



Judge, Jurist and Parliament

Annual Lecture 2002

by

Professor Sir John Smith QC

Judicial
Studies
Board

Annual Lecture

Many years ago I was called upon to speak at a Nottinghamshire Law Society Dinner after Sir Jack Longland, a famous mountaineer and distinguished Director of Education. Seeing that I was to follow him, Sir Jack observed that academic lawyers always reminded him of doctored cats – interested in other cats or lawyers, as the case may be, but quite unable to do anything about it. This was typical of the attitude to law teachers 50 years ago when I began teaching law. It was the era when the editor of the *Modern Law Review*, Lord Chorley, was summoned by the Law Lords to be solemnly reprimanded for publishing a relatively mild criticism of the judiciary by Professor Jim Gower in his important inaugural lecture; a time when even so distinguished an academic as Sir William Holdsworth behaved in a way which Harold Laski thought revealed a desire to fall flat on his face before a law lord. It was a time when eminent judges advised students with legal ambitions not to read law at university, but classics or chemistry, or whatever subject had been the foundation of his lordship's own brilliant career – an attitude which I am sorry to say is not entirely dead. But things have greatly changed. In 45 years of writing not entirely uncritical commentaries upon judicial decisions, and perhaps especially of the House of Lords, not only have I escaped, so far anyway, being carpeted by their Lordships, but the Judicial Studies Board has seen fit repeatedly to invite me to participate in their seminars – an experience which I have greatly enjoyed – and now has done me the great honour of inviting me to give this lecture.

Longland's taunt of impotence, 45 years ago, was difficult to rebut. A very few outstanding academic lawyers in privileged positions – like those two great editors of the *Law Quarterly Review*, Pollock and Goodhart – had significant influence on the development of the law but they were very exceptional. Most of us were apparently writing for the edification of one another, not with any expectation of influencing the course of the law. When a case of fundamental importance in the criminal law, *DPP v Smith*¹, came before the House of Lords in 1960 it was argued for four days and the House reserved judgment for four weeks but the only authority other than case law

cited in the single speech was OW Holmes, *The Common Law*, published in America in 1882, expressing a view contrary to that of Fitzjames Stephen in this country and generally rejected in the United States². Those English jurists who had written extensively on the subject³ must have felt they were wasting their time. The status of the academic lawyer in England relative to that of his colleagues in the United States and in European jurisdictions was very low. Lord Goff recalls a brilliant German student saying to him: 'In Germany, the professor is God: in England the judge is God.' Only recently an Italian colleague at Nottingham told me that when he came to teach in England a few years ago he was shocked at the relatively low standing of the English professor. Interestingly, however, he regards English university legal education as far superior to that of Italy and is well content to remain here. Over the long term, respect for the influence of the academic lawyer has certainly increased. An interesting recent book, *Jurists and Judges*, by Professor Neil Duxbury suggests that today the English academic may not be far behind his American and European colleagues. But comparison between judges and academic lawyers is generally futile because our jobs are entirely different. The principal job of the academic lawyer is to teach – at least, so I always thought – and I regarded my classes in contract to first-year, criminal law to second-year, and evidence to third-year, students as my first responsibility. The judge's job is to judge, which is entirely different. It is in matters incidental to our primary function that we have similar aims. In 1985, in his Maccabean lecture to the British Academy, 'The Search for Principle'⁴, a lecture much welcomed by academic lawyers, Lord Goff, eminent as both judge and jurist, presented an up-to-date and balanced assessment, recognising that the academic lawyer has an important role in that search. But, he said:

'In the development of legal principle the dominant power should be that of the judge, because the dominant element in the development of the law should be professional reaction to individual fact situations rather than theoretical development of legal principle.'

¹ [1961] AC 290. ² See Jerome Hall, *General Principles of Criminal Law* (2nd ed, 1960) 158. ³ EG, JWC Turner, *The Mental Element in Crimes at Common Law* (1936) 6CLJ66.

