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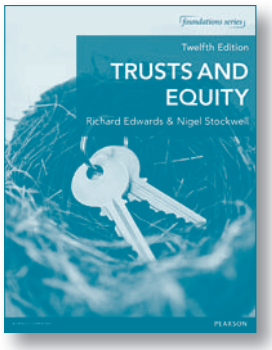

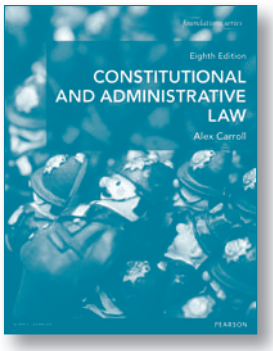

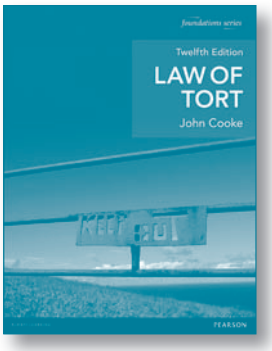

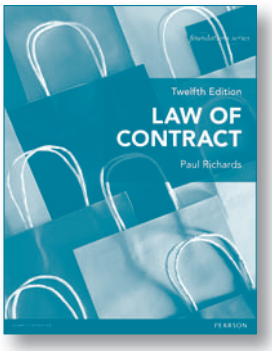

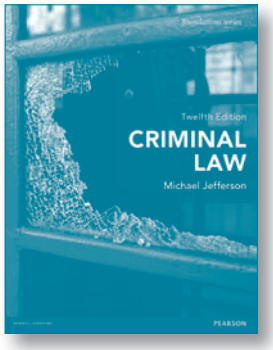

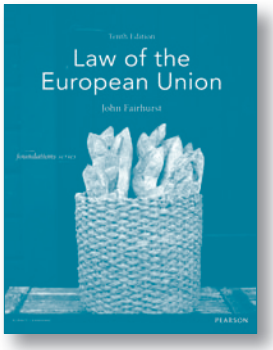

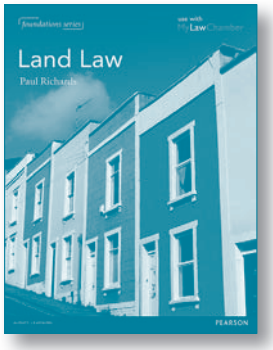

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Twelfth Edition

Criminal Law

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Preface

This book is written for LLB, CPE/Graduate Diploma in Law and BA students sitting assessments on English criminal law in their first or second year whether in England and Wales or outside the jurisdiction. It is hoped that persons with little or no access to law libraries will find the text helpful. The text is also useful for those studying for other qualifications by private study including distance learning, whether in England and Wales or elsewhere. Extracts of law reform reports may be of especial use to such students. It should be noted that as a result of the Government of Wales Act 2006 twenty areas of law are devolved to the National Assembly of Wales but as yet no changes affecting Wales only within the scope of this book have been made. The book is deliberately of medium size in order that readers are not put off the subject by the length or density of the text, and it incorporates many pedagogic features. There is also a website attached to this book which includes not just updates on the law but also guidance on answering essay and problem questions.

The book, which is analytical in nature, includes those areas of substantive criminal law which are traditionally covered on a criminal law course, and those topics are presented in the way in which English law subjects are normally taught. Criminal law is fast-moving and fast-growing, and there has to be some selection among topics. One can see how fast-moving the topic is by comparing chapters in the first edition and this one. For example, the chapters on sexual offences and fraud are completely new. Other chapters have substantial changes, for example the law on assisting or encouraging has replaced incitement in the chapter on inchoate offences and loss of control has replaced provocation in the chapter on manslaughter. The emphasis in criminal law courses also changes over time. Deaths at work, domestic abuse, and sexual offences (including historical ones and the sexual abuse of children) may be instanced. Selection removes some of the interesting parts of criminal law such as female genital mutilation/cutting, extreme pornography, euthanasia, terrorism, and drink-driving offences, but such offences are rarely covered by a criminal law module and if all crimes were covered, then this portable book would become a four-volume encyclopaedia!

