

Chapter 8

How much do you need to know? Perspectives on strict liability and criminal responsibility.

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Abstract

In 1969 the House of Lords were asked to consider whether the wording of a statute created an “absolute offence”. Stephanie Lavinia Sweet was a schoolteacher who rented out rooms in a farmhouse to students. It was accepted that she only visited the farmhouse occasionally and that she kept a room in the farmhouse for her own use. The appeal concerned three points of law:

- (i) Whether section 5(b) of the Dangerous Drugs Act 1965 creates an absolute offence
- (ii) What, if any, mental element is involved in the offence; and ... (iii) Whether on the facts found a reasonable bench of Magistrates, properly directing their minds as to the law, could have convicted the Appellant.

Stephanie Sweet had been convicted of being concerned in the management of premises and permitting those premises to be used for the smoking of cannabis. The House of Lords had to consider whether the junior courts had erred in their interpretation of the law.

This case is seminal because it considers the minimal fault elements required for criminal responsibility. The thread that connects many of the cases that acknowledge *Sweet v Parsley* as a precedent is that they are central to the debates surrounding criminal responsibility in the last fifty years. It is possible from the cases to gain a perspective of the view taken by the senior courts of criminal responsibility; and on occasion the politics and the policies that underpin the definition of responsibility. This chapter will examine and critique the reasoning adopted by the courts in interpreting and developing the criminal law.

1. Introduction

It is sometimes difficult to write a chapter which precisely fits the brief of the book of which it will form a part. But not so in this instance: two cases almost fifty years apart dealt very differently with the meaning of words in statutes. The issue, in both cases, was what mens rea elements should be read into a criminal law statute by a court interpreting and applying the law? *Sweet v Parsley*¹ was a landmark decision of the House of Lords given in January 1969. Nearly fifty years later in 2018, the interpretation of words in a statute was once more before the UK Supreme Court in *Lane and Letts*.²

The issues considered in *Sweet v Parsley* raise many questions that are still pertinent. Should mens rea always be part of the offence definition in serious crimes? Is what the accused thought in relation to the criminal act relevant or, alternatively, should the judgement of whether their act is criminal be made objectively, after the event? Should someone be convicted of a serious criminal offence when they could not prevent the outcome as they have

¹ *Sweet v Parsley* [1969] 1 All ER, 347, [1969] 2 WLR 470.

² *R v Sally Lane and John Letts* [2018] UKSC 36, [2018] 1 WLR, 3647.

no knowledge of relevant events? How should a statute that is drafted to catch a large class of people as potential criminals be interpreted and applied by the courts? These questions are even more pertinent when the outcome that is criminalised is only one of a number of possible outcomes that could happen as a result of the accused person's action. That is, what is criminalised is not an actual harm but rather engaging in behaviour that might bring about a harm; a task made more complex when that harm is not clearly defined in the criminal statute. The precise nature of this problem will become clearer as the facts of *Sweet v Parsley* and *Lane and Letts* are considered.

Analysing the reasoning in these two cases enables us to obtain an understanding of the perspective taken by members of the senior courts on criminal responsibility; and to see that on occasion government policy, parliamentary politics and social pressures affect the definition of criminal responsibility. This chapter will examine these issues and critique the reasoning adopted in legislating, interpreting, and developing criminal law.

2. Starting at the beginning.

In 1968 the House of Lords were asked to consider whether the wording of a statute created an 'absolute offence'. Stephanie Sweet, a schoolteacher, rented out rooms in a farmhouse near Oxford to university students. Sweet was convicted of being concerned in the management of premises and permitting those premises to be used for the smoking of cannabis. At her trial it was acknowledged that Sweet only visited the farm occasionally to collect rents and that, very occasionally, she stayed overnight in a room that she kept for her own use. At her trial it was stated that:

she did not enter the rooms of the tenants except by invitation, and she had no reason to go into their rooms. ... She had no knowledge whatever the house was being used for the purpose of smoking cannabis or cannabis resin.³

Sweet lost her job as a schoolteacher as a result of the conviction.⁴

The House of Lords was asked to consider whether the junior courts had erred in their interpretation of the law. In particular, they had to decide whether for the conviction to stand, it should have been demonstrated that Sweet knew that drugs were being used by those living at the farmhouse.

The case report makes it clear that the Law Lords had concerns about any legislation that created a serious criminal offence and imposed criminal sanctions without need for proof of mens rea. Lord Reid had no doubt that the offence, being concerned in the management of premises used for the purpose of smoking cannabis contrary to s 5(b) of the Dangerous Drugs Act 1965,⁵ was a serious offence. The issue before the House of Lords was whether the Act created an absolute offence.⁶

³ [1969] 1 All ER, 347, 349.

⁴ *The Court's Sympathy with Miss Sweet*, The Times, 24th April 1968 15.

⁵ s 5 Dangerous Drugs Act 1965 stated:

If a person – (a) being the occupier of any premises, permits those premises to be used for the purposes of smoking cannabis or cannabis resin or dealing in cannabis or cannabis resin (whether by sale or otherwise); or (b) is concerned in the management of premises used for any such purpose aforesaid; he shall be guilty of an offence against this Act.

⁶ Absolute liability has no precise definition. Ormerod, D and Laird, K, *Smith, Hogan and Ormerod's Criminal Law* (15th edn, Oxford, OUP, 2018) 146 gives the following explanation: 'The label "absolute offence" is best reserved for those rare situations where the offence criminalizes D whose conduct has caused an actus reus with no mens rea and who is precluded from relying on defences.'

