2. Criminal law history

2.1 Introduction

The eminent legal historian S. F. C. Milsom once said of the criminal law that ‘[t]he miserable history of crime in England can be shortly told. Nothing worthwhile was created. There is no achievement to
In this chapter, we will see why that claim is wrong. As we will see, whilst there is much to criticize in the way that the criminal law has developed over centuries, there is no doubting the fascination of its intellectual evolution. The brief history presented here seeks to develop the outline of an argument suggesting that Christian—and in particular Church of England—religious beliefs played an important historical role in England, in developing criminal law writers’ understanding of what conduct ought to be criminal. That understanding became more secularized during the late eighteenth and the nineteenth centuries. This led to greater emphasis on a more rationalist approach on the part of later criminal law writers, concerned at least as much with organizing the form of the criminal law—through codification, in particular—as with its substance. This rationalism was, at least to some extent, buttressed by a new enlightenment ‘humanism’, which placed an emphasis on the need for punishments to be more ‘proportionate’ to the gravity of crimes, leading to abolition of the death penalty for many less serious crimes.

Prominent works on criminal law were for centuries primarily concerned with what were called the ‘pleas of the Crown’. The extensive jurisdictional reach of the criminal law, as a nationwide system, was based on royal authority. Pleas of the Crown were cases in which the Crown claimed jurisdiction over the alleged offence, taking precedence over the application of local law and custom, and over compensation arrangements between the offender and the victim (or between their families). Moreover, from the sixteenth century onwards, the legislature increasingly turned into pleas of the Crown cases—many of which involved offences against religion or morality—that had previously been within the jurisdiction of the church courts. As we will see, this development considerably broadened the remit of ‘Crown law’, with harsh and enduring consequences for offenders.
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Pleas of the Crown were divided into treason, felonies—at one time meaning the betrayal of one’s lord and master—and offences called misdemeanours. Until the middle of the nineteenth century, many felonies were capital—death penalty—offences. Felonies ranged from the most serious, such as murder, down to innumerable offences involving the regulation and protection of trade, or state business, in the interests of the common good. Historical examples of the latter were selling a horse to a ‘Scotchman’, wilfully obstructing someone lawfully serving a writ in the Royal Mint, or causing a nuisance on the highway or on a bridge. Accordingly, the crimes included in their treatises by early writers on criminal law were a broad-ranging collection, like those included in major modern works directed at practitioners and the judiciary. Until the twentieth century, and the advent of the modern university law course, there was no need for writers to concentrate only on a much narrower set of crimes, chosen with an eye to enthralling student readers and impressing on them the potential gravity of criminal law’s concerns. We will say more about this in Chapter 3.

2.2 The Church of England and the framework of English criminal law

It is worth investigating briefly the values that guided the content of earlier works of criminal law, to understand how much things have changed. In a way that too few criminal law writers have appreciated, the importance of a citizen’s loyalty to the monarch, and to the tenets of state religion, have played a fundamental role in shaping English ‘criminal’ law. Early works emphasized crimes touching on what were perceived as a citizen’s fundamental obligations of loyalty, to the Crown and to the (protestant) church. This is an emphasis entirely absent from modern works on criminal law. Sir Matthew Hale (1609–76), whose History of the Pleas of the Crown was published posthumously in 1736, gave pride of place to the crime of treason. This was, and remains, a very broad offence. At one time, simply being a Catholic priest in England, without swearing an oath of loyalty to the monarch, amounted to treason. To this day, treason includes killing the Lord Chancellor or a High Court judge; having sexual intercourse with the King’s wife, his eldest unmarried daughter, or the wife of the heir to the throne; ‘compassing or imagining’ the death of the King, the Queen, or the heir to the throne; although, thankfully, the rather remote possibility of being beheaded for treason was abolished in 1973. In Hale’s time, treason also included many forms of counterfeiting sealed documents, or coins. Hale, who as an MP had helped ease the path to the restoration of Charles II as King in 1660, did not explain the magnitude of the offence solely in terms of its threat to the ‘safety and preservation of the person, dignity and government of the king’. Hale also explained it in terms of the betrayal of loyalty owed by the citizen to the monarch:
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[As the subject has his protection from the king and the laws, so on the other side the subject is bound by his allegiance to be true and faithful to the king; and therefore all indictments of high treason run ... as a breach of trust, that is owing to the king ...]¹⁵

