987] AC 1; [1986] 2 All ER 334 ..... 149, 150, 169, 171, 500
Silverman [1987] Crim LR 574 520
Simcox [1964] Crim LR 402 327
Singh [1974] 1 All ER 26 210
Singh [1999] EWCA Crim 460; [1999] Crim LR 582 ..... 37, 360
Siracusa (1989) 90 Cr App R 340 ..... 152, 154, 155
Skipp [1975] Crim LR 114 ..... 440, 441
Slingsby [1995] Crim LR 570 ..... 259, 263, 267, 385
Small [1987] Crim LR 777 460–1
Smith (Thomas) [1959] 2 QB 35 ..... 52, 53, 57, 59, 318, 372
Smith [1974] 1 All ER 632 ..... 541, 542
Smith [1979] Crim LR 251 ..... 37, 40
Smith and Jones [1976] 3 All ER 54 ..... 486, 488, 511, 584
Smith and others [2011] EWCA Crim 66 454
Smith v Chief Superintendent of Woking Police Station [1983] Crim LR 323 381
Somchai Liangsiriprasert [1991] AC 225 155
Southard v DPP [2006] EWHC 3449 (Admin) 572, 573
Southwark LBC v Williams [1971] Ch 734 231
Spall [2007] EWCA Crim 1623 430
Spratt [1991] 2 All ER 210 69
Steane [1947] KB 997 ..... 66, 80
Steer [1987] 2 All ER 833 ..... 549, 550, 553
Stephenson [1979] QB 695; [1979] 2 All ER 1198 ..... 68, 543
Stevens v Gourley (1859) 7 CB NS 99 485
Stewart [2009] EWCA Crim 593 ..... 333–4, 335, 374
Stewart and Schofield [1995] 3 All ER 159 ..... 122, 130, 131
Stone and Dobinson [1977] QB 354 ..... 38, 57, 58, 356, 359, 360, 373
Stubbs (1989) 88 Cr App R 53 296
Sullivan [1984] AC 156 ..... 272, 273, 275, 276, 277, 284, 309, 312
Swan [2006] EWCA Crim 3378 ..... 327, 331, 332
Sweet v Parsley [1969] 1 All ER 347 ..... 91, 93, 99, 102, 107
Symonds [1998] Crim LR 280 237

T [1990] Crim LR 256 ..... 276, 287, 290
Tabassum [2000] 2 Cr App R 328; [2000] Crim LR 686 ..... 251, 252, 262, 263, 267, 268, 385, 408
Tandy [1989] 1 All ER 267; [1989] 1 WLR 350 ..... 332, 333, 334
Taran [2006] EWCA Crim 1498 424
Taylor (Robert John) [2002] Crim LR 205 152
Taylor v DPP [2006] EWHC 1202 (Admin); (2006) *The Times* 14 June 572
Terry [1961] 2 QB 314; [1961] 2 All ER 569 374
Tesco Supermarkets Ltd v Nattrass [1972] AC 153 ..... 188, 190, 193, 206
Tesco v Brent LBC [1993] 2 All ER 718 190

Thomas (1985) 81 Cr App R 331 383
Thomas v R (1937) 44 ALR 37 101–2
Thompson (1965) Cr App R 1 154
Thorne v Motor Trade Association [1937] 3 All ER 157 497
Thornton (No 1) [1992] 1 All ER 306 ..... 339, 340
Tolson (1889) 23 QBD 168 276
Tomsett [1985] Crim LR 369 ..... 446, 447, 586, 587
Toothill [1998] Crim LR 876 ..... 145, 146
Tosti and White [1997] EWCA Crim 222; [1997] Crim LR 746 ..... 145, 146, 150, 151
Towers (1874) 12 Cox CC 692 50
Treacy v DPP [1971] 1 All ER 110 ..... 436, 496
Tree [2008] EWCA Crim 261 ..... 158, 160
Troughton v Metropolitan Police [1987] Crim LR 138 508
Tuberville v Savage (1669) 1 Mod Rep 3 381–2
Tuck v Robson [1970] 1 WLR 741 117
Turner (No 2) [1971] 2 All ER 441 ..... 454, 459, 460, 470
Turner [2005] EWCA Crim 3436 429
Tyrrell [1894] 1 QB 710 153

Uddin [1998] 2 All ER 744; [1998] EWCA Crim 999 ..... 126, 127, 130, 139

Valderrama-Vega [1985] Crim LR 220 ..... 210, 211, 220, 227
Vane v Yiannopoullos [1964] 3 All ER 820 ..... 183, 184
Velumyl [1989] Crim LR 299 466
Venclovas [2013] EWCA Crim 2182 319
Venna [1976] QB 421; [1975] 3 All ER 788 ..... 67, 387
Vinagre (1979) 69 Cr App R 104 ..... 325, 327
Vinall [2011] EWCA Crim 6252 480
Vincent [2001] Crim LR 488 508

W [2005] EWCA Crim 3138 429
Wacker [2003] EWCA Crim 1944; [2003] 4 All ER 295 ..... 198, 356–7, 360
Wain [1995] 2 Cr App R 660 457
Walker [1995] Crim LR 44 8
Walker and Hayles [1990] Crim LR 44 ..... 146, 171
Walkington [1979] 2 All ER 716 ..... 171, 485, 487, 512, 584
Wall (1802) 28 State Tr 51 51
Walton [1978] 1 All ER 542; (1978) 66 Cr App R 25 ..... 272, 325
Ward [2012] EWCA Crim 3139 340
Warwick *see* Webster and Warwick [1995] 2 All ER 168
Watmore v Jenkins [1962] 2 QB 572 287
Watson [1989] 2 All ER 865 ..... 47, 350, 351, 352, 353, 355, 376
Watts [1998] Crim LR 833 356
Webster [2006] EWCA Crim 415 ..... 117, 118, 121
Webster [2010] EWCA Crim 2819 25
Webster and Warwick [1995] 2 All ER 168 ..... 549–50, 553
Wheeler (1990) 92 Cr App R 279 ..... 444, 448
White [1910] 2 KB 124 ..... 43, 56, 59, 148, 150, 171, 372
Whitefield (1984) 79 Cr App R 36 133
Whiteley (1991) 93 Cr App R 25 540
Whittaker v Campbell [1983] 3 All ER 582 493
Whybrow (1951) 35 Cr App R 141 ..... 146, 150, 171
Whyte [1987] 3 All ER 416 ..... 241, 249
Widdowson (1986) 82 Cr App R 314; [1986] Crim LR 233 142
Wilcox v Jeffrey [1951] 1 All ER 464 ..... 117, 122, 584
Willer (1986) 83 Cr App R 225 ..... 220, 225, 227
Willett [2010] EWCA Crim 1620; [2011] Crim LR 65 ..... 350, 376
Williams [1923] 1 KB 340 420
Williams [1987] 3 All ER 411 ..... 218, 235, 236, 237, 238, 242, 244, 249, 266, 267
Williams [2012] EWCA Crim 2162 ..... 25, 26

