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Landmark Cases and Wider Themes in Criminal Law

PHILIP HANDLER, HENRY MARES AND IAN WILLIAMS

MAKING THE SELECTION for a volume of landmark cases in criminal law was not an easy task. Many of the cases in this volume will be familiar to modern students of criminal law, but continuing presence in syllabi does not itself identify a case as a landmark. We suspect that many of our students would agree that selecting landmark cases on the basis that students are expected to know of a case would also hardly narrow the field.

Some cases in the volume are landmarks in the sense that they have changed the landscape of criminal law in some way. As Matthew Dyson observes in his chapter on *Hancock and Shankland*, for example, whatever the case's individual importance, it was an essential part of the process of developing the current law of intention. Rebecca Williams's chapter on *Flattery* identifies the case as a landmark in two ways: both as a signpost to current challenges and as a floodgate, the opening of which had the potential to overwhelm law and practice.

Several of the cases in the volume are landmarks at the start of journeys in the criminal law. Ian Williams identifies *The Carrier's Case* as the fifteenth-century beginning of a process of confusion in the law of larceny. That process ultimately led to calls for reform from the nineteenth century and culminated in statutory reforms to the law of theft in various parts of the common law world in the second half of the twentieth century. *Saunders and Archer*, a case well known for its poignant and unusual facts, is identified by John Baker as of particular significance in being the first detailed and thorough criminal law report, an essential step for the development of the common law of crime.

The *Landmark Cases* series focuses on placing important cases into context, seeking to understand why they were, or became, landmarks in their field. This has led to many chapters using untouched sources in investigating their cases, ranging from governmental and judicial archives through to

contemporary newspapers and personal correspondence. Such sources lead to a richer understanding of the cases and decisions.

All of the cases in this volume have affected the development of criminal law, for better or worse, even if the cases themselves are no longer good law, at least in England and Wales. We aimed to include cases where a contextual understanding illuminates the case in new ways or provides perspective on the law more generally.¹ As a consequence, many of the chapters are historical, focusing on understanding a particular case in its particular context. But other chapters use their investigation of particular landmarks as gateways to the consideration of current issues in criminal law. Jonathan Herring's chapter on *Brown*, for example, suggests that the particular context of that case has shaped (and perhaps even distorted) subsequent discussion of the role of consent in criminal law.

The historical approach adopted here benefits from a certain timelessness in the problems addressed by the criminal law. This volume features the oldest case yet included in one of the *Landmark Cases* volumes, *The Carrier's Case* from 1473. One case considered for the volume, but ultimately not included, is even older.² The sixteenth-century Inns of Court used Roman-derived material in discussions of causation in criminal law, an issue considered in this volume in the twentieth-century case of *Jordan*.³ Issues, even fact patterns, do recur over long temporal spans. Jeremy Horder, in his discussion of *Bembridge* and the exploitation of public office for private gain in the eighteenth century, draws parallels with controversies earlier this century concerning Members of Parliament. In his wide-ranging discussion of late medieval and early modern English criminal law learning, Baker identifies a hypothetical discussion in the early sixteenth century: if one person asks another to shoot him in order to test whether recently purchased armour is effective, and the test makes it fatally apparent that the armour is not, is this criminal? Just such facts were tried, seemingly for the first time, in 2015.⁴ The technology involved has changed, but human nature, it seems, has not.

Some issues may in fact become more significant over time. Kevin Crosby's discussion of *The Dean of St Asaph's Case* is concerned with justifications

¹ One case excluded from this volume on this basis is *R v Dudley and Stephens* (1884) 14 QBD 273 (QB). The editors took the view that it was highly unlikely that Brian Simpson's masterful elaborations of the case and its context would be improved upon (AWB Simpson, *Cannibalism and the Common Law* (Chicago, University of Chicago Press, 1984)).

² *Sir Hugh's Case* (1293–94) on the long-standing common law rule that defendants had no right to counsel in felony cases. The case, and its aftermath, is discussed by TP Gallanis, 'Making Sense of Blackstone's Puzzle: Why Forbid Defence Counsel?' (2010) 53 *Studies in Law, Politics, and Society* 35.