William Hawkins, writing on pleas of the Crown in 1716, gave equal prominence to offences ‘against God’. These encompassed not only specifically religious offences, but also some offences then regarded as immoral (particularly under the seventeenth-century influence of puritanism), such as sodomy¹⁶ and ‘open lewdness’. In Hawkins’ view, such offences were at the heart of criminal law because religion and morality are together ‘the foundation of government’.¹⁷ Falling under offences ‘against God’ were the capital (death penalty) common law offences of heresy, witchcraft, and sodomy, but also a host of non-capital offences. At common law, the latter included, ‘scoffing at the scriptures’,¹⁸ blasphemies against God (including denying God’s existence), and speaking or writing ‘seditious words in derogation of the established religion’. Under statute, Hawkins adds mention of, amongst other non-capital crimes, ‘profane swearing and cursing’, drunkenness, failing to go to church, and various examples of promoting or encouraging the ‘Popish religion’.¹⁹

The importance accorded in law to treason, and to conduct contrary to God’s will, reflected centuries of belief and practice. However, the idea that the two are intertwined in a special legal relationship is a product of the reformation period in England.²⁰ In 1528, leading protestant William Tyndale had written—in a work that may have been read and approved by Henry VIII himself—that

He that judges the King judges God, and he that lays hands on the King lays hands on God, and he that resists the King resists God and damns God’s law and ordinance. If the subjects sin, they must be brought to the King’s judgment.²¹

One result of this change was that, during and after the reformation, the King’s courts were given the power to deal with most offences against God (as well as with other crimes). Offences against God had previously been tried and sentenced under a parallel jurisdiction enjoyed by church courts:²² church courts had exercised jurisdiction over offences such as heresy, blasphemy, illegal sexual activity, fraud, and perjury.²³ The process of replacing the church’s criminal jurisdiction with royal jurisdiction began in earnest under Henry VIII, and involved harsh punishments for religious offences in particular.²⁴ For our purposes, an important landmark is a later statute: the Act for the Abolition of the Court of High Commission 1641.²⁵ By virtue of this Act, the church courts lost much of their long-standing criminal jurisdiction.²⁶ Offences against
God hence became pleas of the (p. 27) Crown.\textsuperscript{27} That led to extended discussion of such crimes in post-1641 works on criminal law in general.

The legacy of these developments, in conjunction with prevailing social attitudes, has been a shameful one. For centuries in England and Wales, unashamed atheists or Catholics, and sexual adventurers outside religious and social norms, stood to be condemned by common law and statute on much the same basis as murderers and thieves. Indeed, A. D. Harvey has contended that, during the first thirty-five years of the nineteenth century, more than fifty men were hanged for sodomy in England.\textsuperscript{28} This was roughly a seventh of the number of people executed for murder in the same period, although—seemingly incredibly—in 1806, there were more executions for sodomy than for murder.\textsuperscript{29} This is an illustration of the fact that, for a long period of English criminal law, all such offenders were in one crucial respect condemned on the same basis: their alleged violation of God’s law. So, for example, early nineteenth-century lawyer Humphrey Woolrych (himself an opponent of widespread use of the death penalty) understood the law’s punishment of murder by the penalty of death to be justified by Genesis ix: 6.\textsuperscript{30} He understood the law’s meting out of the same punishment for crimes against religion to be justified by Exodus xxii: 18\textsuperscript{31} and Leviticus xix: 31,\textsuperscript{32} and had this to say about sodomy:

\begin{quote}
And there is no doubt that in the sight of God it is a most grievous and awful sin, and that his holy eyes must turn away from such a violation of his own image with disgust. There is not any question, also, but that He ordered the immediate execution of the sodomite, or unnatural person.\textsuperscript{33}
\end{quote}

Even after the death penalty for sodomy was removed, section 61 of the Offences Against the Person Act 1861 still saw fit to describe the crime (when involving anal intercourse) as ‘the Abominable Crime of Buggery’. The 1861 Act set out the sentence as necessarily involving a minimum of ten years’ imprisonment, up to life imprisonment. It was not until 1967 that sexual acts (with no other person present) between two males over twenty-one were decriminalized in England. It was not until the Sexual Offences (Amendment) Act 2000 that the ‘no other person present’ restriction was removed and the age of consent lowered to sixteen.\textsuperscript{34} So far as blasphemy is concerned, whilst it was as long ago as 1697 that the last person was executed for blasphemy in England, there were a spate of prosecutions in the late eighteenth century up until the middle of the nineteenth century, with a small number of prosecutions undertaken during the twentieth century.\textsuperscript{35} Final abolition of this offence in England and Wales came as late as 2008.\textsuperscript{36}

