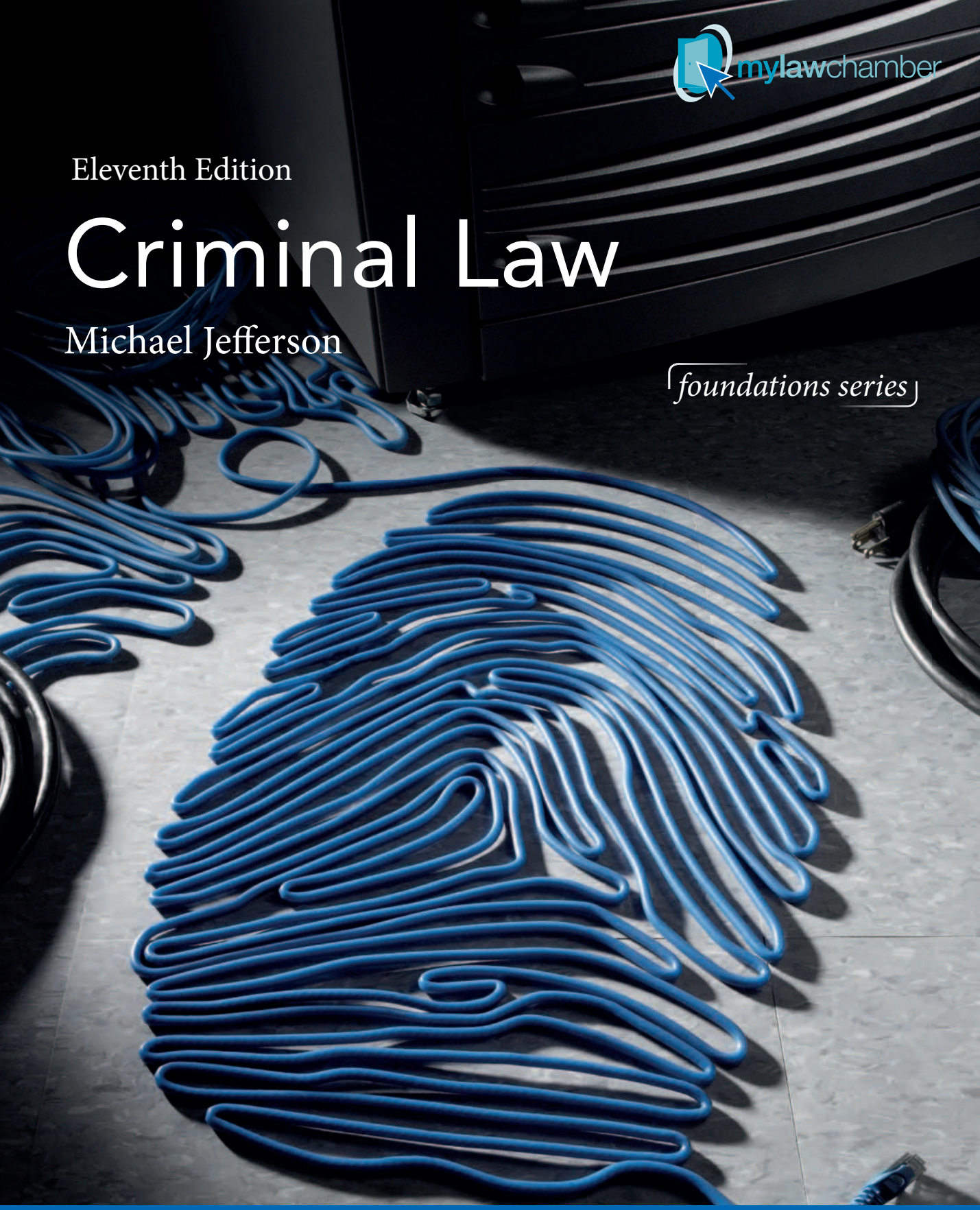
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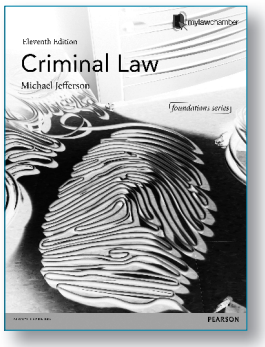

