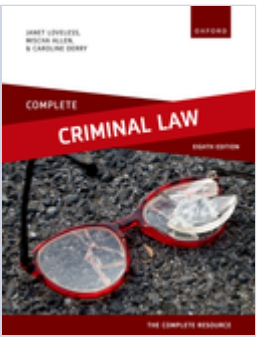

Complete Criminal Law: Text, Cases, and Materials (8th edn)
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1. Introduction to the criminal justice system

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Abstract

This chapter discusses the principles and structure of criminal law and evaluates the criminal justice system in the light of statistics and public perception and the context in which the criminal law operates. It begins with a discussion of the definition of crime and criminalisation and explains theories of criminal law, such as the harm principle, moralism, and feminism. Problem question technique and IRAC are discussed in this chapter. The burden and standard of proof in criminal proceedings and the classification of crimes and the courts are discussed. Finally, the chapter explores miscarriages of justice, punishment, and access to justice.

Keywords: criminal law, actus reus, mens rea, criminal trial, criminal proceedings, classification of crimes, criminalisation, harm, punishment, criminal justice system

Key Points

What is Crime?

This section will help you to identify some common notions of criminal law and to understand the ‘harm principle’. It explores some other theories of criminal law, including moralism, paternalism, and feminist and critical race theory critiques.

How are Crimes Investigated, Tried, and Punished?

This section will help you to understand the criminal justice system including how criminal offences are investigated, prosecuted, judged, and sentenced. It will also help you to understand fair trial rights, such as the right to legal representation.

How Much Should We Punish?

This section will introduce you to the concept of punishment and explores whether we over-criminalise and over-punish. We will look at some recent developments in legislation and justifications for punishment.

What Does the Prosecution Have to Prove?

This section will help you to understand the key principles which underpin the criminal trial—namely, that the accused is to be considered innocent until proven guilty and that guilt must be proven beyond reasonable doubt. It also explores exceptions to this rule, including the defences of insanity and diminished responsibility along with the idea of ‘reverse onus’ provisions.

How is Criminal Law Created?

The key sources of criminal law are cases and legislation. This section will introduce you to these concepts in a criminal law context and includes an explanation of the reform work of the Law Commission. In addition, this section will help you to understand the impact of the European Convention on Human Rights on criminal law and procedure.

Is There Adequate Access to Justice?

This section will help you to understand the true extent of criminal offences committed and the ways in which certain groups, such as people from ethnic minorities and women, are treated by the criminal justice system. It will also explore miscarriages of justice and legal aid.

Context

Criminal law is only one element of the criminal justice system. It helps to determine who will be investigated; whether they will be charged with an offence and, if so, which one; what happens to them in court; whether they are convicted of a crime; and how they are punished. However, there are many other factors which also affect these things, and this chapter will outline some of them to help you understand the context in which the legal rules and principles are applied. Some of these are more theoretical, for example why we criminalise some behaviour and why we punish it. Others, such as the ways in which crime is detected and investigated, procedure, and the classification of offences, are more obviously practical. Together, they will give you a framework for understanding and evaluating the law which you explore in the rest of the book. Subsequent chapters will also build upon the context and critiques introduced here.

1.1 What is crime?

You may think that you know what crime is. Your answer might be that it is something which is against the law, or behaviour which harms others, or you might give examples such as theft or murder. You might be aware that there are common law offences, defined by the courts, and statutory offences, defined by Acts of Parliament. You will learn that crime is an offence against the state, as well as individuals, and a public wrong, which is why prosecutions are not left up to the victim. Yet none of those answers fully accounts for the breadth of behaviour which is criminalised or for some of the behaviour which is not. In fact, there is no single, straightforward answer as to what crime is or as to what should be a crime. However, thinking about these questions is important: without a common understanding of the basis on which conduct should be criminalised, the criminal law might spiral out of control. Is there a single or unifying definition of crime?

p. 3 ↵ We will consider some of the possible answers here; you might want to return to them at the end of your criminal law studies to see if you have changed your views about which are most convincing.

Before we look at those answers, consider some examples of the difficulties and grey areas in deciding what is a crime:

■

Failing to rescue a stranger in danger, even when it would be safe and easy to do so, is not usually a crime in England and Wales. However, it is in many other jurisdictions throughout the world (eg many European, Latin American, and African countries).

■ Obtaining consent to sex by lying about using a condom is a crime, but by lying about having had a vasectomy is not.