What is significant about these developments is the way in which changing values have altered perceptions of some of these early building blocks of criminal law. To use the criminal law to punish departures from
loyalty to individual Crown commands, to an established religion, and to an associated fixed code of moral behaviour is a breach of what we will call the principle of ‘lifestyle autonomy’. Such a use of the criminal law is wrong because it involves censuring people, and exposing them to state punishment, simply for speaking or behaving in a way that shows that their own loyalties, faith (if any), and beliefs do not lie with particular state officials, or with the state religion and its moral code. Lifestyle autonomy involves the freedom, amongst other things, to act on one’s own beliefs and value judgements; to form personal relationships, including sexual relationships, and ties of loyalty of one’s own choosing; to shape one’s own life course and so on, free from the threat of coercion (whether in the name of religion or otherwise). We will have more to say about autonomy in Chapters 3 and 4. The importance of the principle in a more secular world meant that twentieth-century prosecutors increasingly made far less use of treason, or of religious offences (between 1922 and 1977, there were no prosecutions for blasphemy). Similarly, writers on criminal law found earnest discussions of treason and offences against God an embarrassment, and simply downplayed them or omitted discussion of them altogether. However, a conspicuous exception to these developments involved the continued criminalization of sexual activity between men. In late Victorian England, and well into the twentieth century, difficulties with proving that sexual intercourse itself had taken place meant that gay men were being arrested and prosecuted in large numbers for the offence of ‘gross indecency’, until the abolition of that offence in 2003.

2.3 The rise of secular values, humanism, and codification of the criminal law

As Randall McGowen remarks, ‘for much of the eighteenth century ... Divine justice was the normative model for human justice’. Early criminal law texts, influenced by biblical writing, gave homicide and theft or fraud offences a central role, in part because of their connection with the Ten Commandments (‘thou shalt not kill’; ‘thou shalt not steal’; thou shalt not bear false witness’). The Ten Commandments formed the theoretical benchmark against which criminal laws involving moral wrongs were to be judged. The exercise of the King’s jurisdiction over felonies in general—including murder and theft—was expressed and justified in theological terms. In explaining English law, Hale—brought up as a Puritan and, on graduating, originally intended for priesthood—sententiously pronounced, ‘by the ancient divine law ... the punishment of homicide was with death. Genesis ix 6’.

Clerics giving preliminary sermons to the assize judges and juries saw it as their task to lend religious authority to the proceedings. As the Reverend John Lever graphically put it in his sermon at the Lancaster Assizes in 1771:
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When we see the poor affrighted wretch called up to the bar, to answer to the heavy charge brought against him; pale horror and the most dreadful anxiety painted in his countenance, perhaps his guilty conscience giving the lie to his words when he pleads not guilty; I say, when we view this affecting scene, let us remember that we must one day appear before the bar of a higher and more tremendous Tribunal.46

However, by the early nineteenth century, reformist writing on pleas of the Crown was already becoming gradually more humanist, secularized, and rationalistic. For example, in his work on the pleas of the Crown, Edward East sought to explain sodomy not as an offence against God but as an offence against the person;47 and in his later history of English criminal law, Victorian judge, essayist, and jurist Sir James Stephen placed the (p. 30) offence under the heading of 'Acts Injurious to the Public in General'.48 More broadly, the secular and rational turn in analysis of criminal law was in part due to the influence of noted legal commentator and reformer Jeremy Bentham (1748–1832).49 It was Bentham who coined the term ‘codify’,50 and who argued for the separation of church and state.

Taking Bentham’s lead, in the early nineteenth-century work of the Criminal Law Commissioners51 the focus turned to the systematization of offences, so that they could be embodied in an accessible and humane criminal code.52 In their Fourth Report, the Commissioners dealt with the raggedly organized and often brutal law of theft.53 In a famous passage, Bentham had sought to capture what he (exaggerating, as ever) believed was at the root of the harsh and unsystematized law of theft:

The country squire who has his turnips stolen, goes to work and gets a bloody law against stealing turnips. It exceeds the utmost stretch of his comprehension to conceive that the next year the same catastrophe may happen to his potatoes. For two general rules ... in modern British legislation are: never to move a finger until your passions are inflamed, not ever to look further than your nose.54

As Sir James Fitzjames Stephen put it, a detailed focus on such property crimes was justified in that they ‘contain[ed] material of the highest value for systematic legislation’ (my emphasis).55 A new influence also reinforced the preoccupation with such crimes. This was the influence of an Enlightenment value: the desire for proportionality between crime and punishment. As it was expressed, in relation to punishment, by one of its famous originators, Cesare Beccaria, in 1764:
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In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law.\(^56\)

In that regard, murder attracted increasingly critical attention amongst codifiers, precisely in virtue of the fact that, for many influential writers, politicians, and (p. 31) judges, it was fast becoming one of the few crimes for which the death penalty was commonly regarded as still uniquely appropriate.\(^57\) By contrast, theft, forgery, and a variety of other property offences came in for criticism from some eighteenth- and nineteenth-century humanist writers, in virtue of what came to be regarded as the too ready availability of the sledgehammer penalty of death in such cases.\(^58\) Even Sir William Blackstone, for whom English Crown law in the eighteenth century was ‘with justice supposed to be more nearly advanced to perfection’,\(^59\) could not reconcile this view with the existence of the death penalty for—amongst more than 200 other offences—chopping down a cherry tree in an orchard.\(^60\) From a modern perspective, of course, this state of affairs seems nothing short of barbaric, and agitators for reform from the late eighteenth well into the twentieth century never tired of pointing this out.

