影印版法学基础系列

刑法基础
ESSENTIAL CRIMINAL LAW

罗杰·吉里
Roger Geary

（第二版）
（Second Edition）

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本书导读

本书是传统刑法教科书的精要读本，作者试图避开不必要的繁琐与复杂，以简明的方式直接阐释刑法学的核心内容；书中对最近的重要案例、法规以及相关学术论题进行了精辟的分析和讨论，为读者面对当今的市场经济竞争提供了必要的最新专业信息平台。

第一章是刑法的概述。主要介绍了犯罪的定义、分类、举证责任的承担和提供证据的准则以及相关的上诉程序。书中认为，犯罪的概念由行为和官方标准这两个不同而又相互交叉的要点组成，而同一行为的官方标准随时间变化而变化，因此很难对犯罪的概念进行严格界定。在阐述犯罪相关特点的基础上，作者提出了实用的犯罪概念，即犯罪是法官或立法机构规定应当适用刑法程序的行为。对于犯罪的分类，书中将新旧法规进行比较，阐述了不同的分类方式，并对不同犯罪适用的法律程序以及举证责任的承担与转移等相关程序法方面的内容作了详细的论述，使实体法和程序法得到很好的结合。

第二章阐述犯罪的要件。在犯罪行为部分，作者分析了犯罪行为的概念并作了巧妙的公式表示，即犯罪行为＝犯罪的定义－犯意。随后，书中利用大量的案例事实详细阐述了行为必须是意愿的行为、事态犯罪、不作为犯罪以及因果关系的相关理论。在因果关系论中，进一步分析因果关系的确定步骤、事实因果关系和法律因果关系，并用特殊情况（尊严死和逃跑事件）深化了因果关系理论。在犯意部分，将犯意分为故意、明知、蓄意和轻率（或疏忽），并用大量篇幅对该四部分进行了透彻的论述。不同部分均从历史案例产生及法院判决、学术探讨等方面讲述理论的历史发展和完善过程，给读者留下思考借鉴的空间，并对严格责任问题阐明了自己的观点。

第三章论述了不完整罪的理论，即煽动、共谋与未遂。书中分析了不完整罪的责任、煽动的概念，制定法和普通法上的煽动的内涵，煽动种族仇恨的行为方式及相应的辩护理由；制定法和普通法的共谋的概念和构成要件以及相关案例及原则；未遂的概念和构成要件，并对不可能性做了深入探讨。

第四章是共同犯罪部分。作者论述了主犯和从犯的区分，共同犯罪的形式，犯罪行为表现以及共同犯罪的犯意。作者用结合案例的方式，向读者

展示了共同犯罪的深奥理论。书中对故意或偶然违反共同协议理论、犯意的转移理论以及共同协议的退出理论作了进一步分析，并对被害人作为从犯和主犯无罪原理进行了解释，使我们在共同犯罪领域有了全新的认识。

第五章是有关侵犯人身犯罪部分。书中对非致命犯罪和致命犯罪分别加以阐述，对侵犯他人身体罪、攻击罪以及二者之间的区别做了深入讨论。同时，对谋杀罪、故意的和非故意的非预谋杀人罪、推定的非预谋杀人罪以及严重疏忽杀人和机动车杀人等均作了详细的论述。

第六、七章重点论述了侵犯财产的犯罪。对盗窃罪、非法侵入住宅罪、刑事损害罪、诈骗类犯罪以及逃账罪、处置被盗物品罪的概念、构成要件以及行为方式做了具体的阐释，并对相关重要问题通过案例和学术考察的形式加以重点讨论。

第八章涉及一般辩护理由。书中对精神病的概念界定、判断标准及存在的具体形式做了分析；同时对不同年龄阶段负担刑事责任的区别问题进行了总结。在醉酒问题上，书中区别阐述故意醉酒和非故意醉酒，并从理论上系统地介绍了醉酒作为辩护理由的理论基础、历史发展和完善问题。对于紧急避险和正当防卫，书中分析了二者的性质、有效性以及存在的条件并用案例予以充实。此外，作者对胁迫的概念、性质、有效性以及同意的范围和错误问题，给我们展现了系统的理论知识。

总之，本书是对传统刑法教科书的有益补充，可有效地帮助法学专业学生学习有关刑法的基础专业知识。

本书目录和索引的翻译者是张亚军，不当之处敬请专家、读者指正。

译　　者

2004 年 4 月

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must fulfill these gaps.