■ Possession of cannabis is a criminal offence: does it cause harm to other people?

■ At various times during the Covid-19 pandemic, the UK governments told people that they should:

□ only leave home for essential reasons;

□ not socialise with people outside their household, or their 'social bubble', or only meet certain numbers of people;

□ keep two metres' distance from other people;

□ quarantine and test after international travel;

□ wash their hands frequently;

□ wear a face mask.

These rules differed between England and Wales, and sometimes between different English areas. In England, they changed at least 65 times within a year. Failing to follow some instructions, but not others, was a criminal offence (UK Parliament Joint Committee on Human Rights (2021), *The government response to covid-19: fixed penalty notices* <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/1364/136402.htm>). Over a quarter of criminal cases brought by the Crown Prosecution Service for Covid-19 offences were wrongly charged (CPS (2021), *CPS review findings for first year of coronavirus prosecutions* <https://www.cps.gov.uk/cps/news/cps-review-findings-first-year-coronavirus-prosecutions>).

The reality of the criminal law, then, can be messy and contradictory. It also does not always match our sense of what is morally right and wrong.

1.1.1 Moralism

Most of you will readily identify the major offences which are to be found in jurisdictions throughout the world such as homicide, rape, robbery, and grievous bodily harm. No one disputes that these offences transgress moral codes. What of less serious wrongs? Should the criminal law control individual morality? It is true to say that mainstream moral attitudes are generally upheld by the law. There is a view, however, that the criminal courts should retain a residual power to decide cases on the basis of the moral (rather than physical or financial) harm they cause to society.

The moralistic approach is most explicitly applied to the common law offence of outraging public decency. But the courts' role as custodians of public morality was less disguised 40 or so years ago. Conspiracy to corrupt public morals and conspiracy to outrage public decency were judicially created offences in the 1970s to criminalise and censure publications concerning prostitution (*Shaw v DPP* [1962] AC 220) and homosexuality (*Knuller v DPP* [1973] AC 435) at a time when neither activity was against the law. This

p. 4 would now be contrary to Art 7 European ↵ Convention on Human Rights (ECHR) on the grounds of retrospectivity. But the moralistic approach continues to be evident, particularly in relation to harm cases involving self-harm.

Cross-reference

Article 7 ECHR on retrospectivity is discussed in 1.5. See 1.1.3 for harm cases involving self-harm.

In fact, morality and the criminal law do not overlap exactly, and it is surely not desirable that they should. Indeed, the first question we need to ask is, whose morality would be enforced? While some behaviour is clearly immoral, there is much debate about other conduct. For example, is eating meat immoral? Is sex outside marriage immoral? Is nudity on a public beach immoral? It is a central principle of many religions that taking the name of their deities or prophets in vain is wrong, but should such blasphemy be criminal? (In England and Wales, blasphemy against Christianity was a crime until 2008 because it was seen as a wrong against the state—since the Church of England is the official church of England, though not Wales—but blasphemy against other religions was not.)

Even if we agree that behaviour is immoral, does that mean it should be criminal? For example, we might think that lying is immoral, but should small lies ('I can't come to the party because I feel unwell') be crimes? And what of behaviour which may not be immoral but does cause other problems, like parking a car on double yellow lines—should that be decriminalised?

Historically, morality was accepted as a key justification for criminalisation. As we shall explore in the next section, that view has been strongly challenged since the 1960s. In the famous Hart/Devlin debate, leading jurist Lord Devlin explained why he felt that the law should rightly enforce moral principles and nothing else: the morality of 'right-minded' people was fundamental to the cohesion of society which would disintegrate unless upheld by the law ('The Enforcement of Morals' (1961, 1965)). His opponent, legal philosopher H.L.A. Hart, argued for a different basis: the liberal harm principle.

1.1.2 The harm principle

The major offences concern behaviour which is not only immoral but also harmful to others. Homicide, rape, robbery, and grievous bodily harm all have specific victims who have suffered injuries. Therefore, one might assume that in order to justify punishment, a crime should necessarily protect us from 'harm'. This concept becomes somewhat overstretched, however, when you consider that there are over ten thousand offences in the criminal justice system, ranging from murder to selling liqueur chocolates to a child under 16 (s148 Licensing Act 2003)!

J.S. Mill provided the traditional rationale for criminalising conduct, the 'harm principle', in his treatise *On Liberty and Other Writings* (CUP, 1859):

> The only purpose for which power can rightfully be exercised over any member of a civilized community against his will, is to prevent harm to others.