There was a relevant legal precedent. The House of Lords had the previous year, in *Warner*,⁷ considered the issue of mens rea in relation to another drugs offence.⁸ The appellant, Warner, picked up two packages from a café, and a subsequent police search of his van revealed that one of the packages contained perfume and the other contained amphetamine sulphate, a prohibited drug. At his trial Warner claimed that he had expected both packages to contain perfume. The case was appealed to the House of Lords. The issue before the court was whether the trial judge had erred when he directed the jury that this alleged lack of knowledge could only go to mitigation of sentence. In his opinion Lord Reid said:

I understand that this is the first case in which this House has had to consider whether a statutory offence is an absolute offence in the sense that the belief, intention, or state of mind of the accused is immaterial and irrelevant. It appears from the authorities that the law on this matter is in some confusion, there being at least two schools of thought.⁹

The first of these two schools of thought was that mens rea was an element of every common law crime. Thus, even when Parliament chose to replace the common law offence by statute, the new offence should be interpreted as recognising the importance of mens rea in establishing guilt or innocence. The second school of thought was that new statutory offences regulating business practice could impose absolute liability. Regulatory offences of this type are referred to by Lord Reid as 'less serious offences'.¹⁰

The House of Lords upheld Warner's conviction. They found that he was liable by virtue of his possession of the prohibited drugs. However, the Law Lords' opinions on the matter of absolute liability were divided. Lord Reid, who was to give the leading opinion in *Sweet* was firm. He argued that there was, in the case of more serious offences, no reason to expect that the wording of a statute excluded mens rea. He accepted that for some considerable time, in the case of minor offences of a regulatory nature, it had been the practice of Parliament to use absolute liability to protect the public. He described these lesser offences as not attracting the 'disgrace of criminality'.¹¹

Reid in *Warner* referred to the line of cases that accept the right of Parliament to legislate to impose absolute liability saying:

The presumption is, that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.¹²

Reid went on to say that the appellate committee had heard no evidence in the appeal of a 'truly criminal offence where absence of mens rea was not a defence'.¹³

Something of the meaning of 'truly criminal' can be gleaned from Reid's reference to *R v Tolson* and to a mention in that case of the offence entailing severe and degrading punishment.¹⁴ The reasoning Reid employed is that unfair convictions for serious criminal

⁷ *R v Warner* [1969] 2 AC 256, [1968] 2 All ER, 356.

⁸ The Drugs (Prevention of Misuse) Act 1964, s 1(1), provides that 'it shall not be lawful for a person to have in his possession' any of the specified substances unless in specified circumstances.'

⁹ [1968] 2 All ER 356, 360.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² [1968] 2 All ER 356, 361 citing Wright J in *Sherass v de Rutzen* [1895–99] All ER, 169.

¹³ [1968] 2 All ER 356, 363.

¹⁴ *R v Tolson* [1886–90] All ER R, 30.

offences taint a person's reputation, have a stigmatizing effect and may adversely affect employment opportunities. For this reason, Reid was of the view that Parliament could not have intended the creation of an absolute offence in terms of possessing a prohibited drug.¹⁵

Reid did not accept that the use of discretion not to prosecute such an offence would cure the ill of imposing absolute liability for a serious criminal offence: -

I dissent emphatically from the view that Parliament can be supposed to have been of the opinion that it could be left to the discretion of the police not to prosecute, or that if there was a prosecution justice would be served by only a nominal penalty being imposed.¹⁶

Nonetheless, Reid upheld Warner's conviction, on the grounds the conviction was not unsafe. This is because, according to Reid, the error in the trial judge's explanation of the law had no effect: 'Taking into account the prevarications of the appellant before he produced his final story and the whole circumstances, I cannot believe that any reasonable jury would accept that story.'¹⁷ Reid's conclusion is fairly understandable given that the trial judge had asked the jury to indicate whether they found that Warner knew that there were amphetamines in the parcel. The trial jury found that Warner did know. Reid's opinion dissented from the majority in that he found that the direction given by the trial judge was flawed. In his view the offence was not one of absolute liability and therefore, the trial judge's instruction to the jury was in error.

3. How much mens rea is needed to secure a conviction?

Given his statements in *Warner* it is not surprising that Lord Reid in his opinion in *Sweet* was sympathetic to Sweet's predicament.

Her appeal posed three questions on points of law:

- (i) Whether section 5(b) of the Dangerous Drugs Act 1965 creates an absolute offence
- (ii) What, if any, mental element is involved in the offence; and ...
- (iii) Whether on the facts found a reasonable bench of Magistrates, properly directing their minds as to the law, could have convicted the Appellant.

Reid viewed the conviction as unsafe. In *Warner* he commented on pressure on Parliament to formulate laws that would, by requiring little mens rea in relation to the act proscribed by law, make it easier to gain convictions. Reid found such an approach abhorrent for more serious crimes:

One or other House of Parliament has been asked on more than one occasion in recent years to approve of some change in the law which would increase the chance of convicting offenders, but has refused because it would or might also imperil the innocent. Although I would not entirely agree, I think that the general view still is that it

there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account.

¹⁵ [1968] 2 All ER 356, 365.

¹⁶ [1968] 2 All ER 356, 366

¹⁷ [1968] 2 All ER 356, 370

is better that ten guilty men should escape than that one innocent man should be convicted.¹⁸

Press coverage and the social reaction to Sweet's conviction

Miss Sweet won her appeal but not before she had had a considerable fight to gain a hearing in the House of Lords. The biography of Rose Heilbron QC, who acted for Sweet, gives the background to Sweet's appeal to the House of Lords.¹⁹ The Divisional Court initially refused Sweet leave to appeal to the House of Lords, 'on the grounds that the charge was one of strict liability and knowledge and intent were not relevant'.²⁰ But Sweet was not without influential friends, most notably Robert Graves, the famous novelist and poet.²¹ Graves wrote an article published on the front page of the Sunday Times arguing that the imposition of absolute liability in such cases was profoundly unjust. The Sunday Times leader on the same day, 14th April 1968, argued that the real issue was the drafting of Section 5(b) of the Dangerous Drugs Act:

The case has serious implications at a time when many more people must be in danger of prosecution on the same grounds as Miss Sweet, and with as little culpability. They should not be branded as criminals before the Law Lords have had a chance to make sense out of bad drafting.²²

The fuss did not stop there; four MPs saw the Lord Chancellor and another MP, Emyln Hooson QC, pressed for the law to be urgently reviewed by the Attorney General. Miss Sweet said: 'I am determined to take this as far as I can. I can't teach in England and I would find it extremely difficult to get a visa for the US, where I'd planned to go in about a year.'²³ Robert Graves lent money to fund Sweet's appeal. Graves approached Rose Heilbron, a leading QC, to ask her to represent Sweet in her appeal against conviction. Unsurprisingly the Divisional Court bowed to the pressure and the appeal to the House of Lords was permitted. On the 23rd January 1969, the House of Lords unanimously allowed Miss Sweet's appeal.