⁴ Reprinted in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP, 1999) 313.

Of course the judge must be dominant in the sense that his decision is a precedent, it can make law, whereas the jurist's opinion is just an opinion. Lord Goff naturally took his examples mostly from commercial law. I shall look mainly to the criminal law. There is a great difference. A search for the principles of the criminal law in the Criminal Appeal Reports for the first half of the 20th century would be almost completely fruitless. I am loath to criticise judgments because they are short; but these are short because they have so little to say – there is a dearth of argument and discussion of principle. The judgments, I suppose, must reflect the superficiality of the argument by the criminal bar of those days. So little happened in that period that the first edition of Kenny's *Outlines of Criminal Law* in 1902 differed only marginally from the 14th edition which was not superseded until 1951. There was much less development in this half-century than occurred between the first edition of Smith & Hogan in 1965 and the second in 1969. Far the best discussion of criminal law principles in that half-century is to be found in those rather rare civil cases which turned upon some point of relevance to both branches of the law. An example is the vexed problem of the distinction between larceny by a trick and obtaining by false pretences which, in the civil courts, coincided with the question, which of two innocent parties – the duped owner of the property or the bona fide purchaser of it – was to suffer by the fraud of the rogue. For in-depth discussion in the criminal courts it was necessary to go back to the great cases in the Court for Crown Cases Reserved in the 19th century – *Ashwell*, *Middleton*, *Clarence*, *Prince* and others. The poverty of the criminal reports in the first half of the century was matched by that of the books. Contract and Tort, for example, got the full treatment from Pollock. Anson, Salmond, Winfield, followed by Cheshire & Fifoot and others. But in the criminal law there was only *Kenny* – which I do not underestimate because it was a delightfully readable and elegant work to which I was greatly indebted both as a student and in my first years as a teacher; but in one short volume it dealt not only with the substantive law, including many crimes which modern student text books omit, but also the law of evidence and criminal procedure. *Kenny's* book was not in the same class as the books on contract and tort to which I have referred. Criminal Law was

the Cinderella of subjects in the academic curriculum. When I went to Nottingham in 1950 as the junior member of a full-time staff of four, fancying myself as an exponent of Equity, Trusts, Conflict of laws, etc, Roger Crane added Criminal law and Evidence to my portfolio.

As it happened, this was a very good thing for me. The criminal law had the greatest need, and provided the greatest opportunity, for academic influence. I am going to suggest that, in the criminal law, it is the academics who have taken the initiative and have tried to lead a generally conservative and sometimes reluctant judiciary – with a few notable exceptions – in the direction of a principled criminal law. In this field I venture respectfully to doubt Lord Goff's opinion that it is the professional reaction to individual fact situations which should be dominant. I say that, first, because the criminal courts have been particularly prone to allowing hard cases to make bad law. In the law of larceny, as Dr Turner pointed out, they tended to adopt whatever theory of possession would lead to the conviction of the dishonest defendant in the particular case without regard for consistency of principle. Naturally this reduced the law to a state of confusion and, when the Theft Act 1968 was completely successful in freeing the law of stealing from the slippery concept of possession, much the same happened to the concept of appropriation, culminating in the recent, much-criticised decision in *Hinks*⁵. Second, judicial development of the criminal law has proved to be something of a lottery, depending on the composition of the judicial committee of the House of Lords. It was only by a majority of three to two that the disastrous decision in *Caldwell*⁶ was inflicted upon us, and by three to two that a fundamental principle of criminal law was vindicated in *DPP v Morgan*⁷. In these, and in many other cases, it is very likely that a slight change in the membership of the court would have produced a different result. That, it seems to me, is no way to develop a consistent, principled criminal law. It just happens, moreover, that, in the majority of these marginal decisions, it was, in my opinion, the minority who were right in principle.