Williams and Davis [1992] 2 All ER 183 49
Willoughby [2005] 1 WLR 1880; [2004] EWCA Crim 3365 ..... 350, 357, 360, 376
Wilsher v Essex Area Health Authority [1986] 3 All ER 801 358
Wilson [1997] 3 WLR 125; [1996] Crim LR 573 ..... 6, 259, 263, 266, 267, 392
Wilson [2007] EWCA Crim 1251; [2007] 2 Cr App R 31 ..... 223, 228
Wilson v Pringle [1986] 2 All ER 440 ..... 383, 386
Windle [1952] 2 QB 826 ..... 278, 284, 309, 312
Wings Ltd v Ellis [1984] 3 All ER 584 94
Winzar v Chief Constable of Kent (1983) *The Times*, 28 March; Co/1111/82 (Lexis), QBD 84, 85
Wisniewski [2004] EWCA Crim 3361 430
Wood (1830) 1 Mood CC 278 394
Wood (Fraser) v DPP [2008] EWHC 1056 (Admin) 386
Wood [2008] EWCA Crim 1305; [2009] 1 WLR 496 ..... 333, 334, 335, 374
Woodman [1974] 2 All ER 955 454–5
Woodrow (1846) 15 M & W 404 83
Woods (1981) 74 Cr App R 312 ..... 299, 300, 423
Woollin [1998] UKHL 28; [1998] 3 WLR 382; [1998] 4 All ER 103;
[1999] 1 AC 82 ..... 63, 64, 65, 66, 75, 79, 80, 146, 320, 370, 372, 397
Woolmington v DPP [1935] AC 462 19–20
Workman [2014] EWCA Crim 575 338
Wright [2000] Crim LR 510 211
Wright [2000] EWCA Crim 28; [2000] Crim LR 928 65

Yemoh and others [2009] EWCA Crim 930; [2009] Crim LR 888 133
Yip Chiu-Cheung [1995] 1 AC 111; [1994] 2 All ER 924 155

Zahid (Nasir) [2010] EWCA Crim 2158 106
Zebedee [2012] EWCA Crim 1428 341
Zerei [2012] EWCA Crim 1114 476

INTERNATIONAL

Australia

Barker v R (1983) 7 ALJR 426 486
Evans and Gardiner [1976] VR 517 220
Falconer (1990) 171 CLR 30 ..... 277, 281
McAuliffe (1995) 183 CLR 108, HC 126
O'Connor (1980) ALR 449 (HC) 291, 307
Papadimitropoulos (1958) 98 CLR 249 421
Ryan v R (1967) 40 ALJR 488 289–90
Samuels v Stubbs [1972] SASR 200 (Australia) 538
Snow [1962] Tas SR 271 307
Stapleton (1952) 86 CLR 358 279

Canada

Bernard [1988] 2 SCR 833 ..... 305, 307
Bolduc and Bird (1967) 63 DLR (2d) 82 250
Bouchard-Lebrun [2011] 3 SCR 575 ..... 303–4, 307
Chaulk (1991) 62 CCC (3d) 193 279
Ciccarelli (1989) 54 CCC (3d) 121 256
Daviault (1995) 118 DLR (4d) 469, SC 305
Gray (1981) 24 CR (3d) 109 256
JA [2011] 2 SCR 440 418
Kerr [2004] 2 SCR 371 233
Latimer [2001] 1 SCR 3 233
Moloney (1976) 28 CCC (2d) 323 256
Perka [1984] 2 SCR 232 233
Petrozzi (1987) 35 CCC (3d) 528 421
R v George [1960] SCR 871 299
Ryan [2013] 1 SCR 14 214
Williams [2003] 2 SCR 134 253

European Court of Human Rights
Anderson and others v UK (1997) 25 EHRR CD 172....31
CR v United Kingdom (Case no 48/1994/495/577) (1996) 21 EHRR 363; [1996] FLR 434....11, 26, 31
G v United Kingdom (Admissibility) (37334/08) [2012] Crim LR 46....22, 29
Laskey v UK (1997) 24 EHRR 39....263
Salabiaku v France (1988) 13 EHRR 379....96, 97
T v UK; V v UK (1999) 7 EHRR 659....30, 177
New Zealand
Burr [1969] NZLR 736....287
Kamipeli [1975] 2 NZLR 610, CA....291, 307
Lee [2006] 3 NZLR 42....255, 260
Ramsay [1967] NZLR 1005....77
R v Barker [2009] NZCA 186, [2010] 1 NZLR 235....259–60
R v Kirby [2013] NZCA 451....307
South Africa
Chiswibo [1960] (2) SA 714....77
Chretien [1981] (1) SA 1097....291
United States
Burrows v State 38 Ariz 99, 297 (1931) (Arizona)....296
Eldredge v United States 62 F 2d 449 (1932)....134
Hanks v State 542 SW 2d 413 (1976) (Texas)....294
Johnson v Commonwealth 135 Va 524 (1923) (Virginia)....295
People v Cruz 83 Cal App 3d 308 (1978) (California)....294
People v Velez 175 Cal App 3d 785 (1985) (California)....294

Table of statutory instruments

Aliens Order 1920 (SI 1920/448) 84
Defence (General) Regulations 1939 (SI 1939/927) 66
Motor Vehicles (Authorisation of Special Types) General Order 1979 (SI 1979/1198) 365
Traffic Signs Regulations and General Directions 1994 (SI 1994/1519)
Reg 33(1)(b) 231