Criminal law can be approached in different ways such as political, feminist, theoretical, and other standpoints may be taken. The focus in this book is on the rules of criminal law and criticism of them. Controversy underlies much of the difficulty and the fun in studying criminal law. It will quickly become obvious that the law is contingent, historical, and in many ways controversial. There is no vast eternal plan. English criminal law is replete with inconsistencies, and this book reflects those issues. Students must grapple with such difficulties, for a superficial treatment will lead to wrong law and low marks. Attention is focused on what is sometimes called the 'internal critique of the law', in order that such inconsistencies are brought out, and on those areas which present difficulties. This is a common approach in UK law schools, but it is well worth considering the approach which your tutors use. There are many areas of controversy such as the definition of offences such as rape, murder and theft and the width of defences such as duress and loss of control. Indeed, controversy rages over whether an element of a crime is a part of the offence or part

of the defence. The best example is consent in rape. Is it part of the offence or part of the defence? Students should not think that understanding criminal law consists solely of learning legal rules and knowing how to apply them to the facts. In legal jargon this is a 'black-letter' approach to the subject and one which has not been in common use in England and Wales for perhaps 40 years.

The arrangement of topics may differ from the order in which the subjects are taught on your course. However, for the assistance of those familiar with older editions, because of the House of Lords' decision in ***G*** (2004) some rearrangement of topics was made in a previous edition. In particular, the consideration of intention and recklessness in the context of murder and criminal damage respectively has been abolished. This 'unique selling point' of the text was intended to encourage readers to focus their minds on the results that the accused had to intend or on to which he had to be reckless. For example, as an examiner I saw too many students writing: 'the *mens rea* for murder is intent'. Besides being incorrect (if it were true, an intent say to touch would be malice aforethought, the mental element of murder), the statement reveals an ignorance as to how precisely the elements of a crime are defined. Whether this experiment was successful is for others to judge. As things are now, namely the law has returned to the pre-*Caldwell* position, opportunity was taken to reorder the book. This reordering is maintained in the current edition.

Among differences from other textbooks are the following:

(a) There is a concentration on one or two topics which have been unjustifiably neglected in recent years in comparison with some other matters. Offences of strict liability are instanced. Some issues which this book considers have over the past 30 years come to the fore: corporate criminal liability is one obvious instance.

(b) Emphasis is laid on suggestions for reform and on criticism both of individual decisions and the ambit of offences. Criminal law needs to be evaluated and criticised. Proposals contained in Law Commission Consultation Papers and Reports are analysed. It is in the context particularly of reform that the European Convention on Human Rights is looked at. Some attempt is made to uncover the underlying purposes behind offences: if that purpose is not served by current law, reform is due.

(c) There is some reference to Commonwealth and US cases and commentators.

(d) The student is introduced to some of the concepts of theoretical criminal law, such as the distinction between excuses and justifications. There is a burgeoning body of academic criticism and this book introduces the reader to some of the major issues. There is discussion of gender issues, particularly in the law concerned with battered women. This is not, however, a book on criminal law theory. Readers are referred to the further reading at the end of each chapter.

(e) I hope that values and policies underlying the rules of criminal law are brought out.

This book deals with, as stated earlier, substantive criminal law; that is, it is concerned with the question of whether an accused is guilty of a particular offence. It does not deal with the following, all of which are important topics in their own right.

(a) *Bringing the accused to trial* and *procedure at trial*. Such topics are generally covered in courses of varying names such as English Legal System, Criminal Justice, and Criminal Process. Arrest may be dealt with in constitutional or public law. Similarly excluded are the choice of charges, the workings of the police, the Crown Prosecution Service, the Director of Public Prosecutions, plea bargaining, and the investigation of crime, including forensic jurisprudence.

(b) *Sentence*. The methods of disposal after trial are usually dealt with, if at all, in criminology or perhaps jurisprudence courses. Why people commit offences is also part of criminology. Victimology is also not part of substantive criminal law. Alleged racism in sentencing is a topic of continuing significance, as it is in policing.

(c) *Evidence*. Matters relating to evidence such as admissibility, competence and compellability are for a course on the Law of Evidence.

(d) *Public order*. Criminal law can be seen as a way in which the state controls citizens and how officials control state officers. Offences against public order are usually covered by courses on public law.

All these excluded topics are interesting in their own right. For example, why was the Commissioner of Police for the Metropolis charged with endangering the public contrary to s 3 of the Health and Safety at Work Act 1971 rather than murder, when his officers put seven bullets into the head of the Brazilian Jean Charles de Menezes at Stockwell underground station in south London in 2005?