Harm had to be serious and to threaten society. The more serious offences against the person clearly fulfil these two criteria. Laws which protect us from violent aggressors are clearly justified. They also help to preserve social order. They should apply to everyone, including the agencies of the state so that we are protected from both individual and state violence. This is known as the rule of law. Laws prohibiting harm are clearly justified in the interests of individual freedom and the greater good of society.

In a leading work on the harm principle, Joel Feinberg, in *The Moral Limits of the Criminal Law: Harm to Others* (OUP, 1984) considers that crimes should be confined to conduct which is harmful and which displays moral wrongfulness. At pp 33, 34, 215–16 he states:

> A harm in the appropriate sense then will be produced by morally indefensible conduct that not only sets back the victim's interest, but also violates his right … Minor or trivial harms are harms despite their minor magnitude and triviality, but below a certain threshold they are not to count as harms for ↵ the purposes of the harm principle, for legal interference with trivia is likely to cause more harm than it prevents … Where the kind of conduct in question … does create a danger to some degree, legislators employing the harm principle must use various rules of thumb as best they can …

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Not all harmful conduct should be criminalised. There need to be limits. It must be morally indefensible and 'set back' the victim's interests. Feinberg identifies various justifications for criminalising harmful conduct such as gravity, probability, and magnitude of risk.

The difficulty is that 'harm' and the 'set back' of interests can be defined so as to justify criminalising a wide range of conduct, regardless of immorality or the degree of harm to others.

Sexual offences

Historically, the criminal law has prohibited some sexual behaviour on the basis of its perceived immorality rather than the harm principle. All sexual acts between men were illegal until 1967. The law changed following a major review of prostitution and homosexuality in the 1957 Wolfenden Report, which took the view that the criminal law had no role in the enforcement of private morality. Its function was to maintain public order and decency, to protect the public from what was offensive or injurious, and to protect the vulnerable from exploitation. But given the vagueness of what qualifies as indecent, offensive, injurious, or even exploitation, it is little surprise that this area continues to generate debate.

Endorsement of the liberal views of the Committee came from legal philosopher H.L.A. Hart who argued that the criminalisation of morality led to laws based on ignorance or superstition (H.L.A. Hart, *The Listener*, 30 July 1959). The only justification for the law's intervention into morality was protection of the vulnerable from exploitation. We have seen that he debated this issue with Lord Devlin who argued that the law should enforce moral principles. In the following decades, the harm principle has become increasingly

accepted as the basis for sexual offences law. In the words of *Setting the Boundaries* (2000) which set out the approach underpinning the Sexual Offences Act 2003, 'The law should not be able to enter the bedroom to regulate sexual activity between consenting adults without very good reason.'

However, moralism has not disappeared from this area of law. Both approaches are apparent in relation to the defence of consent concerning violent offences. In the leading case of *R v Brown* [1994] 1 AC 212, the majority expressed their views of sado-masochism between gay men in moral terms: Lord Templeman stated that 'Pleasure derived from the infliction of pain is an evil thing.' Dissenting, Lord Mustill put forward the liberal argument that these were matters of *private* morality with which the state should not interfere.

Cross-reference

For a discussion of *R v Brown* and the defence of consent, see Chapter 8, 8.6.

Regulatory offences

The Hart/Devlin debate pitted liberal and moralist approaches to criminalisation against each other. However, neither approach can fully explain all criminal offences. In England and Wales, the criminal law includes many offences not classified as crimes elsewhere even though individual fault is frequently unidentifiable. Strict liability, or regulatory, offences often carrying severe penalties are examples. Here the offence consists of conduct which is criminal simply because it has been prohibited, for example driving, drug possession, or health and safety offences. While such regulatory crimes may be justified by the risks they pose to the welfare of society and interference with the liberty of others, they do not require actual harm and do not necessarily offend our moral code. It is relevant to ask whether these, or other victimless crimes, overextend the boundaries of the criminal law. Are there other ways of controlling behaviour which is detrimental to society? Enforcement tends to occur through specific regulatory agencies such as the Health and Safety Executive or the Environment Agency which rely on negotiation or enforcement procedures with prosecution as a last resort. Criminal prosecutions are rare and

p. 6 ↵ police prosecutions even more so. Therefore one has to ask whether it is essential that regulatory standards be enforced by the criminal law as opposed to civil law orders, injunctions, and awards of compensation. This is particularly so in view of J.S. Mill's requirement that harm needs to be serious before criminal sanctions should be imposed. However, the notion that regulatory offences are not 'real crimes' sometimes involves a value-laden judgement:

Example 1.1

You might assume that an employer who pays her cleaner in cash to avoid paying £50 VAT, a white-collar crime, should be able to get away with it. But few would doubt that the cleaner who steals £50 from her employer should be prosecuted in court. Do you agree? Why?