³ J Baker, 'Roman Law at the Third University of England' in J Baker, *Collected Papers on English Legal History*, vol 1 (Cambridge, Cambridge University Press, 2013) 369 fn 10.

⁴ J Baker, 'Saunders and Archer (1573)' in this volume, nn 19–20.

for, and understanding of, jury trial. As Crosby notes, these issues are once again important. In fact, they may be more significant than ever, in an age when it is possible that a European court might question whether such untrained lay people can ensure that defendants are provided with a fair trial. The endorsements and justifications for jury trial which appeared in the eighteenth century would serve well today in explaining how jury trial is not simply the exercise of power unrestrained by law.

It is apparent from many of the chapters, however, that while issues may have a timelessness to them, individual cases clearly do not. Cases may be shaped by the surrounding historical context, whether factual or legal. The appeal in *Jordan*, for example, can be linked to wider issues about expert evidence in English law at the time, as well as the status of the defendant as an African-American serviceman based in the UK. In *Beard*, the court's discussion of insanity, intoxication and criminal responsibility was intertwined with wider public concerns at the time: the plight of recently demobilised servicemen following the end of the First World War and the dangers of alcohol. It is these chapters which identify a particular niche that the *Landmark Cases* series fills; as David Ibbetson observes at the end of his discussion of *Jordan*, 'understanding of law as a dynamic system ... requires that we see individual cases in terms of the interrelationship between formal law and context'.⁵ Such a focus on a wider context informs Herring's discussion, and reappraisal, of consent and *Brown*.

I. WIDER THEMES

During the workshop preceding the volume, the editors were trying to identify shared issues and features across the cases in the volume, several of which are highlighted below. But one of the pleasures of editing this collection has been the welcome surprises the process has generated. Two features which were unexpectedly prominent in the papers presented were the popular awareness of many of these cases at the time they were decided and the political context of many of them.

A. Popular Interest

Popular interest in crime and trials is to be expected. Press coverage of the salacious facts of *Lemon* and *Brown* cases fits into this mould, but

⁵ D Ibbetson, '*R v Jordan* (1956)' in this volume, n 120.

press interest was not simply directed towards sex and violence. *Jordan* even featured in the international media and American political discourse, with concerns raised about the capital trial of an American serviceman by a foreign court. *M’Naghten’s Case* went even further. While popular interest in the murder of the Prime Minister’s Private Secretary by a man who believed himself to be persecuted by the Tories would be expected, what was more surprising was the nature of the public discussion. Rather than simply lurid headlines, Arlie Loughnan shows that the case generated considerable public debate and disquiet in both national and local newspapers about the wider issues of law and psychiatry which the case posed.

B. Political Context

Other cases feature underlying political contexts. *Hancock and Shankland* arose in the highly charged atmosphere of the miners’ strike. It is only because the Crown rejected a plea of manslaughter and insisted upon a charge of murder for the activities of the miners that the question of intention in murder reached the House of Lords at all. Horder’s discussion of *Bembridge* similarly occurs against a backdrop of politics. Modern readers will probably be unsurprised by the decision that Bembridge’s actions were criminal, but it appears that Bembridge certainly was. It was only in a changed political context in which corruption and venality were unacceptable (at least when practised by the ‘other side’) that Bembridge would be prosecuted.

In most of these cases there is no direct evidence that the political context led to appeals or the development of the law directly.⁶ However, there are hints (for example, in *Jordan*) that the political context may have been relevant.

C. Criminal Law as Constitutional Law

A thread running through several of the cases in this volume is the judicial role, both from the perspective of the separation of powers and the rule of

⁶ *Bembridge* is an obvious exception and *M’Naghten’s Case* may be too. As Loughnan observes in her chapter (A Loughnan, ‘*M’Naghten’s Case (1843)*’ in this volume, nn 77–79), the public disquiet about the decision led to the debate in the House of Lords in which the judges stated the law of insanity.

law. *M’Naghten* is a peculiar example of something very close to ‘judicial legislation’, such that Loughnan suggests it may not be possible to alter the *M’Naghten Rules* simply through a judicial decision.⁷ By contrast, in *Hancock and Shankland*, the House of Lords appeared reluctant to engage in something close to rule-making, declining to provide a model direction for the question of intention.

