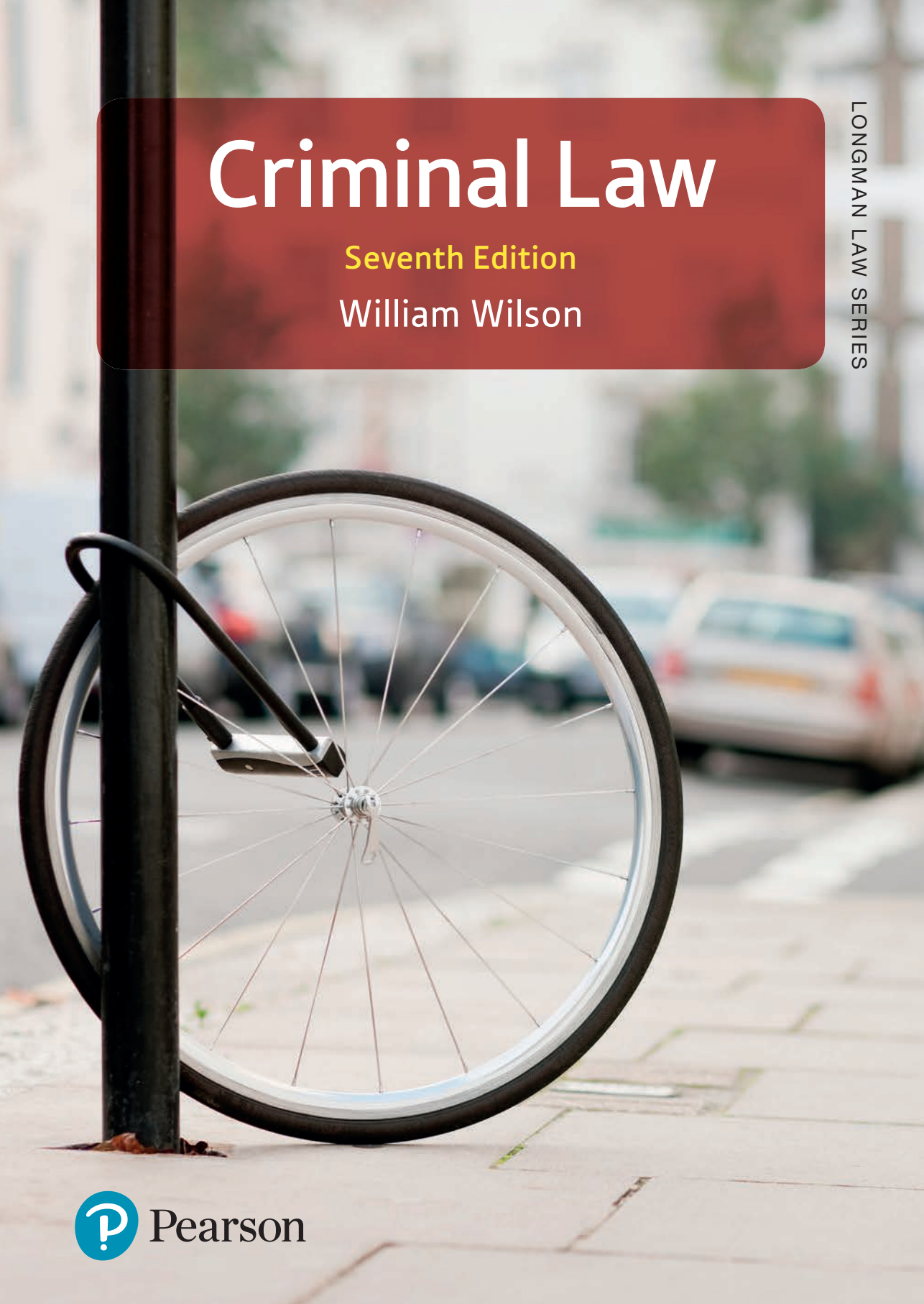
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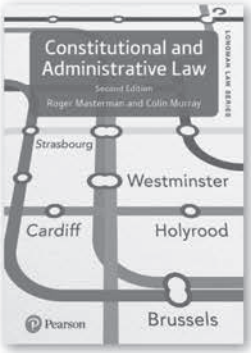

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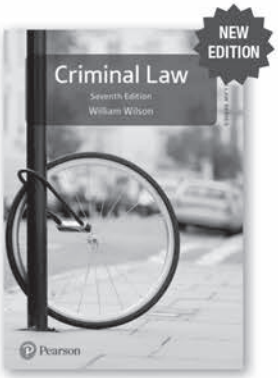