1.1.3 Paternalism

The harm principle justifies criminalisation on the basis of harm to others, but what about harm to oneself? Many types of socially acceptable conduct involve self-harm, such as boxing, tattooing, cosmetic surgery, and body piercing. Few people would consider these to be characterised by criminality for there are social or cultural reasons for permitting them. However, the law permits them only within narrow limits: some body modifications and certain sado-masochistic practices are criminalised regardless of consent. We have already considered the case of *Brown* which established that we are not allowed to consent to private sexual bodily 'harm' unless there are no injuries. *R v BM* [2018] EWCA Crim 560 confirmed that consent cannot be a defence to carrying out body modifications (eg splitting a tongue or removing an ear); this was justified as 'protection of the public'. Similarly, on the grounds of protecting us from harm in the area of private morality, the law either prohibits or regulates euthanasia, abortion, the age of consent, drug use, prostitution, and pornography to name a few examples. The boundaries of the criminal law are fiercely debated in this area.

Cross-reference

R v BM is considered in Chapter 8, 8.6.2.

The justification for the law's intrusion into private adult morality is the protection of vulnerable victims from exploitation and abuse. Here, the law performs a paternalistic role. One would naturally expect there to be legal safeguards protecting weaker members of society from coercive or degrading exploitation. But paternalism can be used to justify censoring private adult consensual conduct in the absence of exploitation or harm. The criticism is often made that the underlying reason is one of upholding the dominant morality of society at the expense of criminalising minority practices perceived as threatening or deviant. Feminists would argue that paternalism is little more than a disguise for patriarchal attitudes which infuse the law. Certainly, its consequence is that individuals are allowed by the law to make certain, but not all, moral choices for themselves.

1.1.4 Politicisation

Arguments around moralism, the harm principle, and paternalism assume some kind of principled basis for criminalisation. However, the huge growth in the number and scope of criminal offences suggests that something other than a principled approach is at work: namely, political expediency. Crime and criminal justice have long been political issues. New crimes are continually being created by Parliament to cater for perceived social problems. It is hard to see the ↵ criminal wrongdoing in some of the offences created. New laws are sometimes created not on the basis of principle or enquiry, seemingly, but by successive governments courting popularity with the mass media and pressure groups, all with reference to a vague and undefined notion of 'harm'.

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Thinking Point 1.1

Do you think the law should be concerned with what we do with our own bodies or with whom?

Should the law prohibit self-harm?

Should law play a role in the enforcement of morality?

What is the point of an unenforceable law?

Is it morally right to disobey laws which infringe our privacy?

The approaches discussed so far broadly accept the criminal justice system as it is but argue for a more principled basis in deciding what should be a crime; they differ upon what that principled basis should be. By contrast, the following theories of criminal law take a more critical view of the system and seek to demonstrate that harm is a socially, morally, and politically relative concept.

1.1.5 Critical legal theory

Many legal scholars today subject the general principles of criminal law to critical analysis. This means they look for inconsistencies and conflicts within the law. A critical and historical analysis of the criminal law is offered by A. Norrie (in *Crime, Reason and History*, Weidenfeld & Nicolson, 1993), who argues that the criminal law is the product of historical social-class contradictions. Legal principles reflect the interests of the economically powerful middle class. The law may appear class-neutral but liability is construed from so-called 'voluntary' individual actions, removed, abstractly, from surrounding social and political forces. At p 23 he says:

> In place of real individuals belonging to particular social classes, possessing the infinite differences that constitute genuine individuality, the reformers proposed an ideal individual living in an ideal world. 'Economic man' or 'juridical man' were abstractions from real people emphasising one side of human life—the ability to reason and calculate—at the expense of every social circumstance that actually brings individuals to reason and calculate in particular ways. Crime was a social problem. It arose out of particular social conditions and was brought into being in the midst of struggles between social classes over definitions of right and wrong.