Each book in the series follows a uniform format. A checklist of the areas covered us provided at the start of each chapter and expanded treatment of 'Essential' issues follows, looking at examination topics in depth.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne
General Editor, Essential Series
Swansea Law School

Preface

The purpose of this book is to provide a revision aid for the undergraduate student of criminal law. It is intended to complement both the traditional textbook on criminal law and the Cavendish *Principles of Law* series.

Seven key areas, which in combination form the essential content of most courses in criminal law, are considered in sufficient detail to enable the student to present sophisticated legal arguments under examination conditions. At the same time, the book seeks to avoid unnecessary complications and superfluous detail, allowing it to function as a concise revision aid.

Where appropriate, the most recent cases, legislation and academic articles are analysed to provide the reader with the up to date information necessary for success in today's competitive marketplace.

I have endeavoured to state the law as at 1 August 1998.

Roger Geary
Swansea
August 1998

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1 Introduction to Criminal Law

You should be familiar with the following areas:

- difficulties of definition
- the pragmatic definition of crime
- classification of offences
- the standard and burden of proof
- the modes of criminal trial and the appeals procedure

The definition of a crime

When a student of criminal law is asked to define the subject matter of his field of study, he is immediately put into a position somewhat reminiscent of a First World War infantryman being sent over the top to negotiate his way through a minefield of unexpected procedural, linguistic and philosophic difficulties. The main problem originates from the fact that the concept of crime encompasses two distinct although overlapping ideas: that of behaviour; and that of the official status, or criminal label, which is attached to the behaviour. Because the official status of the same behaviour may well change over time, it is impossible to formulate a definition which would enable us to identify any individual act as a crime or not a crime. When the criminal label is applied to, or removed from, a particular form of behaviour by the legislature or the courts, the nature of the act does not change only its legal status. Any attempt at a definition of crime based on behaviour will include a description of the behaviour both when it *is* and when it *is not* afforded the status of a crime. For example, the act of taking one's own life was a crime until the Suicide Act 1961 made this activity perfectly lawful. The nature and, possibly, the morality of the act of suicide did not change dramatically in 1961, but its legal status did.

Although a definition of crime based on behaviour would appear impossible, it *is* possible to identify several characteristics which are generally found among actions which are labelled as crimes. One characteristic of a crime which is often emphasised is that it involves immoral conduct. To some extent, criminal law can be seen as an embodiment of a society's moral beliefs; the crimes of murder, rape, robbery and theft, among many others, no doubt reflect a widespread consensus about what amounts to unacceptable behaviour. However, immorality cannot constitute a defining characteristic of a crime, since many forms of behaviour have been criminalised on grounds of social expediency rather than because of their immoral nature. Moreover, some acts which may be widely regarded as immoral, for example, adultery, are not crimes. Additionally, a consensus about the morality of some actions may not always be possible in a pluralistic society such as modern Britain. Thus, the immorality of particular behaviour, even assuming that agreement can be reached on what constitutes immorality, cannot amount to a satisfactory defining feature of crime.