4. Attitudes to legislating criminal offences.

What should or should not be criminalised and how the law framing culpability should be stated in legislation is a matter of dispute. In terms of regulatory offences, from parking to pollution offences, there exists a body of legislation silent as to the need for mens rea to be proved for guilt to be established. The focus of the arguments concerning mens rea and criminalisation tends to be on the more serious criminal offences. This is for the simple and obvious reason that conviction of a more serious criminal offence has huge implications for personal wellbeing. Conviction of a serious criminal offence entails, in all likelihood, loss of freedom, livelihood, reputation, and home, and the stigmatising effect of a guilty verdict.

Therefore, one argument made by jurists is that the law, whilst being normative in identifying and criminalising serious harms to society, must also provide justice by allowing those who are not culpable to escape liability. The issue in Miss Sweet's case was that the law was framed in a manner that meant, as interpreted by the Woodstock Magistrates, she was guilty of a crime that she could not have avoided committing.

¹⁸ [1968] 2 All ER 356, 366.

¹⁹ Heilbron, H, *Rose Heilbron: Legal Pioneer of the 20th Century* (Oxford, Hart 2018).

²⁰ Ibid 275-6.

²¹ Robert Graves 1895 – 1985 for more information see Seymour, M, *Robert Graves, Life on the Edge*, (London: Doubleday 1995).

²² Ibid 277.

²³ Ibid 278.

In *Sweet v Parsley* Lord Reid criticised the manner of framing the legislation because it risked overcriminalisation.²⁴ The question then becomes, what should be the limits of the criminal law? This will become a particularly pertinent question when addressing the issues raised by the case of *Letts and Lane*. It is worth considering the facts prior to further considering the issue of criminalisation. The meaning attributed to the wording of the statute would have great significance to Sally Lane and John Letts. If an objective meaning was attributed to them, they might be liable under section 17 of the Terrorism Act 2000 for sending money to their son who had been nicknamed by the press 'Jihadi Jack', and who had travelled to Syria in 2014.²⁵

5. The meaning to be attributed to reasonable cause to suspect.

R v Lane and Letts reached the Supreme Court because Sally Lane and John Letts challenged the Crown Court's interpretation of the meaning of the words 'has reasonable cause to suspect' in s 17 of the Terrorism Act 2000.²⁶ Was the meaning to be attributed to these words a subjective or objective meaning? That is, did Lane and Letts have to actually suspect that the money might be used to fund terrorism, or was the assessment of reasonable cause for suspicion to be assessed objectively by the jury on the basis of the information available to Lane and Letts?

The appeal was based, inter alia, on the presumption expressed in *Sweet v Parsley* that in serious crimes 'the offence-creating provision ought to be construed as requiring an element of a guilty mind (mens rea) ... meaning that an accused must actually suspect the money may be put to terrorist use'.²⁷ Moreover, it was argued that the Court of Appeal had erred in interpreting the Act by looking at the context in which it was passed, placing too much emphasis on the fact that 'the statute was designed to protect the public against the grave threat of terrorism'. The argument put was that despite this being the purpose of the Act, it was not a reason 'to dilute the presumption.' The presumption being that 'an offence-creating provision ought to be construed as requiring an element of a guilty mind'.²⁸

The unanimous decision of the Supreme Court was given by Lord Hughes who firmly asserted that the role of the court in interpreting the provision was to give expression to the will of Parliament in passing the legislation. If Parliament decided that the 'gravity of the threat of terrorism justified attaching criminal responsibility'²⁹ then that was the will of Parliament. Degrees of blameworthiness could be reflected in sentencing. Hughes denied that this interpretation resulted in an offence of strict liability, though he admitted that 'an accused can commit this offence without knowledge or actual suspicion that that the money might be used for terrorist purposes'.³⁰

Hughes assertion would seem questionable, his interpretation of statute law would seem pretty close to the definition of strict liability in previous case law and in legal textbooks: 'Crimes which do not require mens rea or even negligence as to one or more elements in the actus

²⁴ For a fuller argument in terms of overcriminalisation see Husak, D, *Overcriminalisation*, (Oxford, OUP 2008).

²⁵ 'Jihadi Jack' parents funded terrorism: <<https://www.bbc.co.uk/news/uk-england-oxfordshire-48676894>>.

²⁶ s17. Funding Arrangements.

A person commits an offence if –

(a) he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and

(b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

²⁷ [2018] UKSC 36 [7], [2018] 1 WLR 3647[7].

²⁸ Ibid all quotations.

²⁹ [2018] UKSC 36 [24].

³⁰ Ibid.

reus are known as offences of strict liability.³¹ Certainly, this definition would appear to impose strict liability, as the term was previously interpreted in *Warner* and in *Sweet v Parsley*. The decision in *Lane and Letts* raises many questions about the ambit of criminal offences and about how statute law should be interpreted, and criminal liability imposed.

6. Press Coverage

The press coverage surrounding the subsequent trial of Lane and Letts in 2019, at the Old Bailey, is not unsympathetic. The Telegraph reported the comments of the trial judge Nicholas Hilliard QC to Lane and Letts: 'It is one thing for parents to be optimistic about their children' but 'you did lose sight of the realities.' Two different perspectives are covered in the Telegraph report: those of the police, citing the comments of Detective Chief Superintendent Kath Barnes that 'It is not for us to choose which laws to follow', although she believed that the accused 'were not bad people', who would be going through agonies because of the choices made by their son. The other perspective was given by Letts' barrister, Henry Blaxland QC, who is reported to have told the court that the prosecution of John Letts was 'inhumane to the point of being cruel.'³² Sky News reported that Letts and Lane had 'turned a blind eye to warnings by police and charity workers that the money could inadvertently fund terrorism.' Sky reported that the couple had been desperate to persuade their son to return home and had attempted to send money to achieve that end.³³