1.1.6 Feminism

Feminist critique of the criminal law has focused on the fact that the cultural, historical, and moral arena in which law operates is male. The law's underlying values and assumptions are therefore male and are not gender-neutral or pluralistic. Many of the harms experienced by women have consequently been unseen by the criminal law and are not fully recognised today. It is in the realm of violence and defences that we see this most acutely.

p. 8 ↵ Feminist critiques argue that while we must learn the rules and principles of criminal law, we must also pay attention to its gendered nature. N. Naffine, *Criminal Law and the Man Problem* (Bloomsbury, 2019) at 1 states:

> One can get used to treating criminal law as a formal body of rules made up of offences, with particular component parts, all of which need careful identification, interpretation and application. Crime problems in the class room, the study and the courts, are too easily rendered as the technical application of rules to 'fact situations'. Though this is solid intellectual work, quite consuming in itself, it can prevent one from seeing the actual people involved, and their conduct: the killing, the raping, the punching. The teasing out of broader principles from this body of law, the more philosophical strand of criminal law, can also become a remarkably abstract, esoteric, cold-blooded, even a tedious exercise in fine legal scholarship.
>
> What can go missing in all this is the very character of crime and the people who do it. And the most characteristic thing about crime is its overwhelming maleness. Most violent criminals are men. Maleness is also the overwhelming characteristic of the people who have made the criminal legal world – its norms, priorities and characters. Men are both the regulators and the regulated: the main subjects and objects of criminal law. And yet men, as men, are still hardly talked about as the ruling personnel within criminal law...

This book explores some of the consequences of the 'man problem', for example in relation to the defences to homicide. Until relatively recently, many defences were based on what a 'reasonable man' might do. That language has sometimes yielded to the reasonable 'person' but, as we shall see, there is still some way to go to say that it comprehensively includes the reasonable woman.

Cross-reference

Homicide defences are considered in Chapters 4, 6, and 7.

Lady Justice Hale, then the only female judge in the Supreme Court, was appointed as the first woman president of the Supreme Court in July 2017. She has repeatedly emphasised the need for greater diversity in the judiciary (www.bbc.co.uk *<https://www.bbc.co.uk>*):

> I do not think I am alone in thinking that diversity of many kinds on the bench is important for a great many reasons, but most of all because in a democracy which values everyone equally, and not just the privileged and the powerful, it is important that their rights and responsibilities should be decided by a judiciary which is more reflective of the society as a whole, and not just a very small section of it.

While only 32 per cent of court judges in England and Wales are women, that rises to about half of all judges under the age of 50; but only 8 per cent are from a black or ethnic minority background (Ministry of Justice (2020), *Diversity of the judiciary: Legal professions, new appointments and current post-holders*, www.gov.uk/government/statistics/diversity-of-the-judiciary-2020-statistics <*https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2020-statistics*>).

1.1.7 Critical race theory

Critical race theory, like other critical approaches to law, disputes law's claims to neutrality or objectivity and looks at whose interests the criminal law is designed to serve. It recognises racism as a central part of society and identifies and challenges institutionalised racism in the criminal justice system. In doing so, it questions not only the nature of the harms from which criminal law seeks to protect us, but also whether the criminal justice system does in fact function to protect the public. For example, policing falls disproportionately on certain ethnic groups: in the year to March 2019, black people were nine times more likely than white people to be stopped and searched (Gov.uk (2020), *Stop and search*, www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest <*https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest*>).

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Critical race theory, feminism, and other critical approaches such as queer theory are paying increasing attention to the *intersections* between race, gender, sexuality, class, and so on. The ↵ term 'intersectionality' was coined by American legal feminist and critical race theorist Kimberlé Crenshaw to explain the ways that race and gender interact. A central insight of intersectionality is that these interactions are not purely additive. For example, black women's experiences are not simply racism as experienced by black men *plus* sexism as experienced by white women: the intersection of racism and sexism creates distinctive effects and consequences. According to K. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 Stanford Law Review 1241 at 1244:

> My objective [is] to illustrate that many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately.

Thus, critical legal approaches argue not only that the criminal justice system is far from neutral as to class, race, or gender. They analyse how those biases mutually reinforce each other in sometimes complex and contradictory ways.

Conclusion: harm is a relative concept

As we have seen, what makes conduct criminal lacks one single comprehensive definition. Serious offences seek to protect our fundamental rights. From time to time, other rights are restricted in the interests of public and moral protection. The criminal law is not neutral and objective in its recognition of harms: societal structures including class, gender, and race play a significant role. 'Harm' as such is used in a variety of ways and, as we shall see later in this chapter, has justified the creation of an ever-increasing number of criminal offences.