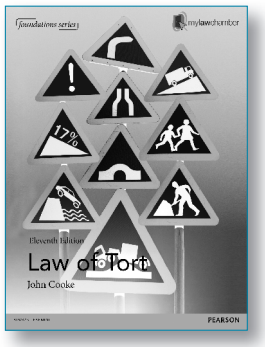

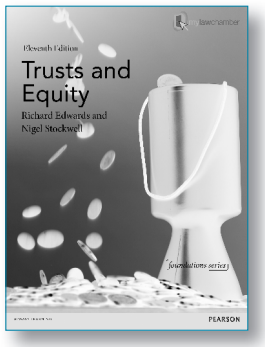

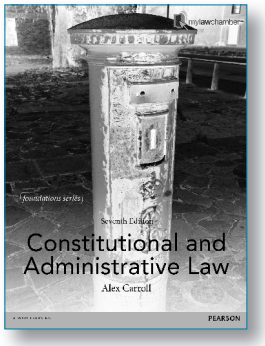

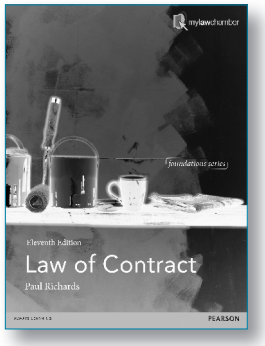

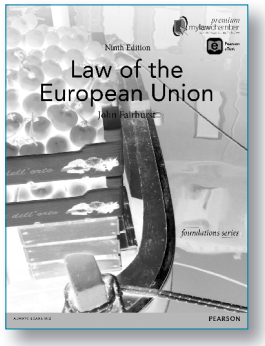

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Preface

This book is written for LLB, CPE/Graduate Diploma in Law and BA students sitting examinations 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. Extracts of law reform reports may be of especial use to such students.

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.

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. 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 25 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 growing 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.

(c) *Evidence*. The opening chapter of this book looks at the evidential and legal burdens of proof so that readers can understand the terms when they meet them in, for example, Chapter 9, which deals with the defences of insanity, diminished responsibility and automatism. The remainder of the law of evidence is for a course on 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.

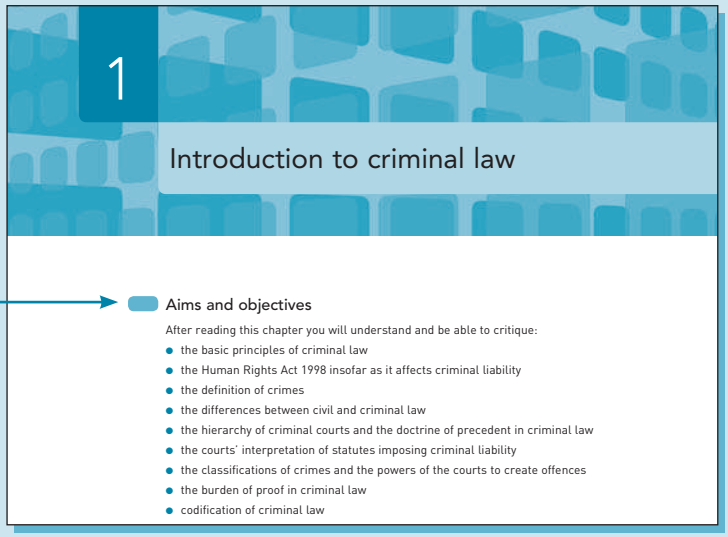
When originally submitted to the publishers, this book was written in what I considered to be a non-sexist style. However, to conform to series style, the traditional use of 'he' to refer to both sexes was reverted to at editing stage.

I would like to thank Christine Statham, the publisher, and editors and proofreaders at Pearson for their professionalism and patience, and the anonymous students who read the book with 'student eyes' on the text.

Michael Jefferson
February 2013

Guided tour

Aims and objectives at the start of each chapter help focus your learning before you begin.



1

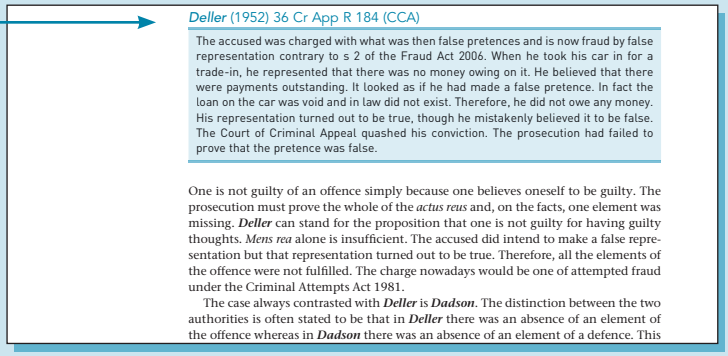
Introduction to criminal law

Aims and objectives

After reading this chapter you will understand and be able to critique:

- the basic principles of criminal law
- the Human Rights Act 1998 insofar as it affects criminal liability
- the definition of crimes
- the differences between civil and criminal law
- the hierarchy of criminal courts and the doctrine of precedent in criminal law
- the courts' interpretation of statutes imposing criminal liability
- the classifications of crimes and the powers of the courts to create offences
- the burden of proof in criminal law
- codification of criminal law

Case summaries highlight the facts and key legal principles of essential cases that you need to be aware of in your study of tort law.