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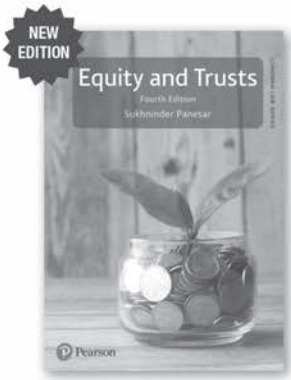

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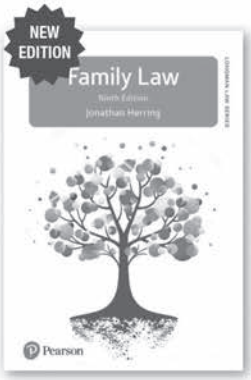

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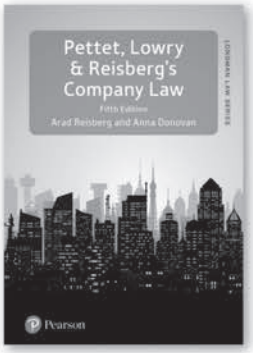

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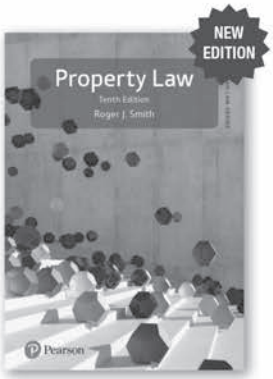

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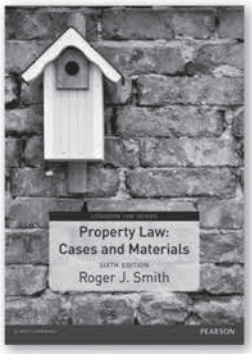

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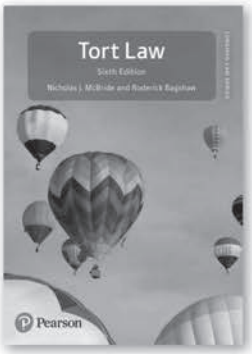

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Seventh edition

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Preface

This is the seventh edition of this book. A number of interesting developments have occurred since the last edition. Some of the highlights are as follows:

Most noteworthy is the case of *Ivey v Genting (2017)* in which the Supreme Court returned dishonesty to its pre *Ghosh* (1982) meaning. Two cases on joint enterprise *Mitchell (2018) And Tas (2018),* typify the persisting problems governing joint enterprise post *Jogee (2016)*. *Tas* also raises questions about the continued significance of *Rafferty* (2007) on supervening acts. Likewise *Wallace* raises its own questions about the notion of a voluntary act in the context of breaking the chain of causation most notably raised in *Kennedy* (2007). Loake_v_CPS [2017] EWHC 2855 (Admin) DC makes an important clarification of how insanity is a general defence and not limited to crimes of *mens rea*. *R v Kay (2017)* addresses the question of the relationship between psychosis and intoxication for the purpose of diminished responsibility. *Ray (2017)* affirms the ruling in *Collins* (2015) on the question of reasonableness in householder cases and *Cheeseman (2019* rules that the householder defence is available to a person who had caused injury to another person who had entered a premises lawfully but had then become a trespasser. Finally two cases on consent in the context of non fatal offences against the person. *Melin* (2019) qualifies *Richardson* (1999) on the effect of fraudulent misrepresentation on apparent consent in cases involving surgical operations and comparable activities. R v BM makes an important clarification of the need for non clinical forms of body alteration to satisfy the public interest.

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Part I
Introduction

1 Understanding criminal law

1.1 INTRODUCTION

Proficiency in criminal law involves a number of different skills and competencies. It requires a knowledge of the rules wherein the elements of criminal offences are to be found. It requires a knowledge of the rules of evidence and procedure. It requires an ability to identify the rule(s) applicable to a fact situation and to apply them logically and coherently. Attaining these latter competencies is necessary to discharge effectively the day-to-day tasks of a criminal lawyer – solicitor, advocate or judge.

However, true mastery requires something further. It requires also a critical and evaluative attitude. The criminal law in action is not just a matter of doctrine. Criminal law doctrine has, as its purpose, the delivery of criminal justice, and criminal justice is a contingent outcome in which rule, process and context all play their part. It is not simply a logical description of what happens when rule meets (prohibited) event.

Understanding criminal law requires, therefore, an appreciation of the day-to-day workings and constitution of the criminal justice system. Moreover, it requires an understanding of the resources of the criminal law to produce substantive justice. If the mechanical application of a given rule to a fact situation acquits a dangerous or wicked person or convicts someone neither dangerous nor blameworthy according to ordinary standards, the law may be considered not only 'an ass' but as confounding its own rationale. Understanding this rationale is also, therefore, a necessary preliminary to understanding the law itself since it will inform a realistic appreciation of what can be argued and what cannot. At its most basic, to know what the law is may require an understanding of how to produce cogent and principled arguments for change.