In the Criminal Division of the Court of Appeal we have no dissenting judgments, but I have heard a judge express extreme

⁵ [2001] 2 AC 241. ⁶ [1982] AC 341. ⁷ [1976] AC 182.

frustration at her inability to dissent from judgments with which she profoundly disagreed. At one time, one could at least expect consistency from the old Court of Criminal Appeal – in a sample volume of the Criminal Appeal Reports, I found that Lord Goddard presided in all but three of the cases reported, whether in Divisional Court or the Court of Criminal Appeal, but now we have several constitutions of the court, turning out what are, theoretically at least, binding precedents, perhaps unaware of what the others are doing, and sometimes, it has to be said, not very well informed about the criminal law. I recall the extraordinary events of 1971 when, unknown to one another, two divisions of the Court were, on the same day, required to decide whether, under section 47 of the OAPA 1861, (assault occasioning actual bodily harm) the prosecution had to prove that the defendant *foresaw* he might cause actual bodily harm. One court said yes, the other said no. Within a few days, yet a third case raising the same issue came before a third division of the court, which being apprised of the earlier conflicting cases, came down in favour of the negative answer: it was not necessary to prove that the defendant foresaw any possibility that he might cause harm. Now the truly astonishing thing is that there was a decision of 20 years standing, *Roberts*⁸, binding on the court, the citation of which would presumably have brought any of these three appeals on this issue to an abrupt end. It was no obscure decision but one fully reported in the *Criminal Appeal Reports* as well as in the *Criminal Law Review* and the *Solicitors Journal* and discussed in the current edition of Smith & Hogan and other books. Yet none of the nine judges, two QCs and six juniors, not to mention solicitors, involved in the three appeals, appears to have been aware of its existence.

In the House of Lords, which held that *Roberts* was rightly decided and finally settled the point, Lord Ackner said: ‘This is perhaps explicable on the basis that the case is not referred to in the index to Archbold...’⁹ Explicable, possibly, but excusable? Surely not. So it is a lottery. What is lacking is that consistency of legal principle, which it is the function of the academic lawyer to develop and propagate.

There are two routes by which the jurist may indirectly

influence the development of the law. He may, by the force of his arguments, persuade the judges as to the way in which the law should develop and, where it is open to them to do so, to decide cases accordingly. Or he may persuade Parliament – which, in practice, means persuading the government, to legislate. But in the 1950s, these avenues were not open, except perhaps to one or two.

In 1950, however, a turning point for the criminal law was at hand. Glanville Williams, who had already established a great reputation for his work in tort, contract, public law and jurisprudence, had turned his mind to criminal law, which was to remain his principal interest for the remainder of his long and illustrious career. In 1953, he published *The Criminal Law, The General Part* – the event of the 20th century for the criminal law. It was a book in a completely different class from any of its predecessors in the depth, quality and clarity of its analysis of principles, drawing extensively on the law and literature of other jurisdictions. It provided the means to raise the standard of scholarship in criminal law courses to new levels. When Brian Hogan and I published our book we acknowledged our obvious indebtedness in almost every chapter to Glanville’s work; and every book which has followed is similarly, if not so obviously, indebted. At about the same time, another of the greatest jurists of the 20th century, Herbert Hart, Goodhart’s successor as Professor of Jurisprudence at Oxford, also found the criminal law a fruitful source for jurisprudential studies. With these two giants on board, it would be hard to deny the academic respectability of the subject, yet prejudice continued to exist in some quarters. In 1954, there appeared the first issue of the *Criminal Law Review*, which was to provide us with the means to bring our research and reaction to current developments quickly to the attention of each other and the practising profession.