A separate but related and much debated question is whether an act *ought* to be defined as a crime simply because it is considered to be immoral. The view of the Wolfenden Committee on Homosexual Offences and Prostitution was that: 'It is not ... the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.' These 'purposes' included the preservation of public order and decency, the protection of the public from offensive and injurious conduct, and the provision of safeguards against exploitation and corruption, but did not involve preventing mere outrage and disgust (Wolfenden Committee on Homosexual Offences and Prostitution, 1957, Cmnd 247, London: HMSO, para 13). An alternative view was put by Lord Devlin in his book, *The Enforcement of Morality*. He argued that there is a public morality which bonds society together and which ought to be enforced by the criminal law. Lord Devlin's views have had their supporters and critics and the debate has been given fresh impetus by the decision of the House of Lords in *R v Brown and Others* (1993), where consensual homosexual, sado-masochistic acts, performed in private for the mutual enjoyment of all concerned, were held to be crimes (for an assessment of Lord Devlin's views, see Hart, HLA, *Law, Liberty and Morality*, 1962, Oxford: OUP; Williams, G, 'Authoritarian morals and criminal law' [1966] Crim LR 132).

Another characteristic of crimes is that they are actions which go often beyond mere interference with private rights and are said to have a harmful effect on the public. Thus, Lord Hewart CJ, in *R v Bateman* (1925) 19 Cr App R 8, stated that the degree of negligence required for the crime of killing by gross negligence was a failure, by the defendant, to conform to the standards of the reasonable man, which was so gross as to go beyond a mere matter of compensation between subjects. It must involve negligence so culpable that the State would intervene to punish it in the criminal courts, regardless of whether the victim decided to pursue the matter in the civil courts. This approach involves circular reasoning in that it does not amount to much more than stating that a crime is a crime if it is sufficiently serious to merit the application of a criminal sanction.

Because of the definitional difficulties mentioned above, the by now somewhat shell-shocked student of criminal law can be excused for taking refuge in a pragmatic definition which focuses on the criminal label, rather than the nature, of the act. *A crime is an act which the judiciary or the legislature have laid down should warrant the application of criminal procedure.* This is a sound, although limited, definition from which to commence a study of criminal law, provided it is remembered that it tells us nothing about the *nature* of criminal acts, nor does it help identify actions which *ought* to be crimes.

The classification of criminal offences

At common law, prior to the enactment of the Criminal Law Act 1967, crimes were classified as being either treasons, felonies (that is, the more serious offences) or misdemeanours (that is, the less serious offences). Felonies and misdemeanours were abolished by the 1967 Act, although the difference between serious and minor offences in now reflected for procedural purposes in a distinction between *summary* and *indictable* offences. The important distinction between trial on indictment and summary trial is that the former involves trial by jury whereas the latter does not. Of course, there are many crimes whose gravity depends upon the circumstances of the individual case and which constitute a third category of offences: *triable either way* (that is, an offence which can be tried on indictment or summarily).

The basis for this method of classification is now to be found in the Magistrates' Courts Act 1980.

Offences triable summarily only

Summary offences can be only heard in the magistrates' court. These offences tend to be the least serious and are the creation of statute. Examples of this type of offence include common assault and battery and taking vehicles without consent (Criminal Justice Act 1988).

Offences triable only on indictment

These offences are the most serious and can only be heard before a judge and jury in the Crown Court. Such offences include murder, treason, robbery and causing death by dangerous driving.

Offences triable either way

These offences are capable of being tried *either* in the magistrates' court *or* the Crown Court. Such offences tend to encompass a wide range of behaviour, varying in seriousness. For example, an 11 year old child who steals sweets from a corner shop and a professional criminal who takes millions of pounds from a bank both commit theft. Although the two forms of behaviour are very different, they are fall within the same legal definition. Clearly, it would be incongruous and unjust if the proceedings were the same in both cases. Theft, together with obtaining property by deception and handling stolen goods, are examples of offences triable either way.

In the case of offences triable either way, it is for the court to decide, having heard representations from both the prosecution and the defendant and having given due consideration to the circumstances of the case, which is the more appropriate mode of trial (s 19 of the Magistrates' Courts Act 1980). Even if the magistrates decide that the offence ought to be dealt with summarily, the defendant can still exercise his right to trial by jury in the Crown Court. However, a defendant has no right to insist on a summary trial if the court considers trial on indictment to be appropriate.