This text seeks to examine the rules of criminal law in an evaluative context. It concerns itself with what makes a crime, both at a general theoretical level and at the level of individual offences. It addresses what the law is and – from the point of view of the ideas, principles and policies informing it – also what it ought to be. In Chapters 1–3, we will explore some general matters which will help illustrate such an evaluative attitude. In Chapter 2, the principles and ideas informing decisions to criminalise will be considered. What is it, say, that renders incitement to racial hatred a criminal offence, incitement to sexual hatred a matter at most of personal morality,[1] and sexual and racial discrimination a subject of redress only under the civil law? Chapter 3 examines punishment and theories used to justify it. Although this is the subject-matter of its own discrete discipline, namely penology, some understanding is necessary for the student of criminal law. It provides a basis for subjecting the rules of criminal law to effective critical scrutiny. If we have a clear idea of why we punish, we are in a position to determine, for example, what fault elements should separate murder from manslaughter, or indeed whether they should be merged in a single offence. Without such an idea our opinions will, inevitably, issue from our prejudices rather than our understanding.

[1] Compare Part 3A of the Public Order Act 1986, as amended, which renders inciting hatred on the ground of sexual orientation a criminal offence.

Individual offences themselves are covered in Chapters 11–17. The elements of these offences vary, but have certain things in common. In particular, they require proof of some proscribed deed on the part of the offender unaccompanied by any excusing or justifying condition, together with a designated mental attitude, commonly known as a guilty mind. As this model of liability (conduct–consequence–mental attitude–absence of defence) is fairly constant throughout criminal law, these separate elements and the ideas informing them will be explored in Chapters 4–10 before we meet the offences themselves, to avoid unnecessary duplication. Finally, in Chapters 18 and 19, we will examine how criminal liability may be incurred without personally executing a substantive offence, whether by participating in an offence perpetrated by another or by encouraging, assisting, attempting, or conspiring to commit a substantive offence.

Before tackling these issues, we will, in this chapter, examine some general issues pertinent to understanding the criminal law and its operation, concentrating, in particular, on the philosophy, workings and constitution of the criminal justice system.[2]

1.2 WHAT IS THE CRIMINAL LAW?

Crimes are characterised – and distinguished from other acts or omissions which may give rise to legal proceedings – by the prospect of state punishment. It is this latter feature that distinguishes the criminal law from the civil law and other methods of social control such as institutional rules or community morality. The formal threshold at which the criminal law intervenes is when the conduct in question has a sufficiently deleterious social impact to oblige or permit the state, rather than simply any individual affected, taking on the ownership of the wrong.

1.3 WHAT ARE THE CONCERNS OF THE CRIMINAL LAW?

The identifying characteristic of criminal law, generally, is its coercive, controlling nature and its function as society's formal method of social control. The criminal law sets boundaries both to our behaviour and to the power of the state to coerce and punish us. This affords no clue as to any essential internal characteristic of the act or omission which marks it as criminal. Indeed there are none. There is no requirement even that the proscribed conduct be immoral or anti-social. Parliament could enact that giving money to the poor or failing to brush one's dog was punishable and no argument of morality would prevent such conduct from being criminal.

In a sense, then, the rules of criminal law are contingent. The contingency may be the enduring and universal need to ensure that human beings treat each other as human beings rather than as objects. From another perspective, it may be to secure the continuity of existing patterns of power. Often, however, the contingency is nothing more than historical accident, owing little to enduring themes of human depravity or class and much more to political expediency.[3]

Underlying the criminal law and its operation are, however, a number of ethical principles which seek to restrict its mandate. The American Model Penal Code provides what is probably the nearest thing we have to an uncontroversial statement of the proper purposes of the criminal law, namely to:[4]

[2] See generally A. Marmor (ed.), *The Routledge Companion to Philosophy of Law*, London: Routledge (2012).
[3] J. Edwards, 'Coming Clean About the Criminal Law' (2011) 5(3) Criminal Law & Philosophy 315.
[4] Section 1.02(1).

(a) forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
(b) subject to public control persons whose conduct indicates that they are disposed to commit crimes;
(c) safeguard conduct that is without fault from condemnation as criminal;
(d) give fair warning of the nature of the conduct declared to be an offence;
(e) differentiate on reasonable grounds between serious and minor offences.