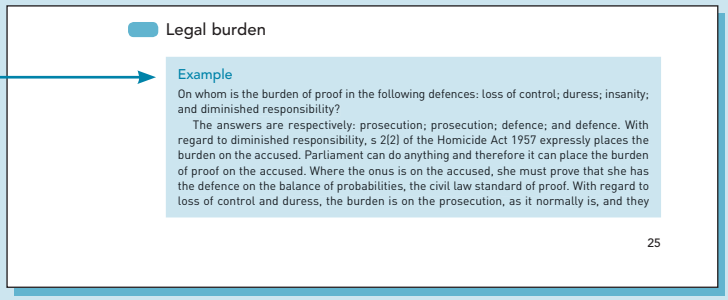
Deller (1952) 36 Cr App R 184 (CCA)

The accused was charged with what was then false pretences and is now fraud by false representation contrary to s 2 of the Fraud Act 2006. When he took his car in for a trade-in, he represented that there was no money owing on it. He believed that there were payments outstanding. It looked as if he had made a false pretence. In fact the loan on the car was void and in law did not exist. Therefore, he did not owe any money. His representation turned out to be true, though he mistakenly believed it to be false. The Court of Criminal Appeal quashed his conviction. The prosecution had failed to prove that the pretence was false.

One is not guilty of an offence simply because one believes oneself to be guilty. The prosecution must prove the whole of the *actus reus* and, on the facts, one element was missing. ***Deller*** can stand for the proposition that one is not guilty for having guilty thoughts. *Mens rea* alone is insufficient. The accused did intend to make a false representation but that representation turned out to be true. Therefore, all the elements of the offence were not fulfilled. The charge nowadays would be one of attempted fraud under the Criminal Attempts Act 1981.

The case always contrasted with ***Deller*** is ***Dadson***. The distinction between the two authorities is often stated to be that in ***Deller*** there was an absence of an element of the offence whereas in ***Dadson*** there was an absence of an element of a defence. This

Examples throughout illustrate possible case scenarios to explain how the law operates in practice and help you understand complex legal processes.



Legal burden

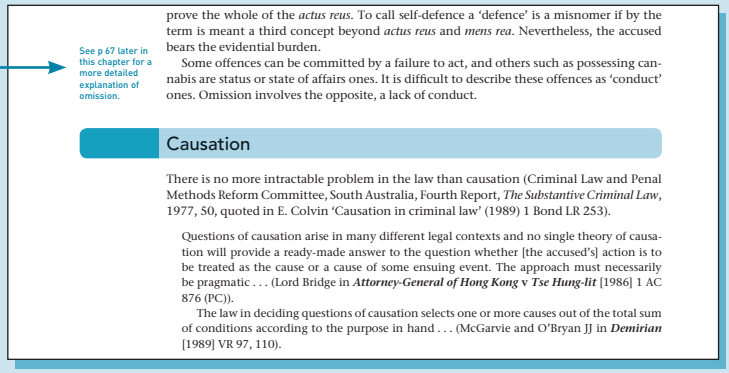
Example

On whom is the burden of proof in the following defences: loss of control; duress; insanity; and diminished responsibility?

The answers are respectively: prosecution; prosecution; defence; and defence. With regard to diminished responsibility, s 2(2) of the Homicide Act 1957 expressly places the burden on the accused. Parliament can do anything and therefore it can place the burden of proof on the accused. Where the onus is on the accused, she must prove that she has the defence on the balance of probabilities, the civil law standard of proof. With regard to loss of control and duress, the burden is on the prosecution, as it normally is, and they

25

Marginal cross-references direct you to other places in the text where the same subject is discussed, helping you to make connections and understand how the material fits together.



Figures and diagrams are used to strengthen your understanding of complex legal processes in tort law.