It is not easy to estimate the effect of academic writing on judicial development of the law with any certainty. The fact that the law has moved in the direction advocated by academics does not necessarily mean that it has happened because it was advocated by them. Sometimes judges acknowledge their indebtedness – Lord Edmund-Davies was particularly

⁸ (1971) 56 Cr App R95. ⁹ *Savage, Parmenter* [1991] 4 All ER 698 at 711.

scrupulous in this respect – the most famous example being *Shivpuri*¹⁰ where Lord Bridge admitted that he had been persuaded to overrule his decision only a year earlier in *Anderton v Ryan*¹¹ by Glanville Williams’s 50-page assault, no holds barred, on that case in the *Cambridge Law Journal*¹².

But in *Luc Thiet Tuan*¹³, a decision of the Privy Council on provocation, Lord Goff referred to an article by Professor Ashworth [1976] (CLJ 292) to which their lordships wished to express their indebtedness, and he said:

‘Professor Ashworth’s article was published in 1976 and *Camplin* [the leading case on provocation] was decided by the House of Lords only two years later. The similarity between the approach recommended by Professor Ashworth, and that adopted by the House of Lords in *Camplin* is so great that it is difficult to believe that his article did not, at least indirectly, influence the reasoning and conclusion in that case.’

If so, Lord Diplock did not disclose that fact and *Camplin*’s case does not, by any means, stand alone in this respect.

I turn to some examples. Consider the rule consistently stated in the books for a century or more that a mistake of fact can excuse only if it is reasonable. If it was a rule, it was wholly inconsistent with the principle that the prosecution must prove *mens rea* – a guilty mind. Glanville, in one of his earliest articles on criminal law in 1951¹⁴, demonstrated the fallacy, the ‘hoary error’, as he called it, in the supposed rule. All but the most conservative academics were convinced by the compelling logic of the argument; but it was not until the majority decision of the House of Lords in *Morgan*¹⁵ in 1976, 25 years later, that the courts took the point. If the prosecution had to prove *mens rea* – in that case, an intention to have sexual intercourse with a woman without her consent – it followed as a matter of inexorable logic (as Lord Hailsham put it) that they had to disprove any alleged belief of the defendant, whether reasonable or not, that the woman was consenting. Even then, two distinguished judges, Lord Simon of Glaisdale and Lord

Edmund-Davies, dissented and the practising profession seemed unable or unwilling to take in the implications of the decision. It was followed by what one writer called ‘The Retreat from Morgan’ – a series of decisions by judges who failed to shake off the idea that only reasonable mistakes could excuse. The retreat, happily, was stemmed by Lawton LJ who, in *Kimber*¹⁶ (1983), an indecent assault case, re-asserted the requirements of inexorable logic. It was not until *Beckford* [1982]¹⁷ six years after *Morgan* and 30 years after Glanville Williams had made the point in the *Modern Law Review*, that Lord Griffiths could say: ‘Looking back, *DPP v Morgan* can now be seen as a landmark decision in the development of the common law, returning the law to the path on which it might have developed but for the inability [until 1898] of an accused to give evidence on his own behalf.’ Some of us thought we knew *Morgan* was a landmark case on the day it was decided; but the judges got there in the end.

Consider next, strict liability. This is one of the issues of principle which has been most debated for 60 years¹⁸. Many academics have argued that liability without fault is unnecessary and should have no place in the criminal law; but such offences have proliferated. In construing statutes so as to impose strict liability, the courts have always claimed to be merely implementing the intention of Parliament as revealed in the statute. But Devlin J, in an address to the SPTL¹⁹ in 1958, was under no illusions:

‘The fact is that Parliament has no intention whatever of troubling itself about *mens rea*. All that Parliament would have to do would be to use express words that left no room for implication. One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to the judges and does not want to legislate about it.’