These five propositions form the basic ethical building blocks of the criminal law and its operation. Without (d) the very **legality** of a criminal proscription is compromised.[5] Unless [(a), (c)] the relevant conduct discloses moral fault, a person should not be blamed (and suffer punishment) however serious the consequences.[6] Even [(a)] if fault is disclosed, criminal consequences should only attend **substantial** interferences with or threats to public or private interests.[7] Severity of sentence should vary according to the seriousness of the offence [(e)].[8] Moral distinctions between different kinds of proscribed conduct should be reflected by the creation of different offences [(e)].[9]

It should be noted at this early stage, however, that this statement, principled and humane as it is, fails adequately to account for the majority of criminal laws in operation. A huge number of statutory offences, most notably those relating to traffic, environment and safety, are constituted without proof of fault. Where major public interests are at stake, the operating principles underlying state coercion emphasise more our individual responsibility to act conscientiously rather than simply not to act selfishly or wickedly.

Paragraph (a) of the Model Penal Code is a convenient starting point for exploring the scope of the criminal law. It concerns itself with prohibiting and preventing conduct which harms or threatens harm to either public or private interests. It will be helpful to clarify the distinction between public and private interests as they are not coterminous. For example, the criminal law prohibits citizens from killing or even harming each other. It is contrary to the public interest that they should, and will usually be contrary also to private interests for obvious reasons. Again, it is in the public interest that people pay their taxes. The economic and social structures of society depend on it. Yet no individual is affected by individual instances of tax evasion. State coercion is justified on the grounds of the public interests threatened rather than the victimisation of individuals. On the other side of the equation, private interests will be offered support through the criminal law but only where the protection of those interests is a matter of public interest. At the forefront of such interests is that of individual autonomy.[10] The crimes of rape, assault and theft are examples of offences where the defence of individual interests in autonomy is subsumed within the public interest, obligating the state to take the side of the injured party.

The major concerns of the criminal law may be expressed, therefore, as follows.

[5] This is known as the principle of legality.
[6] The principle of responsibility.
[7] The principle of urgency or minimal criminalisation.
[8] The principle of proportionality.
[9] The principle of fair labelling. For an incisive analysis, see J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) MLR 217; *cf.* V. Tadros, 'Fair Labelling and Social Solidarity' in L. Zedner and J.V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, Oxford: Oxford University Press (hereafter OUP) (2012) 67.
[10] This will be examined in Chapter 2.

A The support of public interests in –

(1) *preventing physical injury*. This accounts for the crimes of murder, manslaughter, arson and other crimes of violence; also certain road traffic offences, and those relating to public health and safety;
(2) *proscribing personal immorality deemed injurious to society's wellbeing*. This accounts for the criminalisation of bigamy, incest, sado-masochism, bestiality and obscenity, drug possession and supply;
(3) *preventing moral corruption of the young through crimes such as gross indecency with children or unlawful sexual intercourse*;
(4) *maintaining the integrity of the state and the administration of justice through crimes such as treason, perjury, perverting the course of justice, or tax evasion*; and
(5) *maintaining public order and security through offences such as riot, affray, breach of the peace or public drunkenness*.

B The support of private interests in –

Remaining free of

(1) undesired physical interference through crimes such as rape, assault, indecent assault, false imprisonment or harassment;
(2) offences through crimes such as indecent exposure, indecency in public or solicitation; and
(3) undesired interference with property through crimes such as theft, robbery, taking and driving away a road vehicle or fraud.

1.4 HOW ARE THE CRIMINAL LAW'S PURPOSES DISCHARGED?

A Law enforcement

The criminal law's purposes are discharged by law enforcement and the machinery of criminal justice generally.[11] This includes both the operational prevention of crime, typically via policing, and also by bringing offenders to justice. Procedures vary according to the nature and seriousness of the offence committed.

To understand properly the operation of the criminal justice system, it is important to be aware of the general context of criminal behaviour and law enforcement.[12] Only a tiny proportion of crimes results in criminal proceedings, whether culminating in conviction or otherwise. Estimates of the number of offences committed that result in conviction are steady at between two and three per cent. One obvious reason why people may escape 'justice' in this way is that their offences are not detected. Few offences come to the attention of the police. The police are heavily dependent on public reporting of offences. Criminal offences may not be reported either because they do not come to the public's attention, as with many 'crimes of the powerful', or are not treated as worth police

[11] See generally A.J. Ashworth and M. Redmayne, *The Criminal Process* (4th edn), Oxford: OUP (2010).
[12] For the misleading picture offered by statistics see: M. Maguire, 'Criminal Statistics and the Construction of Crime', in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology* (5th edn), Oxford: OUP (2012) 206. See also http://www.homeoffice.gov.uk/rds/pdfs07/recorded-crime-2002-2007.xls.