Table of legislation

Abortion Act 1967
s 1 ... 367
Accessories and Abettors Act 1861 ... 166
s 8 ... 114–15, 136, 138, 584, 585
Age of Marriage Act 1929 ... 104
s 2 ... 103
Aggravated Vehicle-Taking Act 1992 ... 494
Anti-social Behaviour, Crime and Policing Act 2014 ... 436
s 177 ... 234
Bribery Act 2010 ... 9
British Nationality Act 1948
s 3 ... 318
Child Abduction Act 1984
s 1 ... 219
Children Act 1989
s 31 ... 174
s 31(2) ... 174, 175
Children and Young Persons Act 1933
s 1 ... 350
s 1(1) ... 350
s 50 ... 174, 177
Civil Aviation Act 1982
s 92 ... 319
Civil Aviation (Amendment) Act 1996
s 1 ... 319
Civil Partnership Act 2004 ... 153
Computer Misuse Act 1990
s 3(6) ... 540
Contempt of Court Act 1981 ... 90, 109
Coroners and Justice Act 2009 ... 369, 371
s 52 ... 323, 334
s 53 ... 150
s 54 ... 249, 250, 267, 335, 337, 370
s 54(1) ... 337, 338, 340, 348
s 54(1)(a) ... 338, 340
s 54(1)(b) ... 340
s 54(1)(c) ... 345, 348
s 54(2) ... 338, 348
s 54(3) ... 348
s 54(4) ... 340, 348
s 54(5) ... 338, 348
s 54(6) ... 348
s 54(7) ... 338, 348
s 55 ... 335, 370
s 55(1) ... 337
s 55(3) ... 340, 341, 344, 348
s 55(4) ... 340, 342, 344, 348
s 55(4)(a) ... 341, 342
s 55(4)(b) ... 341, 342
s 55(5) ... 342–3, 348

s 55(6) 343
s 55(6)(a) 343, 348
s 55(6)(b) 343, 348
s 55(6)(c) 344, 346, 348
s 56(1) 335, 337
s 56(2) 335
s 57 365
Corporate Manslaughter and Corporate Homicide Act 2007 ..... 9, 197–9, 205, 206
s 1(1) 197, 206
s 1(3) 197
s 8 199
s 8(1)(b) 199
s 8(2) 199
s 8(3) 199
s 8(4) 199
Crime and Courts Act 2013 ..... 559, 572
s 43 ..... 237, 246
Crime and Disorder Act 1998
s 11 ..... 175, 177
s 28 ..... 555, 574
s 28(1) 555
s 28(4) 575
s 29 ..... 401, 404
s 30(1) 555
s 30(3) 555
s 31 ..... 574, 577
s 31(1)(a) 575
s 31(1)(b) 570
s 34 ..... 176, 178
Criminal Appeal Act 1995 16
Criminal Attempts Act 1981 ..... 147, 160, 169, 170, 468
s 1 ..... 148, 167, 171
s 1(1) 148, 583
s 1(2) 148, 583
s 1(3) 148
s 1(4) 150
s 4(3) 142
Criminal Damage Act (CDA) 1971 ..... 8, 450, 538
s 1 ..... 69, 70, 543, 544, 552, 553, 554, 556
s 1(1) 68, 537, 553, 555
s 1(2) 300, 549, 550, 551, 552, 553
s 1(2)(b) 549
s 1(3) 300, 552, 553
s 2 554
s 2(b) 554
s 3 ..... 539, 543, 554
s 5 ..... 545, 548, 557
s 5(2) 306, 545, 548
s 5(2)(a) 547, 555, 557
s 5(2)(b) 546, 547, 548, 555, 557
s 5(3) 306, 557
s 10 548
s 10(1) 540
s 10(2) 541
s 10(3) 541
Criminal Justice (Terrorism and Conspiracy) Act 1998 156

Criminal Justice Act 1925
s 47 ... 234
Criminal Justice Act 1967 ... 63
s 8 ... 79, 301, 310
s 91 ... 300
Criminal Justice Act 1972
s 36 ... 17
Criminal Justice Act 1988
s 39 ... 380
Criminal Justice Act 1991 ... 487
Criminal Justice Act 2003 ... 17, 18
s 44 ... 15
Criminal Justice and Immigration Act 2008 ... 90
s 76 ... 236, 237, 242, 244, 246, 247, 267
s 76(3) ... 242, 247, 249
s 76(4) ... 242, 247, 248, 249
s 76(4)(b) ... 244, 245
s 76(5) ... 245, 247, 248, 249
s 76(5A) ... 246, 247, 248, 249
s 76(6) ... 242, 249
s 76(6A) ... 242, 249
s 76(7) ... 242, 249
s 76(8) ... 242
s 76(8A) ... 246
s 76(8A)(d) ... 248
s 76(8D) ... 247, 248
s 76(8F) ... 247
s 76(10) ... 247
Criminal Justice and Licensing (Scotland) Act 2010 ... 174, 282
Criminal Justice and Public Order Act 1994 ... **6**, 407, 409, 568
s 68 ... 559
Criminal Law Act 1967
s 3 ... 236
s 3(1) ... 236
s 3(2) ... 236
s 4(1) ... 135
s 6(4) ... 151
Criminal Law Act 1977 ... 158, 169, 170
s 1 ... 583
s 1(1) ... 152, 160
s 1(1)(a) ... 160
s 1(2) ... 157, 160, 170
s 1A ... 156
s 2(1) ... 153, 160
s 2(1)(b) ... 160
s 2(2) ... 170
s 2(2)(a) ... 153, 160
s 2(2)(b) ... 153
s 2(2)(c) ... 153, 160
s 5(3) ... 159
Criminal Law Amendment Act 1880 ... 104
Criminal Law Amendment Act 1885 ... 6
Criminal Law Amendment Act 1922 ... 104
Criminal Procedure (Insanity) Act 1964 ... 179
s 1 ... 272
s 5 ... 272