The remainder of a possibly very wide course forms substantive criminal law. It is that area of law which has to be applied by the triers of fact, the jury in the Crown Court and the justices of the peace in the magistrates' courts, in order to determine whether the accused is guilty. (It should be noted immediately that the topics selected for inclusion in this book are, as stated above, those normally taught on a criminal law course and not necessarily those such as motoring offences most often met in practice.) A jury may have to determine whether the accused is to be convicted of murder or whether he has the defence of loss of control. Substantive criminal law is concerned with *what* has to be shown in order to find the accused guilty or not. *How* a matter of substantive criminal law is to be proved is part of the law of evidence. A person may confess to murder, have the crime proved against him in court, and so on. Those matters are ones of evidence. What has to be proved is part of substantive law. If when reading substantive criminal law you find difficulty accepting what it is said the accused thought or did, don't worry: assume that the prosecution has proved to the satisfaction of the triers of fact what the accused did or thought.

This book is part of the *Foundation Studies in Law* Series and has a Companion Website at: **www.mylawchamber.co.uk/jefferson**.

Errors and omissions are my own.

When originally submitted to the publishers, this book was written in what I considered to be a non-sexist style. However, to conform to series style, the traditional use of 'he' to refer to both sexes was reverted to at editing stage.

I would like to thank the publisher, editor, and proofreader at Pearson for their professionalism and patience, and the anonymous reviewers and students who read the book with 'student eyes' on the text.

Michael Jefferson
20 January 2015

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Part 1

Preliminary matters

1 Introduction to criminal law

1

Introduction to criminal law

Aims and objectives

After reading this chapter you will:

1. Understand the basic principles of criminal law.
2. Have a critical knowledge of the Human Rights Act 1998 insofar as it affects criminal liability.
3. Understand and be able to evaluate the definition of crimes.
4. Be able to distinguish between civil and criminal law.
5. Have a critical knowledge of the hierarchy of criminal courts and the doctrine of precedent in criminal law.
6. Be able to explain the courts' interpretation of statutes imposing criminal liability.
7. Have a critical understanding of the classifications of crimes and the powers of the courts to create offences.
8. Understand and be able to critique codification of criminal law.

The fundamental principles of criminal liability

Objective 1

As stated in the preface, criminal law may be approached in several different ways. This book deals with how the various crimes and defences are defined and subjects them to criticism. Before, however, offences and defences are dealt with, various preliminary matters must be understood. Part of that understanding is, if there is to be any criminal law at all, how it would look in a more perfect world. From knowing fundamental principles, one can see how the law should be reformed. One of the problems in studying criminal law is that it is not based on principles laid down by Parliament but on common law, the law determined by judges in actual cases. Extracting those principles is a difficult and controversial process. For example, one may say that the law on murder is based on the right to life, but one can see currently the development of principles of autonomy and the right to have life of a certain quality which point towards not making mercy killers into murderers (as they are now) but into individuals worthy of praise, not of censure. Criminal law in the UK is nowadays largely derived from statute, but how problems are transmuted into offences is intricate and contingent. An illustration of a recent law is that under the

Anti-Social Behaviour, Crime and Policing Act 2014, s 121, there is an offence of forcing someone into marriage; the law was brought into force on 16 June 2014. An example of a law which may come into force during the currency of this edition involves modern means of communication such as Twitter and Facebook. The House of Lords Communications Committee announced an inquiry into social media offences and announced its first evidence session on 1 July 2014. Current law is spread across several statutes including the Offences against the Person Act 1861, which was passed some 150 years before social media existed. The law as a whole would seem to lag behind the rise of social media such as Twitter and Facebook and the speed of technological change means that even if the law was satisfactory in 2000, it may well not be so now.