Cross-reference

Over-criminalisation is considered at 1.3.1.

Thinking Point 1.2

Do you think people should be deprived of their liberty for causing a nuisance to others or without proof of fault?

Should politics play a role in the creation of criminal offences?

1.2 How are crimes investigated, tried, and punished?

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1.2.1 Police

The police are not the only body to investigate crimes, but other organisations are responsible only for certain specific offences (eg the Health and Safety Executive investigates health and safety offences). Most serious crimes will be investigated by the police, who also have a wider duty to 'keep the peace'. They may

discover crime (eg through intelligence-gathering), investigate crime which is reported to them, or encounter crimes directly (eg when policing events). In order to perform these roles, they are given powers to behave in ways which would be unlawful for ordinary citizens. For example, they can stop people in the street or in their cars, or enter their homes, and search them; they can stop people entering, or remove them from, public streets; and they can detain them in custody for days at a time.

Police powers were codified by the Police and Criminal Evidence Act 1984. Codes of Practice issued under the Act, and revised periodically, set out their powers in respect of stop and search, seizure of evidence, arrest, detention in the police station, and so on. In the following decades, those powers have been extended: for example, the police have greater powers of search, seizure, and detention under the Terrorism Act 2000; s60 Criminal Justice and Public Order Act 1994 allows police to stop and search people in a locality without reasonable suspicion when certain preconditions are met; the Serious Organised Crime and Police Act 2005 made virtually all offences arrestable and extended the police station detention limit.

The growth in police powers is controversial. There are questions about whether all these powers are needed, how they are exercised, and how effectively their misuse is addressed. Consider the following recent examples:

■ London's police force, the Metropolitan Police, carried out 48 per cent of all stop and searches in 2018–19. Only 15 per cent of searches that year were for weapons; 60 per cent were for drugs (House of Commons Library (2020), *Police powers: stop and search*).

■ Despite decades of debate over racial disparities in stop and search, black and Asian people continue to be disproportionately searched.

■ In 2020, a Metropolitan Police officer murdered a young woman, Sarah Everard. Police were criticised for heavy-handed policing when they broke up a vigil in her memory on the basis that it was unlawful under Covid-19 regulations.

1.2.2 Crown Prosecution Service

Many offences are dealt with out of court by fixed penalty notices or formal cautions. However, if the police believe a case should go to court then they will refer it to the Crown Prosecution Service (CPS). The CPS is headed by the Director of Public Prosecutions and is independent from the police. It applies a two-stage test when deciding whether to bring a prosecution (the 'Full Code Test'):

■ The evidential test: is there a realistic prospect of conviction? This means that it is more likely than not the suspect will be found guilty in court.

■ The public interest test: is it in the public interest to bring a prosecution? Relevant factors include the seriousness of the offence, the culpability of the suspect, and the effect on the victim and community.

If the case is prosecuted in court, then the CPS will be responsible for conducting the prosecution. Its decisions throughout the course of the case, from referral by the police to the final ↵ outcome, are guided by the Code for Crown Prosecutors which sets out, and gives further guidance on applying, the principles set out above.

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1.2.3 The age of criminal responsibility

Charges will not be brought against a child under the age of criminal responsibility, which is ten. Children under the age of ten are conclusively presumed incapable of committing a criminal offence (s50 Children and Young Persons Act 1933). This presumption is known as *doli incapax.* Children above the age of ten are capable of committing an offence. Between ten and 21 there is age differentiation in relation to procedure and sentencing but not legal responsibility. For example, children under 18 are tried and sentenced in youth courts rather than the adult courts except for the most serious crimes.

Until 1998, the presumption of *doli incapax* applied up until the age of 14. Between the ages of ten and 14, the presumption that a child was incapable of crime was rebuttable by prosecution evidence that the child knew their act was seriously wrong not merely naughty. This protection for children, which had existed for centuries, was removed by s34 Crime and Disorder Act 1998, ironically as part of the Labour government's criminal justice programme on youth justice. The removal of such a historic protection for children was politically popular but repressive.

Article 3 of the UN Convention on the Rights of the Child 1989 states that in all actions concerning children, the rights of the child shall be a primary consideration. The United Nations Committee on the Rights of the Child issued three reports (1995, 2002, and 2008) criticising the UK for its lack of a child-centred and rights approach to criminal justice, particularly in relation to the low age of criminal responsibility.