Following their conviction BBC News reported that a statement was read by the solicitor acting for Lane and Letts. In the statement it was made clear that their primary aim was to get their son home. They had tried to work with the police to achieve this aim – but were prosecuted. The BBC reported that 'Letts and Lane criticised the government for their lack of action in helping Jack and others, return to the UK from Syria.'³⁴ One judge is reported as commenting that Lane and Letts were 'two perfectly decent people ... in custody because of the love of their child.'³⁵

Public opinion did not seem to support Lane and Letts' view of government inaction. In late 2017 Opinion ran an online poll that showed 77% of respondents felt that jihadist fighters should be prevented from returning to the UK; 42% believing that such fighters should be stripped of British citizenship. The survey showed that 77% of respondents believed that the fighters could never be reintegrated into British society. This antipathy in the country was echoed by politicians. Rory Stewart, then Foreign Office and International Development Minister, was quoted as saying 'We have to be serious about the fact these people are a serious danger to us, and unfortunately the only way of dealing with them will be, in almost every case, to kill them.'³⁶

This does not suggest that society would be sympathetic to the plight of the parents of 'Jihadi Jack' or to their fight to repatriate him. Nor does the reaction to the request for repatriation of the teenager Shamima Begum who is referred to in the media as an IS bride.³⁷ Begum was

³¹ Ormerod, D and Laird, K (2018) 143.

³² <<https://www.telegraph.co.uk/news/2019/06/21/jihadi-jacks-parents-found-guilty-funding-terrorism/>>.

³³ <<https://news.sky.com/story/jihadi-jack-parents-john-letts-and-sally-lane-guilty-of-funding-terrorism-11744699>>.

³⁴ www.bbc.co.uk/news/uk-england-oxfordshire-48676894.

³⁵ <<https://www.bbc.co.uk/news/uk-48662853>>.

³⁶ <<https://www.opinium.co.uk/government-british-jihadists/>>.

³⁷ <<https://news.sky.com/story/is-bride-shamima-begum-gives-birth-in-syria-11640060>>.

stripped of her British citizenship for her actions in travelling to Syria and marrying a terrorist.³⁸

³⁹

Such reactions raise questions about how a jury would reach an objective view of criminal liability when applying the statute's wording 'has reasonable cause to suspect that it ... may be used for the purposes of terrorism' to the facts of a case. Juries are specifically chosen for the role of finders of fact as part of society and therefore taken to reflect its views. If society is not sympathetic to repatriation then a jury may objectively interpret the phrase, 'he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism', in a different manner to that of the parent desperate to bring their son home.

7. Thinking about knowledge and reasonable cause to suspect as a culpability requirement

Most criminal law textbooks focus on two mens rea states: intention and recklessness, which are used to describe blameworthy states of mind. The requirements of knowledge are usually given less prominence.⁴⁰ It is worth stressing that the discussion of knowledge as a mens rea state differs between *Sweet v Parsley* and *R v Lane and Letts*. In *Sweet* it relates to circumstances that existed at the time of the crime. Whereas in *Lane and Letts* the 'knowledge' is surmise as to circumstances that may have occurred had all the money reached their son.

The press reports of the trial of Lane and Letts describe the view of the court and of the prosecutors as being that the parents lost sight of reality or, at worst, turned a blind eye to the possibility that (a reasonable person might suspect) the money that they sent, and planned to send, to their son might be used for the purposes of terrorism. Such a suggestion is a long way from actual knowledge that a set of circumstances will occur. Furthermore, their actions are not linked to any known outcome but rather to a possible outcome – 'might be used'.

In *Lane and Letts*, it seems clear that for the accused funding terrorism was not their aim. Their primary aim is acknowledged by the court: and it is to get their son home safely. The outcomes of their action, if all their payments had reached their son successfully, is in the realms of speculation. Speculating on circumstances that might have occurred is very imprecise as a way of determining criminal responsibility: a range of things might have happened had their son received the money they wished to send.

8. Broadening the base of potential criminal liability.

How far should the government, though Parliament, proceed with broadening the base of criminal liability? How far should prosecutors, defenders and the courts be able to speculate upon the possible outcome of a person's behaviour when no actual harm has to have resulted?

Letts and Lane were convicted of a terrorism offence. Terrorism legislation is often introduced in response to horrific events. A reading of Hansard reveals that the Counter Terrorism Bill in 2018 was introduced in the House of Lords using emotive rhetoric reminding Parliament of the victims of terrorism.⁴¹ Baroness Warsi expressed concern about the wording of one of the

³⁸ <<https://www.theguardian.com/uk-news/2019/oct/24/shamima-begum-faces-extreme-scenario-in-citizenship-appeal>>.

³⁹ Begum's appeal against the order removing her British citizenship was heard by SIAC (Special Immigration Appeals Commission) and was rejected see Appeal No: SC/163/2019, 7 February 2020.

⁴⁰ Though two exceptions are worth mentioning: Ormerod, D and Laird, K (2018) 154-120 and Wilson W., *Criminal Law*, (6th edn, Pearson 2017) 148-50.

⁴¹ Lords Hansard vol 793 3.17pm 9th October 2018 per Baroness Williams of Trafford:

'It is easy to reel off statistics. Seventeen Islamist or far-right terrorist plots have been thwarted since

offences created by the Bill, which as enacted criminalises the sharing of certain photographs, where there is a reasonable suspicion that the ‘person is a supporter of a proscribed organisation’. Baroness Warsi questioned the need for the new legislation when existing laws were, in her view, sufficient to protect society. She was particularly concerned about the lack of consultation regarding the creation of the new offence. The offence has now been enacted as s 2(3) of the Counter Terrorism and Border Security Act 2019.⁴² Baroness Warsi particularly deplored the failure to engage with groups most likely to be at risk of criminalisation, journalists and those who worked for human rights organisations.⁴³ Once again, no actual suspicion is required, just evidence that from an objective viewpoint, and with hindsight, there could have been a reasonable suspicion that the person, or item of clothing in the photograph supports a proscribed organisation. This new criminal offence potentially criminalises journalists or bloggers who retweet or share photographs.