The reports are full of cases of strict liability where there was nothing in the words of the statute inconsistent with the common law presumption that criminal offences require proof of *mens rea*. The fact is that the judges, while routinely

¹⁰ [1987] AC 1. ¹¹ [1985] AC 560. ¹² [1968] CIJ 33. ¹³ [1996] 2 All ER 1033. ¹⁴ ‘Mistake in Criminal Law’ (1951) 14 MLR 485. ¹⁵ [1976] AC 182. ¹⁶ [1983] 3 All ER 316. ¹⁷ 1 All ER 801, PC. ¹⁸ See RM Jackson, ‘Absolute Prohibition in Statutory Offences’ (1936) 6 CIJ 83. ¹⁹ 4 JSPTL (NS) 206 at 208.

paying lip-service to that presumption, decided to impose strict liability because they thought the social context or public interest demanded it²⁰. As early as 1953, in the first edition of *The General Part*, Glanville Williams had subjected to devastating criticism the reasoning in the leading case of *Prince* in 1875. It will be recalled that Prince was convicted of taking a girl under the age of 16 out of the possession of her parent, although he believed on reasonable grounds that she was 18²¹. It has taken the courts nearly 50 years to catch up. They did so eventually in the House of Lords in *B (a minor) v DPP*²² (1999) and *K* (2002)²³. I took seriously all that their lordships said in *B*'s case because here they had not merely paid lip-service, but had actually applied the presumption and I spelled out what I saw to be the much wider consequences of that decision. Not so the editors of Archbold, who wrote that I had overstated its significance and that it probably decided nothing more than the proper construction of the section of the Indecency with Children Act with which it was directly concerned. Their caution may well have been due to familiarity with high-sounding judicial statements of principle having little effect in practice: but, on this occasion they were wrong. Their lordships have, so far, been as good as their word and, in *K*, have held, in the face of substantial obstacles, that indecent assault on a consenting girl under the age of 16 required *mens rea* with respect to the girl's age, overruling numerous decisions – and leaving, no doubt, a long trail of unsafe convictions. *Prince* is now discredited, though not formally overruled²⁴. We now find their lordships stating that 'unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence' and that 'in principle an age-related ingredient of a statutory offence stands on no different footing from any other ingredient', and (per Lord Steyn):

'The applicability of the presumption is not dependent on finding an ambiguity in the text. It operates to supplement the text. It can only be displaced by specific language, i.e. an express provision or a necessary implication.'²⁵

I shall return to strict liability but next I am going to glance at the other route to better law – i.e. via Parliament.

In 1952, the Lord Chancellor revived the pre-war Law Reform Committee which had dealt only with civil law. Again it was Glanville who took the lead in a letter to *The Times* proposing the establishment of a separate criminal law reform committee, followed the next year by a letter to the Home Secretary signed by eight lawyers – but with no immediate effect. Following the meeting of the SPTL in 1957, at which the Lord Chancellor, Lord Kilmuir, showed interest in the proposal, the Society sent a memorandum to him. It was drafted by Glanville, so restrained by cautious colleagues that he has recorded that he was not allowed to mention the word 'codification', presumably because it was feared that so revolutionary a concept would have frightened the government off altogether. The tactics worked and the CLRC was established. The membership included four judges, three QCs who soon became judges, a chairman of quarter sessions, a metropolitan magistrate, and two academics – Glanville and Seaborne Davies. It was an academic initiative which led to the establishment of the CLRC. The academic membership of the committee never rose above three – for many years Glanville Williams, Rupert Cross and I – and at the time of its last reference it included seven judges and two academics – Andrew Ashworth and myself; but I am sure that the academics' influence on the work was out of all proportion to our number. We – and especially Glanville, an irrepressible source of ideas – produced most of the papers and drafts which the committee debated. The academic lawyers also played a major part in the establishment of the Law Commission and have always had, and have, a prominent role, as Commissioners or consultants.