Burden of proof and standard of proof

It is a general principle of English and Welsh criminal law that a person is innocent of any criminal offence until proved guilty. The burden, therefore, falls on the prosecution, who must prove that the defendant

is guilty *beyond reasonable doubt* (that is, the *standard of proof*). In *Woolmington v DPP* (1935), the House of Lords held that it is not for the defendant to prove his innocence and that he is entitled to the benefit of any doubt as to his guilt. There is only one exception to this principle at common law – the defence of insanity – when the defendant has the burden of proving that he was insane at the time the crime was committed. He does not have to satisfy the heavy onus of proving insanity beyond reasonable doubt; proof on a *balance of probabilities* will suffice (*R v Carr-Briant* (1943)).

In the case of other defences, such as non-insane automatism, provocation, duress and self-defence, the law usually requires that the defendant produce some credible evidence to support the defence and then the onus of proof will shift back to the prosecution who must prove that the defendant is not entitled to the defence beyond reasonable doubt.

The appeals process

It is important to understand the appeals process because much of the criminal law is established as a result of appeal decisions. Crown Court decisions are relatively unimportant since this court occupies a relatively lowly position in the hierarchy of courts. The most important decisions are those of the House of Lords, those of the Court of Appeal and, to a lesser extent, those of the Divisional Court of the Queen's Bench Division of the High Court.

Summary trials

The defendant or the prosecution can appeal *by way of case stated* to the Divisional Court of the Queen's Bench Division on the grounds that the magistrates' court exceeded its jurisdiction or that it misunderstood or misapplied the law. The appeal will normally be heard by two or three Court of Appeal or High Court judges. There can be a further appeal direct to the House of Lords if the Divisional Court certifies that a point of law of general public importance is involved and either the Divisional Court or the House of Lords grants leave to appeal. Cases in the House of Lords are normally decided by five Law Lords.

A defendant may also appeal from the magistrates' court against conviction to the Crown Court. The appeal is usually heard by a circuit judge assisted by two lay magistrates.

Trials on indictment

A defendant can appeal from the Crown Court to the Court of Appeal with the permission of the trial judge, or leave from the Court of Appeal, on the sole ground that the conviction was 'unsafe' (s 2(1) of the Criminal Appeal Act 1995). If the defendant was acquitted at first instance, the Attorney General may appeal to the Court of Appeal for a ruling on a point of law, although the defendant's acquittal remains unaffected. There can also be an appeal by the Attorney General to the Court of Appeal if he considers that a sentence given in the Crown Court was unduly lenient and wrong in law. The Court of Appeal will then pronounce a 'guideline sentence' which trial judges are, thereafter, expected to follow (s 35 of the Criminal Justice Act 1988). It is also possible for a defendant convicted in the Crown Court, with leave of the Court of Appeal, to appeal to the Court of Appeal against the sentence imposed. Appeals in the Court of Appeal may be heard by two or three Court of Appeal judges, but are more usually heard by one Court of Appeal judge sitting with one High Court judge and one senior circuit judge.

Either the prosecution or the defence may make a further appeal to the House of Lords on a point of law, provided the Court of Appeal has certified the point as being of general public importance, and either the Court of Appeal or the House of Lords has granted leave to appeal.

Miscarriages of justice

Following revelations in the cases of the 'Guildford Four' and the 'Birmingham Six', considerable disquiet arose concerning the operation of the criminal justice system in general and, in particular, the role of the Court of Appeal. In March 1991, the then Home Secretary, announced the establishment of a Royal Commission, under Lord Runciman, to investigate every aspect of the criminal process, from pre-trial procedures, to the handling of alleged miscarriages of justice by the Court of Appeal. As a result of the Royal Commission's recommendations, the Criminal Cases Review Commission has been established to investigate cases involving an alleged miscarriage of justice and to refer the case, if appropriate, to the Court of Appeal (Criminal Appeal Act 1995).