s 6 ... 325
Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 ... 179, 180, 312
s 1 ... 272
Criminal Procedure (Scotland) Act 1995
s 51A ... 282
Criminal Procedure and Investigations Act 1996 ... 17
Customs and Excise Management Act 1979 ... 229
s 170(2) ... 154
Domestic Violence Crime and Victims Act 2004 ... 15, 57, 179, 272
s 5 ... 363, 364, 371
s 5(1) ... 362–3
s 5(6) ... 363
Domestic Violence Crime and Victims (Amendment) Act 2012 ... 362
Explosive Substances Act 1883
s 4 ... 564
s 4(1) ... 239
Female Genital Mutilation Act 2003
s 1(1) ... 258
Finance (No 2) Act 1940 ... 187
Finance Act 1968
s 1(1)(a) ... 95
Firearms Act 1968
s 5(1)(b) ... 106
s 16 ... 549
Firearms Act 1982
s 1(5) ... 26
Food Act 1984 ... 109
Food Safety Act 1990
s 8 ... 106
s 14 ... 106
s 15 ... 106
s 21 ... 106
s 21(1) ... 106
s 21(3) ... 106
s 21(4) ... 106
Football (Offences) Act 1991 ... 36
Fraud Act 2006 ... 8, 9, 72, 435, 436, 441, 515, 533
s 2 ... 516, 517, 518, 528, 529, 534
s 2(1) ... 516, 523
s 2(2) ... 516, 524
s 2(3) ... 516, 524
s 2(4) ... 516, 517, 524
s 2(5) ... 519, 524
s 3 ... 516, 520, 524, 525–6, 528, 529, 534, 535
s 4 ... 516, 526, 527, 528, 529, 534, 535
s 4(1) ... 526
s 4(2) ... 526
s 5 ... 521, 524
s 5(2) ... 521
s 5(3) ... 521
s 5(4) ... 521
s 6 ... 516, 529, 529–30, 534
s 6(1) ... 529
s 7 ... 516, 530, 534
s 11 ... 516, 531, 534, 536
s 11(1) ... 531

s 11(2) 531
s 11(2)(a) 534
s 15 513
s 16 513
Health and Safety at Work etc Act 1974 193
Homicide Act 1957 ..... 8, 280
s 2 ..... 180, 272, 312, 323, 370, 374, 375
s 2(1) 323, 326, 327, 328, 334
s 2(1A) 323, 334
s 2(1B) 323, 329
s 2(1)(c) 329, 332
s 2(2) 20–1, 324, 335
s 2(3) 324
s 3 ..... 335, 340
s 4 370
s 4(1) 348
s 4(3) 348
Homicide Act 1975
s 2(2) 26
Human Fertilisation and Embryology Act 1990
s 37 367
Human Rights Act 1998 ..... 10, 96, 142, 263–4, 359
s 3 ..... 21, 25
Indecency with Children Act 1960
s 1 104
s 1(1) 100, 101, 105
Infanticide Act 1938
s 1 371
s 1(1) 365, 366
Infant Life (Preservation) Act 1929
s 1(1) 366–7
s 1(2) 367
Insolvency Act 1986
s 362(1)(a) 94, 95, 105
Interpretation Act 1889 186
Interpretation Act 1978 186
Larceny Act 1916 439
Law Commissions Act 1965
s 3(1) 8
Law Reform (Year and a Day Rule) Act 1996
s 1 319
s 2 319
Legal Aid, Sentencing and Punishment of Offenders Act 2012
s 148 237
Licensing Act 1872
s 12 85
s 13 88
s 16 88
s 16(1) 89, 93
s 16(2) 88, 89
Licensing Act 1961
s 22 183
Licensing Act 1964 117
Magistrates' Courts Act 1980
s 44 136
Malicious Damage Act (MDA) 1861 ..... 67–8, 538, 541

Medicines Act 1968
s 58(2) 92
Mental Deficiency Act 1913
s 56(3) 104
Mental Health Act 1983 ..... 178, 179
s 37(1) 325
s 41 180
Merchant Shipping Act 1894
s 502 191
Metropolitan Police Act 1839
s 44 183
Misuse of Drugs Act 1971 229
s 4(2)(b) 157
s 19 161
s 28(2) 24
National Health Service (Family Planning) Amendment Act 1972 257
National Lottery etc Act 1993
s 13 93
s 13(1) 93
s 13(1)(a) 87, 93, 94
s 13(1)(b) 93, 94
s 13(1)(c) 87, 93, 94
Offences against the Person Act (OAPA) 1861 ..... **8**
s 4 161
s 9 318
s 10 318
s 18 ..... 43, 62, 64, 74, 75, 218, 224, 254, 298, 301, 306, 319, 379, 380, 390, 394, 395, 396–8, 403, 404, 405
s 20 ..... 5, 69, 73, 211, 252, 253, 254, 264, 265, 266, 276, 298, 299, 301, 304, 306, 319, 379, 380, 384, 390, 391, 392, 393–6, 397, 398, 401, 403, 404, 405, 415, 416
s 23 ..... 67, 371, 396, 402, 403, 404
s 24 ..... 402, 403, 404
s 47 ..... 5, 6, 49, 67, 69, 211, 254, 263, 264, 265, 266, 296, 299, 379, 380, 384, 388, 389–93, 395, 398, 401, 403, 404, 405
s 52 104
s 55 ..... 85, 86
s 58 367
Official Secrets Act 1989 226
Police and Criminal Evidence Act (PACE) 1984
Code of Practice H 13
s 24 12
s 42(1) 13
s 56 13
s 58 13
Powers of Criminal Courts (Sentencing) Act 2000
s 143 478
Prevention of Corruption Act 1889
s 1 25
s 1(2) 25
Prevention of Corruption Act 1916
s 2 21
Prevention of Crime Act 1953
s 1 ..... 349, 564
s 10 489
Prevention of Terrorism (Temporary Provisions) Act 1969 24