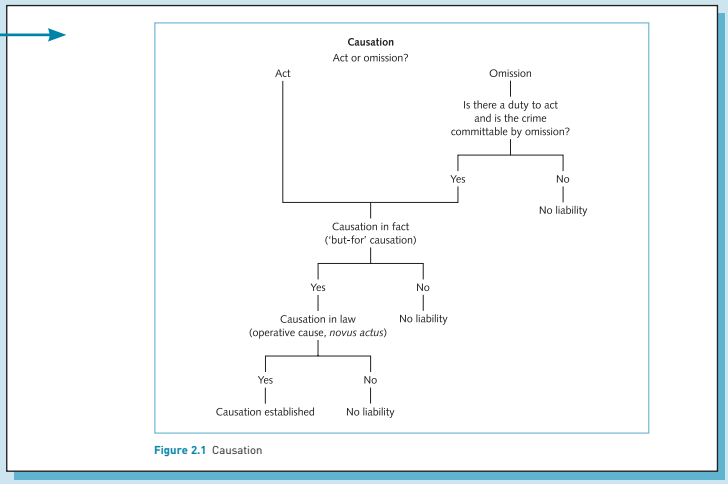
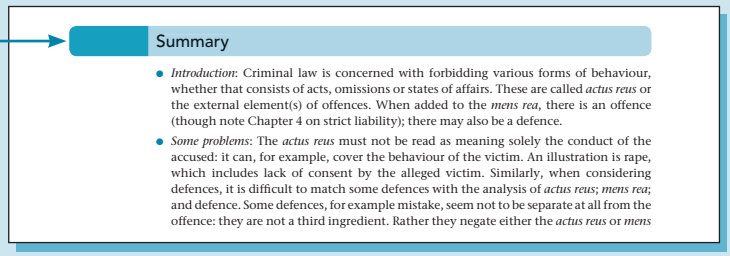
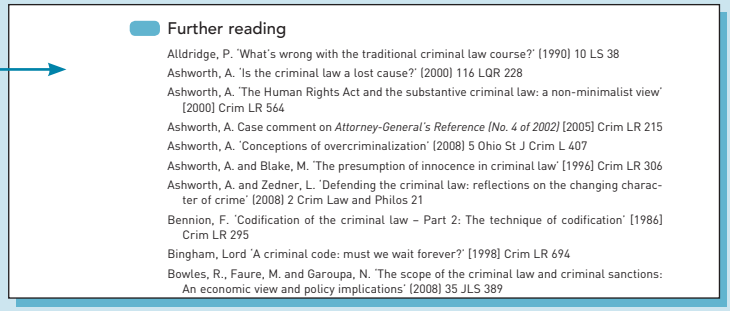


Figure 2.1 Causation

Chapter summaries located at the end of each chapter draw together the key points that you should be aware of following your reading, and provide a useful check for revision.



Suggestions for **Further reading** at the end of each chapter encourage you to delve deeper into the topic and read those articles which help you to gain higher marks in both exams and assessments.



an unlawful act. If the unlawful act is a crime, the offence is one contrary to the Criminal Law Act 1977, s 1(1), as amended. There are one or two common law conspiracy offences, the main one being conspiracy to defraud: one can be guilty of this offence even though the object is not in itself criminal.

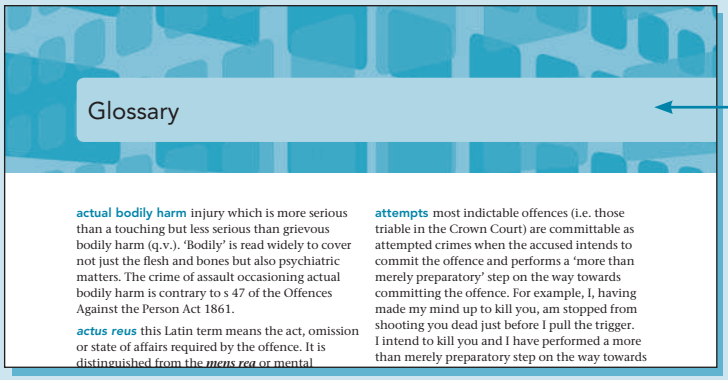
constructive manslaughter a person is guilty of this form of **manslaughter** if she kills as a result of committing a crime which is seen objectively as being dangerous. The term 'dangerous' in this context means: one which 'all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm' (per Edmund Davies LJ, ***Church***

destroys or damages property *whether belonging to another or not*, intending to destroy or damage property or being reckless as to whether property is destroyed or damaged. Criminal damage by fire should be charged as **arson**: see s 1(3) of the 1971 Act.

deception misrepresentation, fraud, telling lies. See also **fraud**.

diminished responsibility this defence found in s 2(1) of the Homicide Act 1957 as inserted by the Coroners and Justice Act 2009 has the effect of reducing murder to (voluntary) manslaughter. It comprises three elements: (i) an abnormality of mental functioning, which arises from 'a recognised medical condition'; (ii) this must substantially impair the accused's ability to do

Reference sections have a stepped coloured tab to allow you to navigate quickly to key information within the text.