By 1980, the SPTL felt confident enough to propose to the Law Commission that a team drawn from its members should consider and make proposals to the Commission in relation to a criminal code. The proposal was welcomed and acted on by the Commission to whom the Code Team reported in November 1984. Our draft code was the basis of the draft sub-

²⁰ Cf. Lord Cooke of Thorndon's Hamlyn Lecture, "One Golden Thread?" *Turning Points of the Common Law* [(1977) 28 at p 47]. ²¹ Being a decision of 15 judges including some of the most eminent of the day, *Prince* is said to have marked a turning point in judicial thought and certainly it was soon followed by a series of decisions imposing strict liability in a variety of fields – e.g. that when a licensee sold liquor to a drunken person it was no defence that he believed on reasonable grounds that his customer was sober.

²² [2000] 2 AC 428. ²³ [2002] 1 AC 462. ²⁴ Per Lord Nicholls at [2000] 2 AC 466 C-F, Lord Steyn at 476 C-H. ²⁵ [2002] 1 AC at 477 E-F.

sequently published by the Law Commission itself and which, after long period of neglect, is now being reconsidered by the Commission with a view to enactment. After so many years we have, regrettably, made very little progress towards codification; but such as there has been is largely due to the jurists.

There is another way in which the academic lawyer might influence legislation and that is by seeking to persuade Parliament directly. I look to an attempt which failed. Following a recommendation by the Royal Commission on Criminal Justice (The Runciman Report (C2263)), the Home Office published a discussion paper in which it was proposed that the sole ground on which the Court of Appeal should be empowered and required to quash a conviction would be that the conviction 'is or may be unsafe'. The alternative, 'or unsatisfactory', in the 1965 Act, was to be omitted. I doubted the wisdom of this, recalling cases such as that of *Algar*²⁶, who, in 1953, was convicted of forgery on the evidence of his former wife as to matters occurring during the subsistence of a marriage since annulled. It was held that the evidence was inadmissible and the conviction was quashed. Goddard LCJ was reported in *The Times* to have said to the appellant who was present: 'Do not think we are doing this because we think you are an innocent man. We do not. We think you are a scoundrel.' This seemed a good example – there are plenty of others – of a conviction which might very well be described as 'safe' – there was no question as to the reliability of the evidence of the appellant's guilt – but, as the law of evidence then stood, plainly 'unsatisfactory'. If the conviction was safe, there would, under the proposed formula, be no power to quash it. My attempt to persuade the Home Office received no response. I developed my memorandum into a short article but, before it could be published, the Criminal Appeal Bill had reached its second reading in the House of Commons²⁷. I sent a copy to Sir Ivan Lawrence QC, MP, as the chairman of a relevant Commons committee, and Sir Ivan kindly brought it to the attention of the House. In vain. In the standing committee, the Minister of State said 'the Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought and they believe that the new test re-states the existing practice of the Court of Appeal'. Well, everyone

knows that it proved to be far from so simple and even now we may not have got to the end of the confusion created by the omission of the words 'or unsatisfactory'. The opinion of a highly respected Lord Chief Justice and unnamed senior judges against that of a professor is no contest; but perhaps I may ask – with the greatest possible diffidence – might it not have been better if the academic opinion had prevailed on this occasion?

I return to case law. Parliament is still sovereign and if Parliament chooses to infringe a legal principle of the common law, however fundamental, we must accept that. I have warmly welcomed the recent, long-delayed recognition by the House of Lords of the subjective test of liability but I am bound to express my doubts as to the compatibility of its application in these cases with the sovereignty of Parliament and the integrity of statutes.

When criticising *Prince* in 1953, Glanville Williams went on to write that subsequent legislation was clearly based on the assumption that *Prince* was rightly decided and concluded that 'the general development makes it clear that *Prince* is now riveted upon English law in respect of the question of age until reversed by Parliament'²⁸, adding that there was no need for it to be extended to any question other than age. That seems to be clearly right. The provision in many sections of the Sexual Offences Act 1956 of various statutory defences would make no sense if it were otherwise – and same assumption must surely underlie the Indecency with Children Act, which was in issue in *B v DPP*. Lord Millett (para 43) in *K* concurred in the decision, 'without reluctance but with some misgiving, having little doubt that the House is failing to give effect to the intention of Parliament'. I cannot believe that Lord Millett's brethren did not know equally well that they were ignoring the meaning which the draftsman and Parliament must have intended the statute to bear and that they were introducing an assortment of new anomalies into the law of sexual offences. But, surely, we ought to be able to rely on statutes meaning what they plainly say. I thought this was one of the primary objects of codification. For this reason, in my opinion section 3(1) of the Human Rights Act 1998 is a dangerous provision