Proceeds of Crime Act 2002 157
s 327 147
Protection from Eviction Act 1977 36
Public Order Act 1936 559
s 5 567
Public Order Act 1986 559
s 1 ..... 560, 563, 566, 576, 578, 579
s 1(1) 560
s 1(2) 560, 567
s 1(3) 560, 566
s 1(4) 560
s 1(5) 560, 566
s 2 ..... 562, 563, 566, 576, 578
s 2(1) 562
s 2(2) 562
s 2(3) 562
s 2(4) 562
s 3 ..... 350, 563, 564, 566, 576, 578
s 3(4) 565
s 3(5) 566
s 4 ..... 566–8, 574, 575, 576, 577, 579
s 4(1) 566
s 4(1)(a) 567
s 4(2) 566
s 4A 30, 568, 569, 570, 572, 573, 574, 575, 576–7
s 4A(1) 569
s 4A(3) 570, 571
s 5 ..... 568, 571, 572, 574, 575, 577, 578, 579
s 5(1) 571, 574
s 5(3) 573–4
s 6 ..... 578, 579
s 6(1) 561, 566
s 6(2) 562, 563, 565, 566
s 6(3) 567–8
s 6(4) 574
s 6(5) 562, 563, 565, 577
s 8 ..... 560, 570
s 8(a) 566
Regulatory, Enforcement and Sanctions Act 2008
Pt 3 109
Rivers (Prevention of Pollution) Act 1951
s 2(1)(a) 94, 95
Road Safety Act 2006 365
Road Traffic Act (RTA) 1988 57
s 1 ..... 364, 371
s 2A 364
s 2A(1) 364
s 2A(2) 364
s 2A(3) 364
s 2A(4) 364
s 2B 365
s 3A 365
s 3ZB 44, 45
s 5 271
s 5(1)(b) 23
s 5(2) 23

s 6 ... 42
s 6(5) ... 236
s 22A(1b) ... 350
s 170 ... 42
Road Traffic Act (RTA) 1991 ... 365
s 1 ... 364
Serious Crime Act (SCA) 2007 ... 9, 79, 161–3, 168–9, 170
s 44 ... 162, 163, 164, 165, 166, 167
s 44(1) ... 161, 164
s 44(2) ... 161, 164
ss 44–46 ... 161, 166
s 45 ... 162, 163, 164, 166
s 46 ... 162, 164–5, 166, 168
s 46(1) ... 162
s 47 ... 168
s 47(2) ... 164
s 47(3) ... 164
s 47(4) ... 164
s 47(5)(a) ... 165
s 47(5)(b) ... 165
s 47(8) ... 165
s 47(8)(a) ... 165
s 47(8)(b) ... 165
s 49 ... 166
s 49(1) ... 163, 166, 167
s 50 ... 166
s 50(1) ... 166
s 50(2) ... 166
s 50(3) ... 166
s 51 ... 167
s 59 ... 161
s 65(1) ... 164
s 65(2)(b) ... 163
s 67 ... 163
Serious Organised Crime and Police Act 2005
s 110 ... 12
Sexual Offences Act (SOA) 1956 ... 28
s 1(1) ... 407
s 6 ... 104, 120
s 6(3) ... 102
s 12 ... 104, 105
s 14 ... 96, 104, 408
s 14(1) ... 103, 104
s 14(2) ... 104
s 14(3) ... 104
s 14(4) ... 104
s 15 ... 408
Sexual Offences Act (SOA) 1967 ... 6
Sexual Offences Act (SOA) 1993
s 1 ... 177
Sexual Offences Act (SOA) 2003 ... 8, 105–6, 251, 298, 411, 430–1
Pt 1 ... 430
s 1 ... 253, 300, 416, 427, 431, 432
s 1(1) ... 36, 72, 408–9
s 1(2) ... 409, 426, 427
s 2 ... 72, 300, 409, 414, 416, 427, 431, 432

s 2(1) 425–6, 428
s 2(2) 426
s 3 ..... 72, 299, 416, 417, 429, 431, 432
s 3(1) 427, 428, 429
s 3(2) 427
s 4 ..... 72, 416, 422, 431
s 4(1) 429–30
s 5 ..... 29, 97, 106, 432, 433
s 8 ..... 149, 161
s 9 ..... 120, 167
ss 9–13 430
s 10 161
s 13 29
s 13(1) 176
s 14 430
s 15 430
s 16 430
s 26 161
s 31 161
s 48 161
s 52 161
s 61 430
s 62 430
s 63 ..... 146, 430, 483, 485
s 66 430
s 67 431
s 69 431
s 70 431
s 74 ..... 412, 413, 416, 423, 431, 432
s 75 ..... 416, 431, 432
s 75(1) 417
s 75(2) 417, 419–20
s 75(2)(c) 417
s 75(2)(d) 417, 418, 419
s 75(2)(f) 418, 419, 420
s 76 ..... 268, 416, 420, 421, 422, 423, 431, 432
s 76(1) 420
s 76(2) 420
s 76(2)(a) 420, 421, 422
s 76(2)(b) 423
s 78 ..... 427, 428
s 78(a) 429
s 78(b) 429
s 79(2) 36, 410
s 79(3) 409
s 79(8) 428
s 79(8)(c) 429

Sexual Offences(Amendment) Act 1976
s 1 300

Sexual Offences (Amendment) Act 2000 34

Sexual Offences (Conspiracy and Incitement) Act 1996
s 2 161

Suicide Act 1961
s 2(1) 150

Suppression of Terrorism Act 1978
s 4 ..... 318, 319

Terrorism Act 2000 ..... 13, 57
s 11 23
s 11(1) 23
s 11(2) 23
s 19 42
Terrorism Act 2006 13
s 1 161
Theft Act 1968 ..... 8, 72, 435, 541
s 1 ..... 436, 437, 442, 583
s 1(1) 441, 442, 444, 459, 472
s 1(3) 442
s 2 ..... 437, 442, 459, 461
s 2(1) 460, 466, 472, 522
s 2(1)(a) 445, 460, 476
s 2(1)(b) 460
s 2(2) 461, 472
s 3 ..... 437, 442, 443, 445
s 3(1) 437, 438–9, 443, 472
s 3(2) 443, 444, 448
s 4 ..... 437, 442, 451
s 4(1) 449, 451, 521
s 4(2) 451, 452
s 4(2)(b) 451
s 4(2)(c) 451
s 4(3) 450
s 4(4) 450
s 5 ..... 437, 442, 445, 456, 458
s 5(1) 443, 453, 459
s 5(2) 456, 459
s 5(3) 459
s 5(4) 445, 459
s 6 ..... 437, 442, 466, 467
s 6(1) 466
s 8 ..... 475, 478, 509, 585
s 9 ..... 36, 483, 485
s 9(1) 483
s 9(1)(a) 145, 146, 430, 483, 485, 486, 487, 488, 489, 510, 511, 583
s 9(1)(b) 483, 484, 486, 488, 489, 510, 511
s 9(2) 483
s 9(3) 487
s 9(4) 484, 487, 511
s 10 ..... 489, 510
s 11 ..... 490, 510
s 11(1) 490
s 11(2) 490
s 12 ..... 468, 491, 492, 493, 494, 510, 583
s 12(1) 491, 504
s 12(5) 491
s 12(6) 491, 493
s 12(7)(a) 493
s 12A 585
s 12A(1) 494
s 12A(2)(b) 495
s 12A(2)(c) 495
s 12A(2)(d) 495
s 12A(3) 495