Crime in England and Wales is published quarterly. The latest figures, for the year ending March 2014, were 3.7 million crimes reported to the police. These statistics are not reliable according to the publisher of the statistical bulletin, the Office for National Statistics. The *Crime Survey for England & Wales*, previously the *British Crime Survey*, which includes unreported and unrecorded crimes, is seen as being more statistically valid. It estimated that there were 7.3 million offences in the same year, a statistic which is half the figure it was in 1995. Indeed, it is the lowest since the Survey began in 1981. The *Crime Survey for England & Wales*, like police statistics, is an undercount because it does not include, for instance, victimless and corporate crimes and those surveyed might not know whether an event constitutes an offence or not. It does now unlike earlier count crimes against children aged 10–15 and it estimated that 859,000 such crimes were committed. These figures are in addition to the 7.3 million figure just mentioned. The 2001 Survey estimated that only half of crimes are reported to the police and the proportion may be less than that. Perhaps one in thirty crimes leads to a conviction, though many people are cautioned. Most of these crimes are committed by men and boys. Offences against property comprise some 75 per cent, of which half involve theft. Violent crimes make up around five per cent of all offences. Violent crimes decreased by 20 per cent in the year ending March 2014, according to the *Crime Survey of England & Wales*. Theft was down 10 per cent and criminal damage down 17 per cent. There is a public fear in some cities such as London, Manchester and Nottingham of gun and knife crime by young males (but these crimes are still well below the level of 1995, the peak year), and non-violent offences are decreasing. Sex crimes are on a rise (20 per cent in the year ending March 2014 in comparison with figures from the previous year), seemingly because of the number of victims who have come forward in respect of historic crimes by celebrities. Fraud recorded by the police rose 17 per cent in the year ending March 2014 but the statistical bulletin is uncertain whether the police are recording more of the fraud offences which do occur or whether there is a true rise in criminality. Contrary therefore to the popular view the number of crimes committed is not rising year on year, but what is increasing is the number of offences created by Parliament. Fear of crime is a significant restriction on freedom of movement, despite the fact that the number of offences has declined drastically since the mid-1990s.

Criminal law can be seen as a series, perhaps not a system, of rules aimed at controlling misconduct, and contrary to expectation criminal law is often not certain or consistent. From the other end of the telescope criminal law also controls the behaviour of those involved in the criminal justice system such as the police and judges. It ensures that the stigma of a conviction and censure of the individual are attached only to those to whom it should be attached. To see a course on criminal law as one designed only to see whether a rule applies to a given set of facts is a narrow-minded approach.

Criminal law was for many years regarded as undeveloped in terms of theory. The jury's verdict – guilty or not guilty – cannot be explored. Jury instructions are not precedents. It

was not until 1907 that there was a Court of Criminal Appeal (now the Court of Appeal (Criminal Division)) and until 1960 appeals to the House of Lords (now the Supreme Court) were few. Until the mid-1960s textbooks for both students and practitioners were largely lists of rules with authorities. Since then there has been an exponential growth in academic interest and analysis, including theoretical works. Despite this development and perhaps because of it, a substantial amount of criminal law is unclear. Should the person who attempts to kill but fails be treated in the same manner as one who succeeds? Why is murder more serious than manslaughter? Is penetrative sex part of life or part of a crime? Accordingly rules, principles and policies have to be investigated. Attention in this book is focused on those offences normally discussed in a criminal law course, but there are thousands of others and no one book can deal with all of them. This book deals with the criminal law of England and Wales: each state has its own penal law, for example each of the 50 United States has its own laws, as does the federal state. This law is contingent historically and currently (dependent for example on the government of the day and media interest) and therefore differs across the world. Nevertheless, in the Anglophone world certain principles apply but there are often exceptions.

Which principles are to be considered when looking at criminal law? As already stated, the criminal law is often unclear and sometimes inconsistent. Some argue that there are no principles, and certainly Parliament is subject to few international or other constraints when making law; others argue that such principles as exist are subject to large exceptions. Since Parliament theoretically can do anything, for example order the French to kill all their blue-eyed boys, it can make anything into a crime. Of course theory and practice are not the same, and indeed in theory there may be restrictions imposed by human rights conventions. See the discussion of the European Convention on Human Rights (ECHR), below.

In his book *Philosophy of Criminal Law* (Rowman & Littlefield, 1987), the American legal theorist Douglas Husak postulates eight principles of liberal philosophy underlying US criminal law. They are generally based on the autonomy of the individual. The accused is taken, unless the facts demonstrate otherwise, to be responsible for his crimes. They can be taken to represent aspirations of some of those involved in creating, applying and teaching criminal law in the UK and elsewhere. These principles are not constrained by country, time or politics. It should, however, be stressed that these principles are not always applied. Parliament is rarely concerned with these general principles of criminal law. It may, for example, try to prohibit an activity which many people indulge in on an almost daily basis such as speeding on motorways. It presumably saw criminal law as being the most efficient means of bearing down on speeding, despite the fact that many do not see conviction for this crime as containing stigma. Judges may be influenced by their desire to put those who have done bad things behind bars rather than apply the law consistently.