²⁶ [1954] 1 QB 279. ²⁷ For reference, see my article, "The Criminal Appeal Act: Appeals against Conviction" [1995] Crim LR 920. ²⁸ 1st ed. 260, 2nd ed, 243.

insofar as it invites courts to give a meaning to statute which no ordinary reader would think it had. I refer to *R v DPP ex p Kebeline*²⁹ where one issue was, in effect, can the words ‘it is a defence for a person charged to prove’ mean... ‘it is defence for a person charged to raise a reasonable doubt whether?’ Well, can they? It seems to me as plain as day that they cannot³⁰. But Lord Cooke of Thorndon stated: ‘Yet for evidence that it is a possible meaning one could hardly ask for more than the opinion of Professor Glanville Williams [in “The Logic of Exceptions” [1988] CLJ 261 at 265].’ Now I fully share Glanville’s aversion to reverse onuses and his opinion, and that of the CLRC, that they ought all to be turned – by Parliament – into evidential burdens. I am astonished to find myself saying that too much weight has been given to an academic opinion – and especially such an academic – but, on this occasion I feel my hero’s enthusiasm carried him too far. Lord Cooke, himself, did not conceal that he had been wholly unpersuaded by Glanville’s article when presiding in the New Zealand Court of Appeal a few years earlier³¹. His first thoughts were surely better. Yet it seems that, following the dicta in *Lambert*³², this is now the prevailing judicial view. Such a decision offends an even more fundamental principle than does the reversal of onus of proof; it falsifies the words of a statute so that it becomes a source of deception instead of enlightenment.

In *B*’s and *K*’s case, the House did not have the support of the Human Rights Act; nor did they in *Morgan Smith*³³ where the pursuit of a subjective test – which may be an admirable aim – seems to have led the House to eliminate the reasonable man from the defence of provocation, notwithstanding his recognition in section 3 of the Homicide Act 1957. I can understand it if the judges have lost patience with Parliament because of its inexcusable failure to reform our antiquated criminal law. Are we witnessing a quiet judges’ revolt?

A most important issue now is whether the courts are going consistently to apply, so far as legislation permits, the principles so boldly asserted in *B v DPP* and *K*? I would like to think so; but a number of matters give rise to doubts.

First, their lordships continue to cite certain venerated dicta of Lord Reid in *Sweet v Parley*³⁴: ‘... *mens rea* is an essential ingredient in every offence,’ he said, ‘*unless some reason can be found for holding that that is not necessary.*’ The courts in the past have been all too astute to find ‘some reason’ but, as I read *B* and *K*, the position is now that the only reason for not requiring *mens rea* is that the words of the statute *expressly, or by necessary implication*, rule it out. Secondly, their lordships also continue to cite the distinction Lord Reid drew between ‘a truly criminal act’ and acts which are not truly criminal in any real sense, but are ‘acts which in the public interest are prohibited under a penalty’. But all the modern jurists – Kenny, Winfield, Allen, Glanville Williams – who have attempted to define a crime, have recognised that you cannot tell whether any act is a crime or not by looking at it in isolation from the law, for the obvious reason that what is not a crime today may well be made one tomorrow and vice versa. The only test is whether the act is prohibited by the common law or by statute with criminal sanctions. When a court asserts, as a Divisional Court³⁵ did recently, that an act – selling a lottery ticket to a child under the age of 16 – is not truly criminal, although it is punishable on indictment with two years’ imprisonment, what sort of truth are they talking about? The only truth that I can recognise is that it is criminal. The court may think it ought not to be, but that is not for them but for Parliament to decide. The normal incidents regarding burden of proof and the presumption of *mens rea* should apply, unless Parliament has ruled them out expressly or by necessary implication.