Two other cases in the volume, *Shaw* and *Lemon*, were concerned with the question of how far judges ought to create or expand common law criminal offences. Both cases take a generous approach to common law crimes, an approach which, as John Spencer notes, has more recently been rejected in *Rimmington and Goldstein*.⁸ To some extent, this change for offences was prefigured in relation to defences in *Howe*, where the judges were unwilling to change the law of duress. Findlay Stark argues in his chapter that this constitutional aspect to *Howe* should be given much greater prominence in the current understanding of the case. While other arguments for the conclusion reached in *Howe* are questionable, the constitutional argument is intellectually robust. If *Howe* is placed together with *Shaw*, *Lemon* and *Rimmington*, this position becomes even stronger—*Howe* occurred between *Lemon* and *Rimmington*, and may help pinpoint the time at which judicial attitudes were changing.

D. The Role of Individual Judges

When considering the judicial role, a natural question is the role of individual judges. Lord Templeman’s remarks in *Brown* have become notorious, but Spencer also suggests that Lord Scarman’s views about the desirability of an offence of blasphemy in the *Lemon* case were informed by Scarman’s beliefs about the role of law in a racially and religiously pluralist society, views perhaps informed by his extra-judicial experiences. However, a focus on individual judges’ attitudes should not be pushed too far. The ‘heroism argument’ in *Howe* that duress should not be a defence to murder because people should heroically resist threats to themselves or others does not seem to have been particularly informed by judges’ own experiences. As Stark observes, Lord Hailsham accepted the heroism argument following his own experiences in the Second World War. However, Lord Brandon (whose own

⁷ Loughnan, ‘*M’Naghten’s Case*’ nn 122–25.

⁸ *R v Rimmington and Goldstein* [2005] UKHL 63, [2006] 1 AC 459.

wartime activities led to the award of the Military Cross) rejected the heroism argument.

E. The Relationship between Legal Scholarship and Legal Practice

Several of the chapters in this volume consider the links between legal scholarship and legal practice. The usual assumption is that legal scholars comment upon what judges have decided, with practice in this sense driving scholarship. Such a position is evident in some chapters. For example, scholarly consideration of causation seems to have been spurred by *Jordan* rather than influencing the case.

Other chapters point in the opposite direction. Ian Williams's examination of *The Carrier's Case* argues for influence from the civil law tradition, probably from the book known as *Bracton*, in developing the law of larceny in the late fifteenth century and through the early modern period. Simon Stern draws out that the decision in *Jones* was influential principally through the interpretation of it in William Hawkins's *Treatise of the Pleas of the Crown*. More recently, Dyson places the decision in *Hancock and Shankland* into a larger process of development of principles of mens rea, one in which judges and legal scholars interacted. In relation to *Morgan*, Lindsay Farmer describes this as a 'kind of extended dialogue'. The concern of judges for the opinion of the jurists is also evident in the discussions of *Shaw* and *Morgan* by Henry Mares and Farmer. Both cases engaged with contemporary scholarly concerns, while the House of Lords in *Morgan* was clearly concerned about academic criticisms of its activities in criminal law.

Such interaction was not always the same as cooperation. As Spencer observes of the *Lemon* decision, an important fault line between the majority and dissenting members of the House of Lords related to the acceptability of strict liability in the criminal law. While the widely accepted academic view was that criminal liability required mens rea, that view was not held by at least three members of the House of Lords. Tellingly, but perhaps in a stereotypically British anti-intellectualism, Lord Russell described this rejection of mens rea simply as 'sense'. It is interesting to observe the difference between this attitude and that visible in *Morgan*, in which Lord Fraser took the need for mens rea as axiomatic, at least for most offences. The cases occurred within a few years of one another, but in *Morgan* the House of Lords was concerned about academic views, while in *Lemon* the House was dismissive.

Finally, in an academic world in which one is increasingly expected to demonstrate the fairly short-term 'impact' of one's work, it is notable

that legal scholarship did not always have rapid effects. Sometimes it did, as in Hawkins's discussion of *Jones*, but *Bracton* was written around two centuries before *The Carrier's Case*, and the interaction between scholars and judges visible in *Morgan* and *Hancock and Shankland* related to views about criminal law shaped by scholarship over the course of decades.