Why criminalisation takes place is an important area of study. Criminal law cannot be divorced from its political, sociological and economic context. Some control of the creation of new offences and the increase in width of old ones is provided by the ECHR; its influence as yet has been minimal but may increase in the next few years.

Legality

This principle is that persons must not be held to be criminally liable without there first being a law so holding (see also below). It prevents arbitrary state power. Husak derives four subsidiary conditions: (a) laws must not be vague; (b) the legislature must not create offences to cover wrongdoing retrospectively; (c) the judiciary must not create new

offences; and perhaps (d) criminal statutes should be strictly construed. (Others derive different sub-rules: for example, laws must be published and laws must not be impossible to obey. For judicial discussion of these meanings see ***J*** [2013] 1 WLR 2734 (QBD).) English law does not adopt the first subsidiary principle, and the others are doubtful. For example, it could be said that in ***Preddy*** [1996] AC 815 the House of Lords strictly construed the Theft Act 1968 (with the effect that mortgage fraudsters were not convicted of a deception offence), whereas the House has at times extended the criminal law by defining statutory offences broadly, as occurred in ***Hinks*** [2001] 2 AC 241 where 'appropriation' in the same Act was read broadly to cover a gift.

Many of the offences have uncertain boundaries. For example, murder is a very serious crime, but the state of mind needed for it has been the subject of change over the past 65 years. As a matter of parliamentary sovereignty, the government acting through Parliament can create laws which apply retroactively. Judges are not consistent in their interpretation of statutes, but have more or less given up the privilege of law-making (see further below).

Judges in what is now the Supreme Court have extended liability in several cases, yet in ***Clegg*** [1995] 1 AC 482 the House of Lords refused to change the law of self-defence in favour of the accused. The accused was a soldier in Northern Ireland who shot a person in a car which had been taken by a joyrider. He alleged that he thought she was part of a terrorist gang, though it must be said that she posed no danger to him or his colleagues. The Lords held that he was guilty of murder. Their Lordships rejected the contention that he should be guilty of manslaughter, not murder, when the force used in self-defence was excessive. They did so with regret but said that any reform was for Parliament. In ***Ireland; Burstow*** [1998] AC 147, two conjoined cases involving stalking, the Lords, disregarding the learning of centuries, extended assault to cover frightening by words including words spoken over the phone. In ***R*** [1992] 1 AC 599 the Lords in effect retrospectively abolished the long-standing immunity of the husband on a charge of rape of his wife, a breach of the principle of strict construction of penal statutes and of the principle against retroactivity, though its reasoning was that the exemption did not exist truly at the time of the accused's act. However, decisions of the House of Lords (now the Supreme Court) are not uniformly in favour of widening criminal liability and when in ***C*** **v** ***DPP*** the Divisional Court abrogated the principle that children aged over 10 but under 14 were not guilty unless they had mischievous discretion, the House restored the previous law ([1996] 1 AC 1). Parliament later changed the law. Similarly, in ***GG*** [2008] UKHL 17 it was held that the offence of conspiracy to defraud did not extend to a price-fixing arrangement because for several hundred years this common law crime had not been used against such agreements.

Both offences and defences are subject to change, with the result that a person would be guilty one day, but not guilty on the next because of a change in the law made by the judiciary. If the accused in ***R*** **v** ***R*** (above), the case involving the marital immunity in rape, often known as 'marital rape', had asked a lawyer for advice whether he would be guilty, the reply before the case would have been in the negative. Such rulings were not predictable. The contrary argument is that expressed by Lord Keith in ***R*** (above): 'The common law is capable of evolving in the light of changing social, economic and cultural developments.' Changing the common law keeps it up to date and Parliament cannot always be trusted to reform criminal law.