To understand historically rather than simply condemn, though, we must keep in mind the religious perspective from which this uniformity of harsh punishment for offences was justifiable.\(^61\) Albeit focused on a wider range of conduct, the justice of the early criminal law was Old Testament-style justice, in which the penalty of death was to be used with little discrimination. In book 27, verse 24 of Deuteronomy, ‘cursed is the man who kills his neighbour secretly’; but also cursed, in verse 23, ‘is the man who sleeps with his mother-in-law and, in verse 17, ‘the man who moves his neighbour’s boundary stone’. According to 22 Deuteronomy 25, if a man rapes a girl already pledged to be married, the man must die (but not the girl); but also according to verse 22, if a man sleeps with another man’s wife (with her consent), both are to be put to death. In a similar vein, Books 20 and 21 of Leviticus prescribe the death penalty—sometimes by fire—for many acts that would now seem relatively trivial: for example, cursing one’s father or mother, or marrying both a woman and her daughter (in this case, all three were to be burned in the fire: 20 Leviticus 14). There is no evidence that the death penalty was in fact ruthlessly carried out in all such instances in the time of the early Hebrews (far from it), but that is also true of the use of the death penalty under early English criminal law. Nonetheless, what is clear is the scriptural authority for the wide availability of the death penalty for crimes both great and small.
2.4 New danger in the use of the criminal law?

The analysis given in sections 2.2–2.3 might have left the impression that the development of the criminal law has been a slow but ultimately triumphal march towards a new era of rational improvement and protection for civil liberties. However, that kind of understanding of the criminal law’s history should be resisted. The twentieth and twenty-first centuries are considered by many to have seen the emergence of a number of new threats to freedom from unwarranted state interference. No more than a sketch can be provided here.

First, there is the impact of the so-called war on terror, not least in the form of restrictions on freedom of speech. Such threats include the criminalization of ‘glorifying’ terrorism. The aim of the legislation was to target those who ‘contribute to creating a climate in which impressionable people might believe that terrorism was acceptable’. That is an unsatisfactory basis for the prohibition of free expression, not least because the justification for the prohibition is simply that ‘impressionable’ people might (not ‘will’, or even ‘probably will’) come to think that terrorism was acceptable. In theory, liberal and democratic states are committed to the view that, in the famous words of Evelyn Hall, ‘I disapprove of what you say, but I will defend to the death your right to say it’. In practice, much of the freedom of speech enjoyed in Western countries is enjoyed on the fragile basis of de facto political restraint, rather than through legal rights and duties.

The legal framework one might expect to express Hall’s view does nothing of the sort. Under Article 10 of the European Convention on Human Rights, freedom of expression can be curtailed on a number of authoritarian grounds. So long as a restriction on freedom of speech is (a) prescribed by law, (b) necessary and proportionate, and (c) pursues a legitimate aim, that restriction can be justified. In itself, that may seem unexceptionable. However, ‘legitimate’ aims include: the interests of national security, territorial integrity, or public safety; the prevention of disorder or crime; the protection of health or morals; and maintaining the authority and impartiality of the judiciary. With such a wide-ranging menu of grounds on which the curtailment of freedom of expression can be justified, it is not hard to see how European governments have experienced little difficulty in setting that freedom to one side in the legislative ‘war on terror’. Irresponsible and deluded though glorifiers of terrorism may be (and some may be worse than that), there is a respectable case for arguing that they are modern-day ‘folk devils’: the equivalent of unashamed Catholic priests and their supporters in earlier times. What Blackstone said of active Catholics in the eighteenth century seems now to be applied by modern governments to glorifiers of terrorism.
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While they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects ...67

Blackstone’s argument begs the question. No one should have to be a ‘good subject’ in order to enjoy the benefits of civil liberty.