The problem created by the Supreme Court decision in *Lane and Letts* is not only that the objective definition based upon the views of the reasonable person may unfairly criminalise individuals, but that it creates an unfortunate legal precedent. It creates an interpretation of a statutory provision that potentially could criminalise broad swathes of the British population. In part this is because of the legal definition of terrorism.⁴⁴

March 2017; as of June, there were some 3,000 subjects of interest known to the police and intelligence agencies, and 412 arrests for terrorism-related offences in 2017. But dry statistics can never bring home the pain and sorrow suffered by individual victims of terrorism. Over recent weeks, we have heard the harrowing testimony at the inquest into the deaths of the five victims of last year’s terrorist attack on Westminster Bridge and at the gates of this very building. In this and the four subsequent attacks in 2017, in Manchester, London Bridge, Finsbury Park and Parsons Green, a further 31 innocent victims lost their lives, and in total over 200 others were injured. The family and friends of those who lost their lives will have to live with this painful loss for the rest of their lives, while the victims who survive have to deal with the ongoing mental anguish and, in some cases, life-changing physical injuries.’

⁴² 2 *Publication of images and seizure of articles*

(1) Section 13 of the Terrorism Act 2000 (uniform) is amended as follows.

(2) In the heading, after “Uniform” insert “and publication of images”.

(3) After subsection (1) insert—

(1A) A person commits an offence if the person publishes an image of—

(a) an item of clothing, or

(b) any other article, in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

⁴³ Lords Hansard vol 793 5.32pm

⁴⁴ s1 of the Terrorism Act 2000 As amended interprets the offence of terrorism:

1. — *Terrorism: interpretation.*

(1) In this Act “terrorism” means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government [or an international governmental organisation] or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious [, racial]² or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person’s life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

The Terrorism Act 2000 defines terrorism to include in s 1(1) use or threat of action designed to influence the government or 'intimidate a section of the public' for 'advancing a political, religious, racial, or ideological cause'. Many protest groups may have this purpose. Even though they would not generally be thought of by the public as terrorist organisations.

Additionally, s1(5) includes within the term action for the purposes of the section – 'action taken for the benefit of a proscribed organisation.' Potentially therefore it is possible for the state to designate protest groups as proscribed organisations under the Terrorism Act and this may bring those groups, or members of those groups within the definition of terrorism for certain offences.⁴⁵

The Guardian reported in January 2020 that the non-violent protest group Extinction Rebellion had been placed, by anti-terrorism police, on the register of organisations who are extremist and should be reported under the Prevent Programme.⁴⁶ The same paper also reported that this action was supported by the Home Secretary Priti Patel. This action and the Home Secretary's support for this action drew widespread criticism and Extinction Rebellion were removed from the list.⁴⁷ Deputy Chief Superintendent Kath Barnes, who featured in press reports of the conviction of Lane and Letts, is quoted as saying:

I would like to make it quite clear that we do not classify Extinction Rebellion as an extremist organisation. The inclusion of Extremist Rebellion in this document was an error of judgment and we will now be reviewing all of its contents as a result.⁴⁸

This statement seems to imply that the designation of organisations as extremist, or not, is a matter for the police. But they will only review the list of organisations included as extremist when there is a significant public outcry – not before. This then opens the possibility that taking this cue such organisations may over time become proscribed organisations.⁴⁹ This must be

(4) In this section–

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

⁴⁵ Reasoning in relation to the definition of terrorism can be quite labyrinthine - See *Secretary of State for the Home Department v LG and others* [2017] EWHC 1529 (Admin) a case in which the court reviewed the operation of s1(5) of the 2000 Act in relation to the Terrorism Prevention and Investigatory Measures Act 2011 and concluded 'Reference has been made to several proscribed organisations in these proceedings, as I shall explain. However, I am asked to note that TA 2000 s.1(5) is *not* incorporated into the definition of terrorism for the purposes of the TIPMA 2011 by s.30(1). However, rather confusingly, the term 'act of terrorism' does include anything constituting an action taken for the purposes of terrorism within the meaning of TA 2000 s.1(5) – see TPIMA 2011 s.30(1)'.

⁴⁶ <https://www.theguardian.com/uk-news/2020/jan/10/xr-extinction-rebellion-listed-extremist-ideology-police-prevent-scheme-guidance>.

⁴⁷ <https://www.theguardian.com/environment/2020/jan/13/priti-patel-defends-inclusion-of-extinction-rebellion-on-terror-list>.

⁴⁸ Ibid.

⁴⁹ Indeed at the time of writing, eco-central, a group who support claims made in denial of climate change, <https://edition.independent.co.uk/editions/uk.co.independent.issue.141120/data/9725131/index.html> have a petition out for signature. The petition requests that the Home Secretary add extinction rebellion to the list of proscribed organisations under the Terrorism Act. <https://eco-central.co.uk/petition/sign-our-petition-proscribe-extinction-rebellion-as-a-terrorist-organisation/>.

a matter of concern. Particularly, where legislation is being worded so as to catch classes of actors, then the wording of clauses that contain the rubric “reasonable suspicion” of loosely defined outcomes may potentially criminalise a wide range of behaviours previously viewed as not criminal. The line between criminal regulatory offences controlling business activities and offences that criminalise acts in the personal sphere risks becoming ever more blurred.

9. Is too much criminalisation a bad thing?

On the one hand it can be argued that the prosecution of members of society like Lane and Letts has some utility. They had been co-operating with the police and had formed a different view from the authorities of the necessity of sending money to their son. They failed to take advice from the police and their prosecution may discourage others from acting in the same way. Such an argument might run that if everyone who had a close relative involved with a group that might contravene s17 of the Terrorism Act 2000 - was free to send money to aid their relative, then the world would be a less safe place. Whether such a view might be supported by evidence is more debatable. In relation to the section of the Act that criminalised Lane and Letts, that argument does not really hold true. The scope of the activity that is criminalised is so ill defined, the criminal act exists in the realm of things that might happen, not in the failure to take police advice. Thus, the possibility of an increase in public safety has to be balanced against by the risk of arbitrary conviction and detention of those who did not think the outcome perceived by the prosecuting authorities would be a possible result of their action.