As can be seen from this discussion, criminal law does not always consist of hard and fast rules, and the extension of the law to previously exempt categories is inconsistent with Article 7(1) of the ECHR, to which the UK is a signatory. Article 7 of the ECHR is an embodiment of the principle of legality. It provides that no one can be convicted of an offence which was not an offence at the time when the act or omission allegedly

constituting the crime was committed. Article 7(1) was applied in ***GG***, above. Challenges under Article 7(1) to the uncertainty of the width of English offences detailed in this book such as gross negligence manslaughter have had no success so far. The Human Rights Act 1998 obliges the courts to give effect to the ECHR. Currently it remains uncertain what will be the full effect of the statute. It is suggested that it may affect strict liability, the age of consent to sexual activities, insanity and self-defence, but as yet English criminal courts have been tentative in their approach to construing the definitional elements of offences in conformity with the Convention. The general judicial view seems to be that as a rule the *substantive* law is largely unaffected. See the discussion of the Human Rights Act 1998 later in this chapter.

The courts must construe statutes and interpret the common law consistently with the Convention and can issue declarations of incompatibility if a statute is inconsistent with the provisions of the Convention. The Convention must be read in accordance with modern conditions. Therefore, what was once Convention law need not be so now, and authorities are not to be used as precedents. An example is ***Sutherland* v *UK*** [1998] EHRLR 117. The European Court of Human Rights ruled that a ban on male homosexual behaviour until the age of 18 when male heterosexuals were legally permitted to have sexual intercourse from 16 was a breach of Article 8(1), the right to respect for private life, despite the fact that previous Convention decisions supported the ban.

Article 7(1) can be used to prevent a court from making a statutory offence have retrospective effect. It would also seem on its face to ban, for example, the penalisation of marital rape as occurred in ***R***. However, the European Court of Human Rights by a majority ruled in ***SW* v *United Kingdom*** [1996] 1 FLR 434, which is ***R*** before that Court, that 'however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation'. Article 7(1) read with Article 7(2) did not prohibit the clarification of the law over time and the final abolition of the marital immunity in rape constituted a gradual clarification. What the Lords had done in ***R*** was to declare that the marital exemption had disappeared over time; Article 7(1) permitted them to do so because there was no retroactivity. As the Court put it:

> The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution . . . was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity . . .

However, while the gradual clarification doctrine may be acceptable, it cannot be said that the law was as clear in 1970 as in 1990, yet a husband was found guilty in 2004 of raping his wife in 1970: ***C*** [2004] 1 WLR 2098 (CA). The decision does appear to be a retrospective one. The Supreme Court in ***Norris*** [2010] 2 AC 487 distinguished ***SW* v *UK*** on the grounds that the extension of conspiracy to defraud to price-fixing agreements was not reasonably foreseeable in light of several hundred years of development of this common law offence.

In ***Misra*** [2005] 1 WLR 1 the Court of Appeal said:

> Vague laws which purport to create criminal liability are undesirable, and in extreme cases . . . their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. . . . That said, however, the requirement is for sufficient rather than absolute certainty.

It was held that the crime of gross negligence manslaughter did not contravene Article 7(1). Linked with the need to identify the nature of the criminal law wrong is the need to distinguish criminal law wrongs from moral wrongs. Both types of wrongs may be disapproved of by ordinary people but, as Lord Hobhouse (dissenting) put it in ***Hinks*** [2001] 2 AC 241(HL): 'To treat otherwise lawful conduct as criminal merely because it is open to such disapprobation would be contrary to principle and open to the objection that it fails to achieve the objective and transparent certainty required of the criminal law by the principles basic to human rights.'

See Chapter 12 for more on gross negligence manslaughter.

Another aspect of Article 7(1) is that it appears to prohibit the restriction of defences. If so, cases such as ***Gotts*** [1992] 2 AC 412 (HL), the authority on whether duress is a defence to attempted murder, are incorrect. It should be noted that there is an exception to non-retrospectivity, Article 7(2). This occurs where the act 'was criminal according to the general principles of law recognised by civilised nations'. This exception was held in ***C***, above, to cover the judicial abolition of the marital immunity from conviction for rape. Judge LJ said:

> Article 7(2) provides ample justification for a husband's trial and punishment for the rape of his wife, according to the general principles recognised by civilised nations. Indeed . . . it would be surprising to discover that the law in any civilised country protected a woman from rape, with the solitary and glaring exception of rape by a man who had promised to love and comfort her.