The curtailment of freely expressed political belief in the overthrow of the state is the hallmark of an authoritarian ‘militant’ democracy, rather than of a true liberal and democratic state. According to the writer who coined the term ‘militant democracy’, it is legitimate for the authorities to suppress by law any act or form of expression involving support for undermining a liberal and democratic state, if the alternative is thought to be the subversion of such a state from within:

The liberal-democratic order deals with normal times ... If democracy believes in the superiority of its absolute values ... it must live up to the demands of the hour, and every effort must be made to rescue it, even at the risk and cost of violating fundamental principles.68

Regrettably, most European states that regard themselves as liberal and democratic in fact behave like militant democracies when they believe themselves threatened as much by the exercise of freedom of expression as by the planning and execution of criminal acts.
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A rather different threat to liberty is alleged to come from the seeming ubiquity of ‘regulatory’ criminal law, put in place to govern many areas of both business and individual activity. Contrary to the impression often given by scholars, penal regulation in some form has been around as long as the legal system itself. It makes an appearance in Magna Carta, and was a part of the sumptuary laws of medieval and early modern England. Penal regulation played a role in the expanding Tudor state (especially during the ascendency of Thomas Cromwell), and in the rise of the fiscal-military state in the period from 1693 to 1815 during which England was at war on different fronts for no less than fifty-six years. Penal regulation was to be found in nineteenth-century legislation responding to the enthusiasm of a new breed of Benthamite reformers for raising or equalizing standards in schools, hospitals, places of work, and elsewhere (sometimes referred to by historians as ‘inspection fever’). It is also a feature of the legislation adopted by newly minted government departments in the early part of the twentieth century. Even on the brink of world war, Parliament found time in 1939 to pass the following pieces of regulatory law (amongst others), which included penal provisions:

(a) Agricultural Produce (Grading and Marking) (Caerphilly Cheese) Regulations 1939;
(b) Prevention of Damage by Rabbits Act 1939;
(c) Hairdressers Act (Northern Ireland) 1939.

The merits of the dominance of regulation in the domain of the criminal and quasi-criminal law have been a hotly contested issue, both amongst scholars, for politicians, and in the press. Criminal lawyers tend to treat penal regulation as if it were an alarming and unwelcome new infestation in the sanctuary of true criminal law, like Japanese knotweed in house foundations. In that regard, the Law Commission has remarked that

the criminal law should be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. It should not be used as the primary means of promoting regulatory objectives.

There is much to commend in this claim, but notice that the use of the term ‘primarily’ rightly leaves open the possibility that—as is in fact the case—far from being an unwelcome intrusion, penal regulation in some form plays (as it always has) an important role in stiffening the spine of the interventionist administrative state. In that sense, penal regulation is a fundamental of such a state. Having said that, in the present context, what is most important about regulatory law is that the offences that underpin it are almost always ‘prophylactic’ in character: targeting conduct harmless in itself, so as to reduce the risks of harm occurring in the future, rather than targeting conduct that itself constitutes, causes, or
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threatens a harm.\textsuperscript{80} For example, health and safety at work offences are aimed at conduct that poses unacceptable risks in the workplace; there are no offences concerned solely with causing harm in the workplace.\textsuperscript{81} This is significant, in that it has been said in criticism of such crimes that they ‘are likely to generate over-criminalisation, since they frequently prohibit conduct that in itself creates no risk of harm’.\textsuperscript{82}

That observation is all the more important when one remembers that most regulatory crimes are not contained in primary legislation (drafted by parliamentary counsel, for debate in Parliament). As we will see in Chapter 4, such crimes appear mostly in secondary legislation (drafted chiefly by civil servants in the relevant department, anticipating no debate in Parliament) made under the enabling primary legislation.\textsuperscript{83} Crucially, legislation often makes the creation and content of criminal offences an entirely discretionary matter for an individual Minister’s department. For example, under s. 11(1) of the Aviation Security Act 1982, the Secretary of State may serve a ‘notice’ on aircraft owners, aerodrome managers, those with access to aerodromes, and adjoining landholders, requiring them to provide information enabling the Secretary of State to perform his or her duties. Under s. 11(5) a failure to comply with a requirement of the notice, without reasonable excuse, is a criminal offence punishable by up to two years’ imprisonment. So, in effect, the Secretary of State has the discretionary power when drafting the notice to write the individual terms of what will, if not complied with (and in the absence of reasonable excuse), be an imprisonable offence. Worries about ministers’ discretionary powers to create crimes as they go led the Law Commission to recommend that imprisonable offences should be created only in primary legislation. That would make every proposal for such a law subject to democratic parliamentary scrutiny.\textsuperscript{84}