Thinking Point 1.3

Do you consider that a child of ten to 14 automatically has the same understanding, knowledge, ability to reason, or awareness of wrongfulness as an adult?

At what age do you consider a child/young person should be exposed to the full consequences of criminal activity?

Are criminal sanctions the answer to youth offending?

One consequence of the limited *doli incapax* presumption is that although a child under the age of ten is incapable of committing a crime, a person above that age who procures or assists a child to commit a crime is criminally liable not as a secondary party but as a principal offender through an innocent agent (child).

1.2.4 Classification of crimes

All criminal cases with adult defendants begin in the magistrates' courts, where initial decisions on matters such as whether the defendant can be released on bail are made. However, some will be transferred to the Crown Court for trial and sentencing. For this purpose, there are three types of crime: summary offences which stay in the magistrates' courts; either-way offences which can be dealt with in either the magistrates' or Crown Court; and indictable-only offences which must be transferred to the Crown Court.

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Summary offences

These are relatively minor crimes, for instance:

- assault;
- battery;
- taking a conveyance [vehicle] without consent.

The magistrates' court has limited sentencing powers (six months' imprisonment for each offence, with a maximum of 12 months for more than one).

Either-way offences

These may be more or less serious depending on the nature and seriousness of the particular facts, for example:

- assault which is racially or religiously aggravated;
- theft, fraud;
- criminal damage;
- assault occasioning actual bodily harm, wounding/infliction of grievous bodily harm.

If a defendant is charged with an either-way offence, the magistrates' court holds a mode of trial hearing in which the magistrates decide whether to accept or reject jurisdiction depending on the gravity of the case and the sufficiency of their sentencing powers. If they accept jurisdiction, the defendant has the right to elect Crown Court trial before judge and jury; only a small percentage of defendants do so. If the magistrates decline jurisdiction because their sentencing powers are insufficient or the case is complex, the defendant will be sent to the Crown Court for trial and has no right to elect to be tried by the magistrates. Magistrates are also able to send a case to the Crown Court after conviction if they feel that their sentencing powers are insufficient (ss2 and 3 Powers of Criminal Courts (Sentencing) Act 2000).

Indictable-only offences

These are the most serious offences in the criminal justice system, for example:

- murder, manslaughter;

- rape;
- robbery;
- wounding with intent to cause grievous bodily harm.

They will be tried by judge and jury in the Crown Court. An 'indictment' will be drawn up by the Crown Court, similar to a charge in the magistrates' court, listing the offences for which the defendant will be tried. The Crown Court can sentence up to the statutory maximum for each offence (ie life imprisonment for the most serious crimes).

1.2.5 Elements of crimes

Whether a crime is tried in the magistrates' or Crown Court, the prosecution must prove that the accused person has committed the offence. Each offence has its own definition but they share common elements. It is useful to begin by understanding these elements and how they fit together.

p. 13 ↵ Criminal offences (nearly) all consist of a conduct element (the wrongful behaviour) and a mental element (a blameworthy state of mind). This is often expressed through the Latin maxim '*actus non facit reum nisi mens sit rea*' which means that no one can be found guilty for a crime unless their mind is also guilty. If the defendant did the wrongful behaviour, with a blameworthy state of mind, they will be guilty of the offence unless they have a defence.

The criminal law expresses this by using the Latin terms from the maxim. We say that the defendant has committed the *actus reus* of the offence, with the required *mens rea*, and did not have a *defence*. If any of these elements is missing then they will be acquitted; that is, found not guilty. This is illustrated in Diagram 1.1.