Thirdly, a specific point. Their lordships in both cases assert, *obiter*, that section 5 of the Sexual Offences Act 1956, i.e. having sexual intercourse with a girl under 13, remains an offence of strict liability although there is nothing in the words of the section which is in any way inconsistent with the presumption of *mens rea* and it is punishable with life imprisonment. It is true, as Lord Bingham said, that a man who has had intercourse with a girl of 12 is unlikely to be able plausibly to assert that he believed her to be 16 or more, but it is not impossible, it does not affect the principle; and it is certainly possible that the man – who, remember, may be a boy – may have honestly

²⁹ [1999] 4 All ER, 801 at 837. ³⁰ For a similar view, see Professor JR Sullivan, [2002] Crim LR 157. ³¹ *Phillips* [1991] 3 NZLR 175. ³² [2001] 3 All ER 577.

³³ [2001] 1 AC 146. ³⁴ *Sweet v Parsley* [1970] AC 132 at 148, 149. ³⁵ *London BC of Harrow v Shah* [1999] All 3 ER 302.

believed her to be 13 or 14. The acceptance of the *mens rea* of a two-year offence as sufficient for conviction of a life offence amounts, if not to strict liability, to constructive crime, a concept of which some of their lordships have only recently strongly disapproved in the context of murder. They could not avoid applying the well-settled rule that an intention to cause grievous bodily harm – the *mens rea* of section 18 of the Offences Against the Person Act 1861 – is the *mens rea* of murder; but consistency should preclude them from inventing new cases.

If the judges really mean what they say, we might now logically expect to see the demolition of another judge-made doctrine which has long been the object of academic criticism – vicarious liability – once dubbed by Lord Goddard as ‘odious’³⁶. The courts have supplemented the intention of Parliament by holding, without any express, or as far as I can see, implied statutory authority, that a person who has a statutory duty not knowingly to permit something to happen is guilty if his delegate knowingly permits it without the defendant’s knowledge or fault. The judges’ reason is that otherwise the statute would be ‘rendered nugatory’. Although this doctrine goes back to the 19th century, the House of Lords has never found it necessary to decide the matter; but, in the leading case in which it was considered, *obiter*, Lord Donovan remarked that ‘if a decision that “knowingly” means “knowingly” will make the provision difficult to enforce, the remedy lies with the legislature’.³⁷ Quite so.

My conclusion is that judge and jurist, however well they may work together, cannot achieve a principled and consistent criminal law through judicial decisions. The imposition of a sound general principle on a largely statutory law which was

enacted on the basis of an unsound principle, or no principle at all, is bound to lead to confusion and anomaly. Parliament has to be involved. The only satisfactory solution is codification, beginning with the all-important general principles, followed by the re-writing of the offences, consistently with those principles. Shortly before he died, Glanville Williams said to me about our efforts at codification: ‘It is just a game; it will never happen.’ He was not often wrong. I hope he was on this occasion, but it certainly seems a long way off.

This, I believe, is my swan song so far as the JSB is concerned, so perhaps I might conclude by saying that it has been, for me, a great pleasure, as well as a privilege, to lecture over the years to so many judges, who have invariably listened to my diatribes with patience and good humour.

³⁶ *Gardner v Akeroyd* [1952] 2 All ER 306 at 311. ³⁷ *Vane v Yiannopolous* [1964] 3 All ER 820 at 832.



Judicial Studies Board

9th Floor, Millbank Tower, Millbank, London SW1P 4QU

Tel: 020 7217 4767 Fax: 020 7217 4779

E-mail: publications@jsb.gsi.gov.uk