A further threat to liberty is of more recent origin. There has been a great expansion in the use of preventative orders involving ‘two-step’ prohibitions.\textsuperscript{85} These typically consist in a civil (non-criminal) order\textsuperscript{86} obtained against a person that instructs that person not to engage in a certain kind of conduct—step 1—coupled with the threat of criminal prosecution and punishment should the order be breached—step 2. Almost all of the scholarly and critical attention has been focused on cases in which two-step prohibitions, such as the old anti-social behaviour orders, are imposed on individuals.\textsuperscript{87} However, two-step prohibitions are also commonly used against businesses. One case is where a business is issued with a prohibition notice by the Health and Safety Executive, and subsequently breaches the terms of that notice.\textsuperscript{88} A ‘mixed’ case (involving both an individual and a corporate dimension) is where someone who has been disqualified (p. 36) from acting as a company director continues to direct a company as if entitled to do so.\textsuperscript{89} Ian Dennis has noted that there are now at least seventeen different types of civil preventative order applicable to individuals, ranging in subject matter from football spectator banning orders to violent offender orders.\textsuperscript{90}
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Two-step prohibitions add an extra dimension to penalization in at least one important way. They seek to control an individual’s behaviour by tailoring the threat of punishment to troubling features of that individual’s own life course, rather than—as would be more usual—targeting the behaviour of an anonymous class of persons (like drivers) or of everyone. So, to use a real but much mocked example, suppose the problem is that someone is seemingly wasting the time of the emergency services by threatening to commit suicide too often by jumping, and then having to be rescued. In such a case, society’s answer can be to impose an ‘injunction to prevent nuisance or annoyance’ banning that person from going near places where jumping to one’s death is possible: rivers, railway lines, bridges, and multi-storey car parks. A more typical case might involve the imposition of a Sexual Harm Prevention Order on someone convicted of certain offences, on the grounds that such an order is necessary to protect people from sexual harm from the individual in question. The Order might, for example, prevent the individual from going within a certain distance of a school during certain hours, if his or her offending indicates that such a condition fulfils the necessity requirement just mentioned.

Such orders are a special kind of threat to liberty in that, like many regulatory offences of the sort discussed previously, (a) they concern possible harm anticipated rather than harm done, and (b) they involve writing specific terms of what will—if the Order is breached—effectively be an individualized criminal offence. The latter feature flirts with a departure from the long-standing view (reflected in the ban on Bills of Attainder in Art. 1, s. 9 of the US Constitution) that penalization should focus on a form of behaviour and not on an individual. A further feature that two-step prohibitions share with many regulatory offences is the frequent dependence of two-step prohibitions on expert evidence—such as psychiatric evidence—for their justification. In the case of regulatory offences governing particular kinds of industry or business, such evidence commonly emerges during consultation with organizations that may be affected. However, when such evidence relates to an individual’s propensity to cause further (serious) harm, the court will typically rely on actuarial assessments of the risk posed by offenders who share a similar background to the individual in question, coupled with some gloss placed on this by a psychiatrist or probation officer in the individual case. Sensible though that might seem, the reliability of such evidence in predicting outcomes with any certainty is hotly contested, and ‘false positive’ rates (mistaken judgements that someone is a risk) may run at the rate of 50% or higher.

Ian Dennis takes the view (probably rightly) that so long as two-step prohibitions are considered by criminal justice officials to meet rigorous tests of necessity and proportionality, they will continue to feature in modern criminal justice systems. As Lord Bingham put it:
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Any prediction about the future behaviour of human beings ... is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would ... [be] irresponsible not to err, if at all on the side of safety.97

Perhaps so, but we should be alert to the danger of unjustified restrictions on liberty posed by two-step prohibitions.

Further reading


J. A. Sharpe, Judicial Punishment in England (Faber, 1990).


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Notes:


4 That distinction, which is still applied in some jurisdictions, was replaced in 1967 in England and Wales by the distinction between offences triable on indictment in the Crown Court, and offences triable only summarily, in the magistrates’ court.

5 23 Henry VIII, chapter 16, perhaps unsurprisingly repealed by 4 James I, chapter 1.

6 9 George I, chapter 28.

7 Hawkins, n 2, chs 76 and 77.

8 The best known of which is J. Richardson (ed.), *Archbold’s Criminal Proceeding, Evidence and Practice* (2015), first published in 1822.

9 Jesuits, etc, Act 1584 (a forerunner of this Act being the Act of Supremacy 1536, which made it high treason for a church office-holder to refuse to renounce papal authority). The execution of a priest under the 1584 Act became an issue in a case as late as 1995: *In re St Edmund’s Churchyard, Gateshead* (1995) 3 WLR 253; see also *In re St Mary the Virgin, Oxford* (2009) 2 WLR 1381.


12 The death penalty for treason was abolished in 1998. Whilst the offence of treason lives on, it is now what lawyers call a ‘dead letter’ (an effectively unusable law). It has been overtaken in terms of coverage and importance by other crimes, including terrorist offences.

13 Counterfeiting and forgery are now no longer treasonous, but have been turned into stand-alone offences contained in the Counterfeiting and Forgery Act 1981.
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14 At that time it was possible to serve as an MP and as a permanent judge at the same time, a position unchanged until the nineteenth century. It is still possible to serve as an MP and sit as a part-time recorder (a kind of judge) in criminal cases.