A further problem is that the accused, on the wording of the statute as interpreted by the Supreme Court, not only does not have to perceive the risk; she does not have to realise that the organisation could be deemed to be terrorist. As has already been canvassed, the definition of terrorism is very broad indeed and does not just include groups that are unarguably terrorist in their aim. Greenpeace and Extinction Rebellion have attracted the attention of the police and been considered at times to be extremist groups that should be ranked alongside terrorist organisations in terms of Prevent Strategies.⁵⁰ Moreover, the views of the jury as to the existence of a reasonable cause for suspicion that money may be used to support terrorism will suffice for a conviction, even though it may never have occurred to the accused.

Another argument might be that the legislators in Parliament will protect the democratic interests of the individual and that therefore, law as made by Parliament should be respected. Baroness Helena Kennedy, a member of the House of Lords, commented on the pressure put upon her when she voted against the Labour whip in order to oppose legislation. Describing the views expressed by the whip, she writes that he suggested that she was ‘completely out of touch with the concerns of voters for whom it was “just law”, not as important as “health or education or the economy”’.⁵¹ Kennedy argues this approach leads to a failure to protect minorities and protect civil liberties. Kennedy points out that this is nothing new, and neither is the argument that supports the erosion of civil liberties, that ‘new restrictions are designed to convict the guilty and decent citizens have nothing to fear.’⁵² She concludes that, ‘Law matters. And ... it is certainly too important to be left to politicians, whose desire for short term gains makes them cavalier with long term interests.’⁵³ Care therefore needs to be taken when expanding the ambit of the criminal law. Either in the interpretation of statute law by the courts

⁵⁰ <https://www.theguardian.com/uk-news/2020/jan/17/greenpeace-included-with-neo-nazis-on-uk-counter-terror-list>.

⁵¹ Kennedy, H, *Just Law*, (Chatto and Windus 2004) 7 all quotations.

⁵² *Ibid*.

⁵³ *Ibid*.

or by the passing of legislation. An example of the desire for short term gains are two Bills before Parliament. Both as presented in Parliament seem to abrogate the rule of law.⁵⁴

10. Changes in the past 50 years.

Looking back over the last 50 years there are a number of changes to the criminal law and criminal justice system that are remarkable. One major change is the acceptance that a crime that has serious consequences for those convicted can be an offence that imposes something close to absolute liability as defined by Lord Reid in *Warner*.⁵⁵

Reid, in his two opinions in *Warner* and *Sweet*, accepted the imposition of absolute liability where the purpose of a less serious criminal offence is regulatory. However, Reid was concerned about the liberty of the subject and, whilst he expressed no view as to how Parliament should legislate, he did express a view about the need for transparency in making legislative changes. 'I would hold without hesitation that it would be wrong to impute to Parliament an intention to depart from its known desire to prevent innocent persons from being convicted.'⁵⁶ He suggested that Parliament should make clear any change of policy with regard to criminalisation and, when enacting legislation, should give reasons for any approach that did not respect established legal principles. This would highlight changes to the development of the criminal law.

Reid traced the roots of absolute liability in the criminal law to business regulation and argued that in terms of liability for business the imposition of absolute liability could be necessary. His reasoning was that regulatory offences were 'the original type of absolute offence' and the conviction for such an offence was punished by a fine. In this type of offence, he surmised that 'a right to prove absence of mens rea would sometimes go too far.'⁵⁷

Reid did speculate that there might need to be some sort of half-way house between subjective and absolute liability. He considered precisely the type of liability that was imposed in *Lane and Letts*, rejecting the idea that such criminal liability should be extended beyond the regulation of business -

If, however, there is to be a halfway house between the common law doctrine and absolute liability, there could be an objective test: not whether the accused knew, but

⁵⁴ The two Bills are the Covert Human Intelligence Sources (Criminal Conduct) Bill that would permit the pre-authorisation of criminal acts in certain defined circumstances and the UK Internal Market Bill which if enacted as published would contravene existing treaty arrangements and thereby breach international law.

⁵⁵ These regulations purport to make any ordinary member of the public guilty of a very serious offence if a drug within the meaning of the Act is "in his actual custody". Any person may, and most people do, from time to time take into their custody an apparently innocent package without ascertaining what it contains, without having the slightest reason to suspect that it may contain anything out of the ordinary, and indeed without having any right to open the package and see what is in it. If every person who takes such a package into his custody must do so at his peril, then this goes immensely farther than any enactment imposing absolute liability has yet been held to go, and I refuse to believe that Parliament can ever have intended such an oppressive result." [1968] 2 All ER 356, 366

⁵⁶ The full quotation is:

Members of both Houses are particularly interested in the liberty of the subject, and if it were intended by those promoting a Bill to extend the old but limited class of cases in which absence of mens rea is no defence I would certainly expect Parliament to be so informed. Then, if Parliament acquiesced, those who dislike this kind of legislation would know whom to blame. If, however, the words of the Act are not crystal clear and Parliament has not been told of this intention, I would hold without hesitation that it would be wrong to impute to Parliament an intention to depart from its known desire to prevent innocent persons from being convicted." [1968] 2 All ER 356, 366

⁵⁷ [1968] 2 All ER 356, 367

whether a reasonable man in his shoes would have known or have had reason to suspect that there was something wrong. I would not support an objective test where the ordinary member of the public is concerned, but it is not unreasonable to say that if a person engages in some particular business he must behave as, and have the capacity of, the ordinary reasonable man.⁵⁸

Clearly times and views of liability have changed. Lord Hughes and the rest of the Supreme Court in *Lane and Letts* did not object to the extension of such a test to an ordinary member of the public for an offence where the punishment was not limited to a fine, the stigma attached to conviction was great, the offence was a serious crime, and the act required by the offence was not clearly defined.

The act that Lord Reid was talking about in *Warner* is clearly defined. It is possession of a prohibited substance. Even for a defined act Reid concluded there was a need to avoid convicting innocent members of the public. Why the difference in the approach of the highest court in the land to two cases separated by fifty years? Why the assimilation of legislative and interpretive approaches necessary for the regulation of business to the regulation of individual liberty?