s 12A(7) 494
s 13 ..... 452, 495
s 15 ..... 440, 441, 504, 516, 524, 535
s 15(1) 500
s 15A 514, 516, 535
s 15B 516
s 16 ..... 516, 535
s 16(1) 515
s 16(2)(a) 518
s 20(2) 516
s 21 ..... 495, 496, 510
s 21(1) 495
s 21(1)(a) 496
s 21(1)(b) 496
s 21(2) 495, 498
s 22 ..... 499, 511
s 24 501–2
s 24(2) 500
s 24(2)(a) 500
s 24(3) 501
s 24(4) 500
s 25 ..... 504, 505, 511, 529
s 25(1) 504, 530
s 25(3) 506
s 34(2)(a) 498
s 34(2)(b) 499, 500
Theft Act 1978 ..... 436, 475
s 1 ..... 513, 516, 531, 535
s 2 ..... 513, 516, 535
s 2(1)(b) 508
s 3 ..... 36, 435, 511
s 3(1) 507
s 3(3) 507
Theft (Amendment) Act 1996 ..... 436, 514
Tobacco Advertising and Promotion Act 2002 109
Trade Description Act 1968 94
s 11 188
s 24(1) 188, 189
Trade Marks Act 1994
s 92(5) 24
Transport Act 1982 193
Trial of Lunatics Act 1883 312
Video Recordings Act 1984
s 11(1) 190
Wildlife and Countryside Act 1981 450
Wireless Telegraphy Act 1949
s 1(1) 98

INTERNATIONAL LEGISLATION
Canada
Charter of Human Rights
s 7 96

France
Criminal Code (1992) 9

New Zealand
Crimes Act 1961 260
Securities Amendment Act 1988
s 20 190

Singapore
Immigration Ordinance
s 6(2) 99
s 9 99
United Nations Instruments and Conventions
United Nations Charter of the Rights of the Child
Art 17

United States
Model Penal Code 1985 ..... 66, 67

Table of European instruments

European Convention on the Protection of Human Rights and Fundamental Freedoms 1950....10, 263–4
Art 2....282
Art 3....230, 282
Art 3(1)....21
Art 5....21, 96
Art 6....22, 24, 25, 96, 97, 128, 177, 423
Art 6(1)....21, 22, 97
Art 6(2)....21, 22, 23, 25, 26, 96, 97, 282, 324
Art 7....11, 12, 26, 27, 168, 359
Art 7(1)....21, 26
Art 7(2)....26
Art 8....22, 28, 29, 265
Art 8(1)....28, 29, 30, 264
Art 8(2)....28
Art 10....142, 569, 574
Art 14....22, 29

Part I

Concepts in criminal law

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1

Introduction to criminal law

AIMS AND OBJECTIVES

After reading this chapter you should be able to:

- Understand the basic origins and purposes of criminal law
- Understand the definitions and classifications of criminal law
- Understand the basic workings of the criminal justice system
- Understand the basic concept of the elements of *actus reus* and *mens rea* in criminal law
- Understand the burden and standard of proof in criminal cases
- Understand how human rights law may have an effect on criminal law

This book deals with substantive criminal law. Substantive criminal law refers to the physical and mental element (if any) that has to be proved for each criminal offence. It also includes the general principles of intention and causation, the defences available and other general rules such as those on when participation in a crime makes the person criminally liable. Substantive criminal law does not include rules of procedure or evidence or sentencing theory and practice. However, these are equally important parts of the criminal justice system.

This chapter, therefore, gives some background information on criminal law. The purpose of the criminal law is considered, as well as how we know what is recognised as a crime, and the sources of criminal law. There are also brief sections explaining the courts in which criminal offences are tried, and the purposes of sentencing. The penultimate section of this chapter explains the burden and standard of proof in criminal cases. The final section looks at the effect of human rights law on criminal law.

1.1 Purpose of criminal law

The purpose of criminal law has never been written down by Parliament and, as the criminal law has developed over hundreds of years, it is difficult to state the aims in any precise way. However, there is general agreement that the main purposes are to:

- protect individuals and their property from harm;

- preserve order in society;
- punish those who deserve punishment.

However, on this last point, it should be noted that there are also other aims when a sentence is passed on an offender. These include incapacitation, deterrence, reformation and reparation.

In addition to the three main aims of the criminal law listed above, there are other points which have been put forward as purposes. These include:

- educating people about appropriate conduct and behaviour;
- enforcing moral values.

The use of the law in educating people about appropriate conduct can be seen in the drink-driving laws. The conduct of those whose level of alcohol in their blood or urine was above specified limits has only been criminalised since 1967. Prior to that, it had to be shown that a driver was unfit to drive as a result of drinking. Since 1967, there has been a change in the way that the public regard drink-driving. It is now much more unacceptable, and the main reason for this change is the increased awareness, through the use of television adverts, of people about the risks to innocent victims when a vehicle is driven by someone over the legal limit.

1.1.1 Should the law enforce moral values?

This is more controversial, and there has been considerable debate about whether the law should be used to enforce moral values. It can be argued that it is not the function of criminal law to interfere in the private lives of citizens unless it is necessary to try to impose certain standards of behaviour. The Wolfenden Committee reporting on homosexual offences and prostitution (1957) felt that intervention in private lives should only occur in order to:

- preserve public order and decency;
- protect the citizen from what is offensive or injurious;
- provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable.

Lord Devlin disagreed. He felt that 'there are acts so gross and outrageous that they must be prevented at any cost'. He set out how he thought it should be decided what type of behaviour be viewed as criminal by saying:

QUOTATION

'How are the moral judgments of society to be ascertained . . . It is surely not enough that they should be reached by the opinion of the majority; it would be too much to require the individual assent of every citizen. English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not to be expected to reason about anything and his judgment may be largely a matter of feeling . . . for my purpose I should like to call him the man in the jury box . . .

It is not nearly enough that to say that a majority dislike a practice: there must be a real feeling of reprobation . . . I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached.'