15 Hale, n 2, 59.

16 A broad sexual offence, but in practice mainly concerned with sexual intercourse between men. ‘Buggery‘ became a capital crime under a statute in England in 1533 (25 Hen viii, c.6) aimed at ‘the punysshement of the vice of buggerie‘, as part of Henry VIII’s efforts to reduce the criminal jurisdiction of the church courts. The suggestion that Catholic priests frequently engaged in buggery was part of the propaganda of reformation England. See P. Johnson and R. M. Vanderbeck, Law, Religion and Homosexuality (2014), 31–3.

17 Hawkins, n 2, ch 6, section 5. See further, L. Moran, The Homosexual(ity) of Law (1996), 75.

18 A biblical notion: see 2 Peter, 3.

19 Hawkins, n 2, ch 15.

20 Proponents of this view drew on scriptural passages, such as 1 Peter, 13: ‘Submit yourselves for the Lord’s sake to every authority instituted among men: whether to the king, as the supreme authority, or to governors who are sent by him to punish those who do wrong and to commend those who do right.’

21 W. Tyndale, The Obedience of a Christian Man (Antwerp, 1528, reprint, 2000) (39–40 my emphasis). The Act of Supremacy 1534 decreed that Henry VIII had always been supreme head of the Church of England, and the Treason Act 1534 made opposition to the Act of Supremacy treason and punishable by death. Having been repealed under Mary, the Act was effectively revived by Elizabeth I in the Act of Supremacy 1559, which declared her ‘Supreme Governor’ of the Church of England. Tyndale himself was executed in Belgium, for daring to have translated the bible into English.

22 For a fascinating account of the wide-ranging diet of cases tried in the Church courts, sometimes known as the ‘bawdy’ courts because of their jurisdiction over sexual misconduct, see J. Briggs, C. Harrison, A. McInnes, and D. Vincent, Crime and Punishment in England (1996), ch 3.


24 See, for example, The Act of the Six Articles (1539), which made punishable by death a number of actions deemed not to be in conformity with church doctrine.

25 1641, 17 Car I, cap 11.
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26 Other than when certain crimes were committed by those entitled to plead ‘benefit of clergy’: A. L. Cross, ‘The English Criminal Law and Benefit of Clergy during the Eighteenth and Early Nineteenth Century’ (1917) 22 The American Historical Review 544, at 551 onwards.

27 W. M. Abbott, ‘Anticlericalism and Episcopacy’, in B. Sharp and M. Fissel (eds), Law and Authority in Early Modern England (2007), 164; D. Eppley, Defending Royal Supremacy and Discerning God’s Will in Tudor England (2007), 9. Part II of the 1641 Act read: ‘[No] … person or persons whatsoever exercising spiritual or ecclesiastical power, authority or jurisdiction by any grant, licence or commission of the King’s Majesty [shall] … award, impose or inflict any pain, penalty, fine, amercement, imprisonment or other corporal punishment upon any of the King’s subjects for any contempt, misdemeanour, crime, offence, matter or thing whatsoever belonging to spiritual or ecclesiastical cognizance or jurisdiction’.


29 Harvey’s figures (n 28) show a striking increase in prosecutions for sodomy in the early nineteenth century. Some contemporary writers gave lower figures for the number of those executed for sodomy immediately prior to this time. For example, speaking about the end of the eighteenth century, H. Woolrych, The History and Results of the Present Capital Punishments in England (Saunders and Benning, 1832), 144 claimed that, between 1757 and 1806, roughly one person was executed for sodomy every three years.

30 ‘Whoso sheddeth man’s blood, by man shall his blood be shed.’

31 ‘Thou shalt not suffer a witch to live.’

32 ‘Do not turn to mediums or necromancers; do not seek them out, and so make yourselves unclean by them.’

33 Woolrych, n 29, 143. See Leviticus 18:22: ‘Thou shalt not lie with mankind as with womankind: it is abomination.’

34 For a fascinating study of the way language was (ab)used in the course of the debates leading up to reform, see P. Baker, “Unnatural Acts”: Discourses of Homosexuality within the House of Lords Debates on Gay Male Law Reform’ (2004) 8 Journal of Sociolinguistics 88.


36 Criminal Justice and Immigration Act 2008. The offence of profane swearing and cursing was abolished by s. 13 of the Criminal Law Act 1967. Sedition and seditious libel, as well as defamatory libel and obscene libel, were abolished by s. 73 of the Coroners and Justice Act 2009. ‘Open
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37 See Chapter 3.2 and Chapter 4.2. What we call ‘lifestyle autonomy’ is typically called ‘personal autonomy’, but we avoid the latter term, because we wish to distinguish personal and interpersonal dimensions to ‘lifestyle autonomy’.