11. Protecting individual liberty- respecting the limits of criminalisation.

One major change in the past fifty years has been the establishment of the Crown Prosecution Service (CPS) as the public authority that prosecutes crime. When *Sweet* was charged, she was prosecuted by Sergeant Parsley of the local police force. A report published in 1981, by the Royal Commission on Criminal Procedure,⁵⁹ recommended that it was inappropriate for the police to both investigate and prosecute crimes. The CPS receives prosecution files from the police after the accused is charged with an offence and then makes a decision with regard to prosecution of that charge. The exercise of this discretion is informed by the Code for Crown Prosecutors.⁶⁰ The Code requires prosecution to proceed where there is a realistic chance of conviction and the prosecution is in the public interest.⁶¹ Had the CPS existed in the 1960s it is possible that, taking a dispassionate view, they might not have prosecuted *Stephanie Sweet*.

But the difficulty of creating a law that is very widely framed and therefore potentially criminalises a wide number of people is not really cured by removing prosecution decisions from the police. The concerns that attached to *Sweet's* conviction and the creation of liability of the type enacted by the anti-terrorist legislation discussed above have more to do with the idea of liberty of the individual subject. The issue is the need to balance the political pressures to protect society from harm with the need to respect individual autonomy.

12. Conclusion

There is a strong argument for vigilance in terms of the use of the criminal law to restrict the liberty of individuals, especially where it limits their ability to interact with others; and the act that is criminalised imposes a duty of care on ordinary people in the manner described by Lord Reid as unacceptable. There is some agreement as to this amongst criminal law commentators. Husak suggests that there is a need for a workable criminal law theory to limit the tendency of governments to pass too many criminal laws. He suggests that the failure to identify a strong basis to argue against new laws is problematic and leaves those who argue

⁵⁸ Ibid

⁵⁹ Cmnd. 8092.

⁶⁰ <<https://www.cps.gov.uk/publication/code-crown-prosecutors>>.

⁶¹ See the code for full details of how the tests should be applied.

against extensions to the criminal law: 'vulnerable to the politically powerful complaint that they oppose such legislation because they are "soft on crime"'.⁶²

Helena Kennedy argues that the process by which it becomes acceptable to frame terrorism laws to have a broad reach, is itself corrosive of society's views of liberty and its respect for the liberty of individuals. She also points out that by carving out a separate category of terrorists, it is easier for those 'who bomb and maim to claim to be political prisoners rather than criminals.'⁶³ Arguably one way in which terrorism offences have become corrosive of liberty is that they have taken the clothes of regulatory offences. These regulatory offences had traditionally been seen as less serious offences often punishable by fines. But terrorism offences are serious criminal offences.

Lord Diplock considered in *Sweet* the limits of criminalisation. He concluded offences that regulate 'a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not,'⁶⁴ were appropriate for regulation by the criminal law; and that they imposed a 'higher duty of care' on those in business. Diplock stressed an inference that a statute imposed such liability was not to be lightly drawn.⁶⁵ People who have chosen to engage in business pursuits that put others at risk must, in Diplock's view, be prepared to shoulder the higher duty of care. Nonetheless his opinion supported allowing Sweet's appeal.

12.1 What are the proper limits of the criminal law?

That question can only be answered briefly here. Lords Reid and Diplock were certain that the ordinary person's liberty should be protected by the courts. The extension of a higher duty of care to business operations and the imposition of a criminal penalty based on a half-way house to absolute liability was only acceptable, to Reid, if enacted as such by Parliament and flagged up by the legislature as a novel act. Furthermore, the reasoning behind the creation of criminal liability had to be specified. He was certain in his view that such liability should not be imposed on the ordinary individual but was acceptable as an expansion of the duty of care owed by the business community to society. This has not been the recent practice of the legislature.

Duff suggests that the problem when considering the need for new criminal offences is not whether the crime is serious or minor, but whether the law is needed at all. This argument has its attractions in that he distinguishes between the creation of the law and its implementation. He does this in a manner not dissimilar to Reid in *Sweet*. What Duff suggests is that the legislature ought to consider a number of questions prior to legislating.

First there is the question of valid need – is there really a reason to protect society from such conduct? Second, how should such protection be framed: should it be enforced by the civil law and subject to civil law remedies or criminalised – enforced by punishment, by deprivation of liberty, or some sort of financial penalty?⁶⁶

One could add to these a requirement that the law should not go further than it need to in criminalising conduct. This would ensure that the response to the perceived threat is

⁶² Husak, D, *The Philosophy of the Criminal Law* (Oxford, Oxford University Press 2010) 118.

⁶³ Kennedy, H (2004) 32.

⁶⁴ [1969] AC 132, 163.

⁶⁵ Ibid. What Diplock argues next shows how modern legislation may have pushed at this boundary in an unacceptable manner. For Diplock a characteristic of regulatory legislation is that it should be possible for those citizens in positions of authority to 'directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control' to 'promote the observance of the obligation.'

⁶⁶ Duff, A R *Answering for Crime*, (Oxford, Hart 2009) 91-92

proportionate to the aim of protecting society. Proportionality is part of a principled approach to the criminal law. It suggests that the interference of the criminal law in the lives of individuals should be kept to a minimum. Horder describes this principle, of minimal criminalisation, as based on humane values that he sees as important in protecting the human rights of people subject to the criminal law. Examining the regulatory criminal law, Horder also sees its proper domain as business related. 'Companies may be found to be at fault in criminal law, but they are incapable of emotional suffering.' The distinction for Horder in the regulation of companies by the criminal law is that 'they can legitimately be created and destroyed at will, and hence cannot enjoy the same status as human beings.'⁶⁷

12.2 What about public opinion?

In *Sweet* there was sufficient precedent for the court to interpret the law in accordance with traditional mens rea principles. The House of Lords was not likely to be criticised by the media or the government following the successful media campaign initiated by Rupert Graves. But in *Lane and Letts* the court did not apply traditional principles to the interpretation of the criminal law as they might have done. The societal and political view of British citizens who are labelled 'jihadist' has been set out above.⁶⁸ It seems likely that in such circumstances the Court might feel pressure to be respectful of parliamentary legislation. Clearly where there is ambiguity, there is in Husak's words a possible risk of being 'vulnerable to the politically powerful complaint that they oppose such legislation because they are "soft on crime"'.⁶⁹ It is possible that the courts may feel bound in such circumstances to apply the reasoning in regulatory criminal cases to the interpretation of statutes that limit the freedom of the 'ordinary man'.