Lord Devlin, *The Enforcement of Morals* (Oxford University Press, 1965)

There are two major problems with this approach. First, the decision of what moral behaviour is criminally wrong is left to each jury to determine. This may lead to inconsistent results, as there is a different jury for each case. Second, Lord Devlin is content to rely on what may be termed 'gut reaction' to decide if the 'bounds of toleration are being reached'. This is certainly neither a legal method nor a reliable method of deciding what behaviour should be termed criminal. Another problem with Lord Devlin's approach is that society's view of certain behaviour changes over a period of time. Perhaps because of the lack of agreement on what should be termed 'criminal' and the difficulty of finding a satisfactory way of legally defining such behaviour, there is another problem in that the courts do not approach certain moral problems in a consistent way. This can be illustrated by conflicting cases on when the consent of the injured party can be a defence to a charge of assault. The first is the case of *Brown* [1993] 2 All ER 75.

CASE EXAMPLE

Brown [1993] 2 All ER 75

Several men in a group of consenting adult sado-masochists were convicted of assault causing actual bodily harm (s 47 Offences Against the Person Act 1861) and malicious wounding (s 20 Offences Against the Person Act 1861). They had carried out in private such acts as whipping and caning, branding, applying stinging nettles to the genital area and inserting map pins or fish hooks into the penises of each other. All of the men who took part consented to the acts against them. There was no permanent injury to any of the men involved and no evidence that any of them had needed any medical treatment. The House of Lords considered whether consent should be available as a defence in these circumstances. It took the view that it could not be a defence and upheld the convictions.

Lord Templeman said:

JUDGMENT

'The question whether the defence of consent should be extended to the consequences of sado-masochistic encounters can only be decided by consideration of policy and public interest … Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.'

Two of the judges dissented and would have allowed the appeals. One of these judges, Lord Slynn, expressed his view by saying:

JUDGMENT

'Adults can consent to acts done in private which do not result in serious bodily harm, so that such acts do not constitute criminal assaults for the purposes of the 1861 [Offences Against the Person] Act. In the end it is a matter of policy in an area where social and moral factors are extremely important and where attitudes could change. It is a matter of policy for the legislature to decide. It is not for the courts in the interests of paternalism or in order to protect people from themselves to introduce into existing statutory crimes relating to offences against the person, concepts which do not properly fit there.'

The second case is *Wilson* [1996] Crim LR 573, where a husband had used a heated butter knife to brand his initials on his wife's buttocks, at her request. The wife's burns had become infected and she needed medical treatment. He was convicted of assault causing actual bodily harm (s 47 Offences Against the Person Act 1861) but on appeal the Court of Appeal quashed the conviction. Russell LJ said:

JUDGMENT

'[W]e are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal should amount to a criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution … In this field, in our judgment, the law should develop upon a case by case basis rather than upon general propositions to which, in the changing times we live, exceptions may arise from time to time not expressly covered by authority.'

The similarities in the two cases are that both activities were in private and the participants were adults. In *Brown* there were no lasting injuries and no evidence of the need for medical treatment, whereas in *Wilson* the injuries were severe enough for Mrs Wilson to seek medical attention (and for the doctor to report the matter to the police). The main distinction which the courts relied on was that in *Brown* the acts were for sexual gratification, whereas the motive in *Wilson* was of 'personal adornment'. Is this enough to label the behaviour in *Brown* as criminal? (See sections 8.6.3 and 8.6.4 for further discussion of the decision in *Brown* and also the decision of the European Court of Human Rights in the case.)

The reference in Russell LJ's judgment to changing times acknowledges that society's view of some behaviour can change. There can also be disagreement about what morals should be enforced. Abortion was legalised in 1967, yet some people still believe it is morally wrong. A limited form of euthanasia has been accepted as legal with the ruling in *Airedale NHS Trust v Bland* [1993] 1 All ER 821, where it was ruled that medical staff could withdraw life support systems from a patient, who could breathe unaided but was in a persistent vegetative state. This ruling meant that they could withdraw the feeding tubes of the patient, despite the fact that this would inevitably cause him to die. Many people believe that this is immoral, as it denies the sanctity of human life.

All these matters show the difficulty of agreeing that one of the purposes of criminal law should be to enforce moral standards.

1.1.2 Example of the changing nature of criminal law

As moral values will have an effect on the law, what conduct is criminal may, therefore, vary over time and from one country to another. The law is likely to change when there is a change in the values of government and society. A good example of how views on what is criminal behaviour change over time can be seen from the way the law on consensual homosexual acts has changed.

- The Criminal Law Amendment Act 1885 criminalised consensual homosexual acts between adults in private. It was under this law that the playwright Oscar Wilde was imprisoned in 1895.
- The Sexual Offences Act 1967 decriminalised such behaviour between those aged 21 and over.
- The Criminal Justice and Public Order Act 1994 decriminalised such behaviour for those aged 18 and over.

- In 2000 the government reduced the age of consent for homosexual acts to 16, though the Parliament Acts had to be used as the House of Lords voted against the change in the law.

We will now move on to consider where the criminal law comes from.

1.2 Sources of criminal law

The two main areas from which our criminal law is derived are case decisions (common law) and Acts of Parliament.

1.2.1 Common law offences

The courts have developed the criminal law in decisions over hundreds of years. In some instances offences have been entirely created by case law and precedents set by judges in those cases. An offence which is not defined in any Act of Parliament or delegated legislation is called a common law offence. Murder is such an offence. The classic definition of murder comes from the seventeenth-century jurist, Lord Coke. This definition has continually been refined by judges, including some important decisions during the 1980s and 1990s. Other common law offences include manslaughter and assault and battery. Equally, some defences have been entirely created by the decisions of judges. The defences of duress, duress of circumstances, automatism and intoxication all come into this category.

One problem with common law offences is that they can be very vague. This is illustrated by the common law offence of outraging public decency. This offence has arisen so rarely that there have even been debates about whether it actually exists, but it was used in two separate cases in the 1990s. The first case was *Gibson and another* [1991] 1 All ER 439.

CASE EXAMPLE

Gibson and another [1991] 1 All ER 439

In this the first defendant had created an exhibit of a model's head with earrings which were made out of freeze-dried real human foetuses. He intended to convey the message that women wear their abortions as lightly as they wear earrings. This model was put on public display in the second defendant's art gallery. Both men were convicted of outraging public decency and their convictions were upheld by the Court of Appeal.