38 So long as one’s choices do not themselves involve the use or threat of significant harm (not simply annoyance, affront, or disgust) to others. See Chapter 4.2. For a useful general discussion, see <www.plato.stanford.edu/entries/autonomy-moral/>; and more generally, J. Raz, *The Morality of Freedom* (1986).

39 Section 11 of the Criminal Law Amendment Act 1885. Between 1967 and 2003, 30,000 gay and bisexual men were convicted for behaviour that would not have been a crime had their partner been a woman: <www.theguardian.com/society/2007/jun/24/communities.gayrights>.


41 See, e.g., Hale’s discussion of capital punishment for murder: Hale, n 2, 2–3.

42 On the significance of the Ten Commandments to early understanding of crime, see Briggs, Harrison, McInnes, and Vincent, n 22. Hale devotes eighty-five pages of his treatise to homicide, and seventy-one pages to offences against property.

43 Briggs, Harrison, McInnes, and Vincent, n 22.

44 Hale, n 2, 2. The same biblical verse is later used in the same justificatory way by Woolrych: see text at n 30.

45 Judges trying cases on circuit around the country. Assizes were abolished as such in 1971, although judges still travel on circuit to try cases in local towns and cities.


47 See Moran, n 17, 75.

48 See Moran, n 17, 76.

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50 Although criminal codes have been around at least since the time of the sixth Babylonian King, Hammurabi, who issued his code in c.1754 BC: <www.commonlaw.com/Hammurabi.html>.

51 There were eight reports completed by Her Majesty’s Commissioners on Criminal Law between 1834 and 1845. For an overview, see K. J. M. Smith, Lawyers, Legislators and Theorists (1998).

52 See further, Wing-Cheong Chan, B. Wright, and S. Yeo (eds), Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform (2011).


55 Sir James Stephen, A History of the Criminal Law of England, vol. III (1883), x. We should note, though, that Stephen was himself, like his eighteenth-century predecessors, a defender of the view that the criminal law could legitimately be employed to deter and punish what he called ‘the grosser forms of vice’, although he did not defend that view solely by pointing to the scriptures.


60 9 George 2, ch 22; 31 George 2, ch 42, discussed in Sir W. Blackstone, n 59, book 4, ch 1. These legislative developments Blackstone— influenced by Beccaria—attributed to ‘quackery in government’.

61 See text at n 17. In relation to what is said next about Old Testament justice, we should recall that in the New Testament, Jesus is reported as saying, ‘Do not think that I have come to abolish the Law (the Old Testament) or the Prophets; I have not come to abolish them but to fulfil them. I tell you the truth, until heaven and earth disappear, not the smallest letter, not the least stroke or a pen, will by any means disappear from the Law (the Old Testament) until everything is accomplished’ (Matthew 5:17–18).

62 Terrorism Act 2006, s. 1.
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63 675 Parl Deb HL (5th Series) 2005, 1385.

64 E. Hall, *The Friends of Voltaire* (1906), 199.


66 See text at n 9.

67 Sir W. Blackstone, n 59, book IV, 54. For reform, see the Roman Catholic Relief Acts 1791 and 1829.


70 ‘There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.’ This would have been enforced in local courts.

71 For example, one of the Acts in the sumptuary legislation of 1336 declared, ‘no knight under the estate of a lord, esquire or gentleman, nor any other person, shall wear any shoes or boots having spikes or points which exceed the length of two inches, under the forfeiture of forty pence.’


75 See Horder, n 69.


78 <www.theguardian.com/money/2015/jun/06/fine-more-penalties-modern-misdemeanours>.
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79 Law Com CP No. 195, para. 1.29.


82 Simester, n 80.

83 It should be noted that objections to the use of powers delegated by legislation are not new. Great controversy about them has arisen from time to time for more than 250 years. A particularly well-known example, which led to a government Committee of Enquiry, was sparked in part by a diatribe against such powers written by the then Lord Chief Justice, Lord Hewart: Lord Hewart, The New Despotism (1929).

84 Law Commission, CP No 195.


86 Such as the injunction to prevent nuisance and annoyance: see Anti-social Behaviour, Crime and Policing Act 2014; or a Sexual Offence Prevention Order: see Sexual Offences Act 2003, s. 104.


91 We note, though, that the addition of conditions to release from prison on parole which, if breached, lead to re-imprisonment, have long been a form of two-step prohibition.


93 For fuller details, see the Anti-social Behaviour, Crime and Policing Act 2014, Sch 5. For a very clear discussion by a practitioner, see <www.1cor.com/1155/records/1103/Sexual%20offences%20-%20LT.pdf>.
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96 Dennis, n 90.