In such a political environment the individual liberty of the subject may be undermined and even subjectively innocent activities, such as the sharing of photographs, objectively criminalised. How does this happen when the constitution requires Parliament to scrutinise legislation? In 1996, slightly more than halfway through the fifty-year period, Klug, Starmer and Weir published an analysis of political rights and freedoms in the UK, *The Three Pillars of Liberty*.⁷⁰ Their conclusions are fairly damning as to the success of the three pillars in protecting the subject's liberty. They identify the pillars as parliamentary sovereignty, a public culture of liberty and the Rule of Law. They argue these are the means that could be used in British democracy to protect political rights and freedoms. In terms of parliamentary sovereignty, they identify as problematic and undermining, 'official complacency'. They argue such complacency is 'compounded by the informality' of the British constitution. The flexibility of this constitution enables, on occasion, 'careless conduct at all levels of government.'⁷¹

In terms of parliamentary scrutiny of legislation, they comment that the executive drives through legislation, is not amenable to amendments because of the drive to get government business done, and particularly ignores amendments if they are from opposition members. They also argue that the House of Lords, as an unelected body, lacks credibility and that, too often, committees who should do much of the work of scrutinising Bills before Parliament fall prey to politically entrenched positions. They find that the role of expert opinion on the appropriateness of new legislation is often overlooked or lost in these processes.⁷²

⁶⁷ Horder, J, *Ashworth's Principles of the Criminal Law*, (9th edn, Oxford, Oxford University Press 2019) 73. Horder goes on to modify this statement by pointing out that millions of people's welfare and happiness depends upon the flourishing of business enterprises.

⁶⁸ See n36 above and accompanying text.

⁶⁹ See n 59 above.

⁷⁰ Klug, F, Starmer, K and Weir, S *The Three Pillars of Liberty*, (New York, Routledge 1996).

⁷¹ *Ibid* 133.

⁷² *Ibid*.

In 2002, in her lecture series *Legal Conundrums in our Brave New World*,⁷³ Helena Kennedy argued that the case for civil liberties is complex and ‘needs more than a soundbite.’⁷⁴ She provides the evidence in the book that leads to two questions that are relevant and need to be addressed in terms of the manner in which legislation is carried out in the twenty first century. They are questions that require society to be open in addressing the needs of those who are disadvantaged and disempowered. The first is whether our historic memory of our own experience of oppression is retreating? The second is: Are memories of the conflicts in Northern Ireland and the terrifying oppression of whole sections of communities by the Nazi regime becoming dim memories, no longer considered relevant by the majority of the population?

Kennedy argued in the lectures that there is a fundamental disconnect between the experience of the majority of British people and the experience of asylum seekers and refugees. This, in her view, contributed to an acceptance of new legislation that could erode individual liberty. She argued that prosperous parts of the community lack knowledge of what it feels like to be on the wrong end of the criminal law – ‘to be powerless and marginalised, at risk of being caught in a backlash where the law may be your only shield.’⁷⁵

But is Kennedy correct? Examining the case of *Lane and Letts*, public opinion as expressed through the media seemed to support criminalisation because of a real fear of victimisation by returning terrorists. There is little discussion of the actual concept of liberty in the media, and therefore evidence to support a thesis of disinterest is hard to find. However, there is evidence, from polling, that ignorance of pending new legislation that will curtail liberty may be widespread. A COMRES poll in 2016 found that of those polled 72% were not aware of new provisions in the Investigatory Powers Bill before Parliament. The Bill proposed legislation enabling an expansion to the legal interception of private communications. Once made aware of the provisions of the Bill, 90% of respondents thought the powers as framed unacceptable.⁷⁶ This suggests that, at least in terms of personal privacy, there is quite a strong concept of individual liberty.

12.3 Care in the framing of and interpretation of legislation is required.

To conclude, whilst it is accepted that laws may need to be passed to protect populations from terrorist attacks, it is important for Government to consider who it labels as terrorist and by the creation of new laws subjects to criminal punishment. The potential criminalisation of parents trying to exercise what they perceive as their parental responsibility, or those who have real concerns about the environment and wish to express them through peaceful protest, will not increase national security. Miss Sweet may well have captured the sympathy of the media and judges in 1969; and “Jihadi John” have deserved the condemnation of his actions by the media. But government responses to terrorism in criminalising those whose purpose is to bring their son home, or journalists who do not interpret an image as terrorist, is a step too far. It is not proportionate to the risk created.

Confident, mature democracies have to accept a measure of risk in order to function effectively. How much risk should be a matter for informed public debate. Factionalised, politicised debate confined within the legislature is unlikely to be helpful. Society needs to understand what proposed legislation will mean for individual liberties. It needs to be shown that unintended consequences of legislation have been considered and that meaningful consultation has taken place. Such an approach could prevent the easy acceptance of the

⁷³ (Sweet and Maxwell 2004).

⁷⁴ Ibid 2.

⁷⁵ Ibid.

⁷⁶ <<https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/ninety-cent-brits-believe-government-surveillance-powers>>

need to restrict individual liberty, without proof of a real necessity, becoming a defining feature of the legislative process. The argument that needs to be made regarding individual liberty is that legislative responses should be necessary, considered, proportionate and measured. Governments must understand and listen to expert opinion as to the effect and effectiveness of new legislative proposals. Additionally, that opinion should be considered and appropriately challenged to establish a real need for legislative action.

There needs to be a further proviso before the creation of new criminal laws of the type that have been considered in this chapter. Those laws that regulate behaviour by criminalising the conduct of the ordinary person, conduct that would not otherwise be viewed as wrong or criminal, should be clear and precise in their ambit. The reason for the existence of such laws must be clearly articulated. Furthermore, the ambit of the law should be as limited as it can be, to effectively achieve its end. The question of whether the use of the criminal law is necessary to achieve the end desired by the government should be central to executive reasoning when introducing legislation. The reason for the introduction of the measure needs to be clearly set out in a manner that engages scrutiny and public debate of the issues. The problems that confronted the House of Lords in *Sweet v Parsley* are as relevant today as they were fifty years ago. They have taken new form but with care, and political will, they could be resolved.