Glossary

actual bodily harm injury which is more serious than a touching but less serious than grievous bodily harm (q.v.). 'Bodily' is read widely to cover not just the flesh and bones but also psychiatric matters. The crime of assault occasioning actual bodily harm is contrary to s 47 of the Offences Against the Person Act 1861.

actus reus this Latin term means the act, omission or state of affairs required by the offence. It is distinguished from the ***mens rea*** or mental

attempts most indictable offences (i.e. those triable in the Crown Court) are committable as attempted crimes when the accused intends to commit the offence and performs a 'more than merely preparatory' step on the way towards committing the offence. For example, I, having made my mind up to kill you, am stopped from shooting you dead just before I pull the trigger. I intend to kill you and I have performed a more than merely preparatory step on the way towards

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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 understand and be able to critique:

- the basic principles of criminal law
- the Human Rights Act 1998 insofar as it affects criminal liability
- the definition of crimes
- the differences between civil and criminal law
- the hierarchy of criminal courts and the doctrine of precedent in criminal law
- the courts' interpretation of statutes imposing criminal liability
- the classifications of crimes and the powers of the courts to create offences
- the burden of proof in criminal law
- codification of criminal law

The fundamental principles of criminal liability

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.

There are some five million crimes notified to the police each year. *Crime in England and Wales* is published quarterly. The latest figures, for the year ending June 2010, are 4,339,000. The British Crime Survey, which includes unreported and unrecorded crimes, estimated that there were 9.6 million offences in 2009–10, a statistic which continues to decline and which was down by nine per cent on the previous year and is half the figure it was in 1995. The British Crime Survey, 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. 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 five per cent. Violent crimes decreased by eight per cent in 2007–08 and six per cent in 2008–09, according to the British Crime Survey. 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. 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 is 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 sexual intercourse 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.) 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 60 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 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). 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.

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 was applied in ***GG***, above. 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 other Convention decisions supported the ban.

Article 7 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 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 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, which is discussed in Chapter 12, did not contravene Article 7.

Another aspect of Article 7 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. 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 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 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 is satisfied but Article 7 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). People are not punished for mere thoughts. The nearest English law has come to penalising people for thinking is one form of treason, encompassing the Queen's death, and conspiracy. Partly on account of this principle there have arisen problems about the scope of criminal liability for omissions (see Chapter 2), attempts (see Chapter 10), and involuntary acts (see automatism in Chapter 9).

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* (see Chapter 4). 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.

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. There are several exceptions discussed in Chapter 3.

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 sado-masochism 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 sado-masochist 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 (Chapter 10), 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 well-being 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.

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 actual bodily harm. Therefore, murder should be punished more severely than actual bodily harm. Perhaps linked closely with this principle is that of fair labelling; namely, that the name given to the crime should correspond to the wrong encapsulated by the offence.

Insofar as criminal law has paradigmatic crimes, an offence comprising harm and intent constitutes the paradigm. Murder consists of harm, death, coupled with the intent to kill or the intent to cause grievous bodily harm; rape in part is comprised of penetration of certain orifices (the harm) and intent to penetrate; theft in part is the harm of appropriating property belonging to another and the intent to deprive the other of that property permanently. Many offences such as criminal damage may, however, be committed either intentionally or recklessly; and many offences do not require any harm to be caused, for instance careless driving. Indeed that crime is an illustration of both the lack of harm and the lack of intent: negligence suffices.

Jurisprudential discussion of the 'harm' principle over the past 60 years is extensive. Some jurists have sought to justify offences based on morality or offensiveness. Readers are referred to the Further reading at the end of this chapter for discussion.

Causation

In result crimes it must be proved that the accused committed the *actus reus* (see Chapter 2). It is not always clear who caused an event. **Causation** in pollution and driving cases seems to be wider than the doctrine found elsewhere in criminal law. Transferred malice can be seen as exceptional: the accused intends to harm one person but harms another. There are also difficulties with omissions (Chapter 2).

Defences

These are examined in Chapters 7–9.

Proof (beyond reasonable doubt)

This is dealt with in this chapter. All the elements of the offence charged must be proved **beyond reasonable doubt**. What has to be proved varies from crime to crime, and that may change from time to time. For example, since 1994 men can be the victims of rape; before then only women could be.