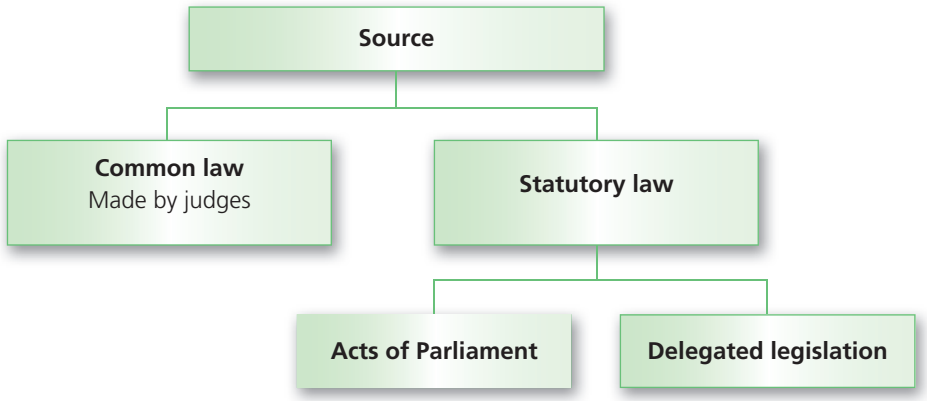

Figure 1.1 Sources of criminal law.

The second case was very different. This was *Walker* [1995] Crim LR 44, where the defendant had exposed his penis to two girls in the sitting room of his own house. The Court of Appeal allowed the defendant's appeal against his conviction, as the place where the act occurred was not open to the public. The prosecution's choice of charge seems odd, but presumably the fact that there had been very few cases made it difficult for them to know whether it was necessary to prove only that other people had been outraged or whether, as decided by the Court of Appeal, it had to be in a place where there was a real possibility that members of the general public might witness the act. In fact in *Walker* there were other more suitable offences with which the defendant could have been charged.

In some instances the courts will develop the law and then it will be absorbed into a statute. This happened with the defence of provocation (a defence to murder). It had been developed through case law but was then set out in the Homicide Act 1957. Even where there is a definition in an Act of Parliament, the courts may still have a role to play in interpreting that definition and drawing precise boundaries for the crime.

1.2.2 Statutory offences

Today the majority of offences are set out in an Act of Parliament or through delegated legislation. About 70 to 80 Acts of Parliament are passed each year. In addition there is a considerable amount of delegated legislation each year, including over 3,000 statutory instruments created by government ministers. Most offences today are statutory ones. Examples include theft, robbery and burglary, which are in the Theft Act 1968. Criminal damage is set out in the Criminal Damage Act 1971. The law on sexual offences is now largely contained in the Sexual Offences Act 2003. The various offences of fraud are set out in the Fraud Act 2006.

Note that, even when offences have been created by Acts of Parliament or delegated legislation, judges still play a role in interpretation. Different sources of law are shown in Figure 1.1.

1.2.3 Codification of the criminal law

One of the main problems in criminal law is that it has developed in a piecemeal way and it is difficult to find all the relevant law. Some of the most important concepts, such as the meaning of 'intention', still come from case law and have never been defined in an Act of Parliament. Other areas of the law rely on old Acts of Parliament, such as the Offences Against the Person Act which is nearly 150 years old. All these factors mean that the law is not always clear. In 1965 the government created a full-time law reform body called the Law Commission. The Law Commission has the duty to review all areas of law, not just the criminal law. By s 3(1) of the Law Commissions Act 1965 the Commission was established to:

SECTION

> 'take and keep under review all the law … with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.'

The Law Commission decided to attempt the codification of the criminal law to include existing law and to introduce reforms to key areas. A first draft was produced in 1985, and this was followed by consultation which led to the publication of A Criminal Code

for England and Wales (1989) (Law Com No 177). The two main purposes of the code were regarded as:

- bringing together in one place most of the important offences;
- establishing definitions of key fault terms such as 'intention' and 'recklessness'.

The second point would also have helped Parliament in the creation of any new offences as it would be presumed that, when using words defined by the code in a new offence, it intended the meanings given by the criminal code unless they specifically stated otherwise.

The Draft Criminal Code has never been made law. Parliament has not had either the time or the will for such a large-scale technical amendment to the law. Because of this the Law Commission has since 1989 tried what may be called a 'building-block' approach, under which it has produced reports and draft Bills on small areas of law in the hope that Parliament would at least deal with the areas most in need of reform. In its Tenth Programme in 2008 the Law Commission removed the codification of criminal law from its law reform programme. It stated that it continued to support the objective of codifying the law and would continue to codify where it could. However, it considered that it needs to redefine its approach and intends to simplify areas of the criminal law as a step towards codification.

Past Law Commission reports for reform of the criminal law have included:

- *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218;
- *Legislating the Criminal Code: Intoxication and Criminal Liability* (1995) Law Com No 229;
- *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237;
- *Fraud* (2002) Law Com No 276;
- *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300;
- *Murder, Manslaughter and Infanticide* (2006) Law Com No 304;
- *Participating in Crime* (2007) Law Com No 305;
- *Intoxication and Criminal Liability* (2009) Law Com No 314;
- *Conspiracy and Attempts* (2009) Law Com No 318.

These reports deal with areas of law in which cases have highlighted problems. Although these are areas of law where reform is clearly needed, Parliament has been slow to enact the Law Commission's reports on reform of specific areas of criminal law. For example there has been no reform of the law on offences against the person or on the defence of intoxication.

However, since 2006 there have been a number of reforms as the result of some of the Law Commission's reports. In 2006 Parliament passed the Fraud Act partially implementing the proposals on fraud. The Corporate Manslaughter and Corporate Homicide Act 2007 implemented proposals made in *Legislating the Criminal Code: Involuntary Manslaughter* (1996) Law Com No 237. The Serious Crime Act 2007 implemented the Law Commission's report *Inchoate Liability for Assisting and Encouraging Crime* (2006) Law Com No 300. The Bribery Act 2010 implemented the report *Reforming Bribery* (2008) Law Com No 313.

It is worth noting that most European countries have a criminal code. France's Code pénal was one of the earliest, being introduced by Napoleon in 1810, though there is now a new code, passed in 1992.