UK jurisprudence on Article 7(1) so far is disappointing to those who expected the Human Rights Act 1998 to restrain judicial legislation. ***C*** so demonstrates. In ***Rimmington*** [2006] 1 AC 459 the House of Lords did, however, amend the common law crime of public nuisance to bring it into line with Article 7. The Lords found that they had no common law powers to abolish offences, but they could overrule cases to bring the common law into line with Article 7. ***C*** is inconsistent with ***Rimmington*** where Lord Bingham stressed that: 'There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.' The second principle is contrary to the ratio of ***C***. ***C***, however, may be upheld on the basis provided by the European Court of Human Rights in ***SW*** v ***UK***, namely, that what the accused did was 'criminal according to the general principles of law recognised by civilised nations', as Article 7(2) ECHR states. ***Rimmington*** is also authority for the proposition that the crime of causing a public nuisance was not too vague to satisfy Article 6. As that Court said in ***Kokkinakis*** v ***Greece*** (1993) 17 EHRR 397, 'where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable', then Article 7(1) is satisfied but Article 7(1) is breached if 'the criminal law [is] extensively construed to the accused's detriment, for instance by analogy'.

Actus reus

The accused is guilty only if he has acted or has brought about a state of affairs (***actus reus***). He is not liable for just being as he is (e.g. poor, black, ill, disabled, Jewish). People are not punished for mere thoughts. The nearest English law has come to penalising people for thinking is one form of treason, compassing the Queen's death, and conspiracy, which is predicated on the mental state of agreement and not on an overt act. Partly on account of this principle there have arisen problems about the scope of criminal liability for omissions, attempts, and involuntary acts.

See Chapter 2 for more on omissions.

See Chapter 10 for more on attempts.

See automatism in Chapter 9 for more on involuntary acts.

Mens rea

A mental state, ***mens rea***, is required in almost all serious crimes. This state of mind is sometimes known as the fault or mental element. People should not be punished unless they are at fault. Only people who act intentionally or who knowingly run a risk are at fault. Justice is not done if persons are punished when they have not acted culpably. Criminal responsibility is largely founded on moral culpability. There are, however, many exceptions: strict liability offences minor or serious do not require *mens rea* as to one or more parts of the *actus reus*. It has been questioned whether negligence is properly to be classified as a state of mind. It is sometimes argued that an accused should not be guilty when he is not blameworthy and offences which do so convict him should be abrogated.

See Chapter 4 for strict liability.

See Chapter 3 for more on negligence as a state of mind.

Take care when translating *mens rea*. The common translation is 'guilty mind', but there need be nothing criminal or otherwise wrongful about what the accused's state of mind is, yet that may still be a *mens rea*. For example, in theft part of the *mens rea* is intention permanently to deprive, but there is nothing inherently wrongful about this state of mind. The honest shopper who takes a tin from the supermarket shelf has this state of mind just as much as the dishonest thief.

Concurrence

In English law the basic rule is that the *actus reus* and *mens rea* must be simultaneous.

See Chapter 3 for discussion of several exceptions.

Harm

In many offences a person or thing is harmed. In murder someone is killed; in criminal damage property is destroyed or damaged. One purpose of the law is to allow people to act free from harm. Aggressors are to be deterred. As the European Court of Human Rights stated in ***Laskey* v *United Kingdom*** (1997) 24 EHRR 39, a case involving sadomasochism by male homosexuals: 'one of the roles which the state is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm'. There are, however, different opinions at times whether something constitutes a harm. In ***Laskey***, above, the sadomasochist homosexuals would no doubt have said that they were not harming anyone, whereas the Lords held them to be guilty of causing harm.

There are several offences which are not predicated on harm to others. The Terrorism Act 2006 creates the offence of glorifying terrorism, a vague term, but one which does not require any victim to be injured or killed. No one need be harmed in the inchoate offences such as attempt, and there is argument about so-called 'victimless offences' such as possessing marijuana. If one does not wear a seatbelt and, as a result, one is more seriously injured than otherwise, one becomes a burden to others. An alternative view is to contend that the state has an interest in the wellbeing of its citizens (see N. Lacey, *State Punishment* (Routledge, 1988), in which Lacey argues in favour of a concept of 'welfare': the state is entitled to intervene to provide for the physical welfare of its citizens by such means as ordering the wearing of seatbelts and penalising violations). Moreover, health costs and absences from work are prevented by such means. Some harms may be trivial; others may be serious, for example pollution. One aim of the criminal law is to prevent certain harms such as interferences with the person or property by penalising infractions.

See Chapter 10 for inchoate offences.

Some academics also derive a principle of proportionality. In other words, some crimes are more serious than others. For example, murder is more serious than assault occasioning