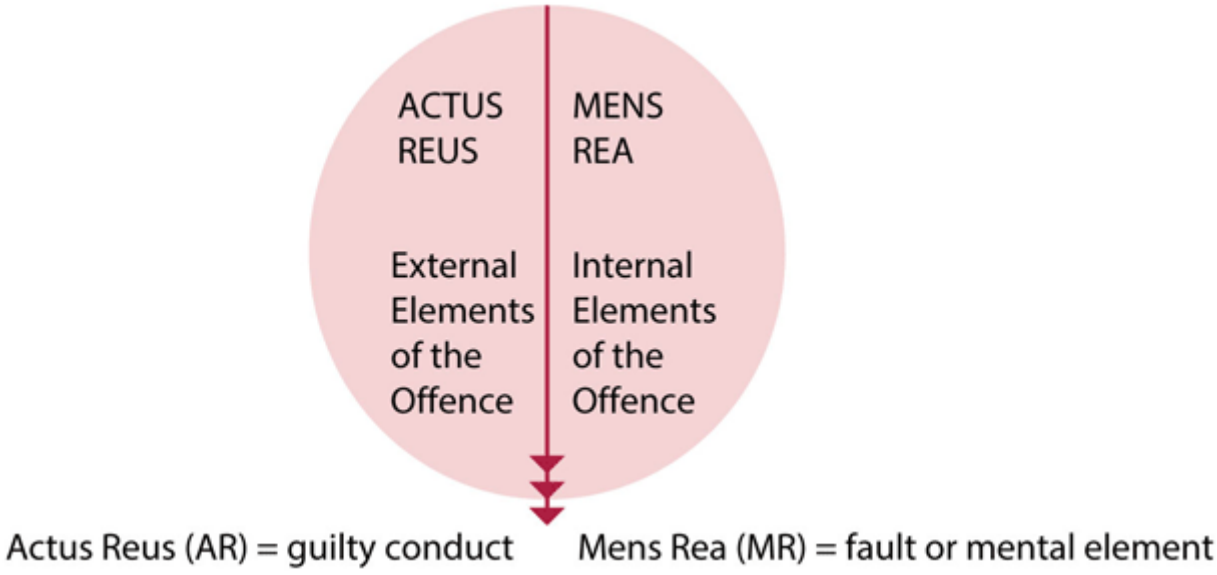

Diagram 1.1 The elements of a crime

Actus reus

Actus reus is a Latin term used to refer to the wrongful act. It is the conduct element of a crime: the behaviour or circumstances which must be established. For example, the actus reus of murder and manslaughter is killing a person; the actus reus of theft is appropriating property belonging to another.

Cross-reference

Actus reus is explored fully in Chapter 2.

Mens rea

Mens rea describes the mental element of the offence: the blameworthy state of mind. Given that most crimes, other than those of strict or absolute liability, require both actus reus and mens rea, it follows that you cannot be guilty of a crime simply for having a guilty mind. There is no such thing as thought crime. It is only when guilty thoughts are put into practice that the actus reus of a crime is committed. For example, the mens rea of murder is the intention to kill or cause really serious injury; the mens rea of manslaughter includes recklessness or gross negligence. The mens rea of theft is dishonesty and an intention to permanently deprive the victim of their property.

Cross-reference

Mens rea is explored fully in Chapter 3.

Defences

If somebody has the actus reus and mens rea of an offence, they will be guilty unless they have a defence which reduces or removes their criminal liability. For example, murder can be reduced to manslaughter if the defendant has a defence of diminished responsibility; if they acted in self-defence then they will be found not guilty.

Cross-reference

Defences are explored in Chapters 4, 6, and 7.

p. 14

Exceptions

Some crimes, such as attempts and conspiracy, do not require the full actus reus to have been committed: these are called inchoate offences. Others, known as crimes of strict liability, do not require mens rea for all elements of the offence (and a few do not require any mens rea at all: these are crimes of absolute liability).

> *Cross-reference*
>
> Inchoate offences are fully considered in Chapter 12.

> *Cross-reference*
>
> Strict liability is considered in Chapter 3, 3.4.

Just as criminal liability needs to be analysed at trial, you will need to analyse liability when you write answers to problem-style questions in coursework and examinations. At the end of this chapter, you will find an explanation of how to deal with problem-style examination questions, using a method known as IRAC. This provides you with a logical process to answer criminal law problem questions. There are also worked examples of this method throughout the book and in the online resources.

1.2.6 The courts

The magistrates' court

All cases involving adult defendants initially begin in the magistrates' court and well over 90 per cent will be dealt with there from beginning to end. If the defendant pleads not guilty, their trial will be before a panel of lay magistrates (volunteers who are not qualified lawyers) or a single district judge. If they plead guilty or are found guilty at trial, the magistrates or district judge will decide their sentence. Appeal will be to the Crown Court against conviction/sentence or to the High Court (Queen's Bench Division) by way of 'case stated' on a point of law. Appeal can be made to the Supreme Court on a point of law of public importance with leave.

Defendants under 18 are dealt with by the youth courts, a special type of magistrates' courts, for all but the most serious crimes. Exceptionally, they may be sent to the Crown Court to be tried for offences such as murder.

The Crown Court

If a case is transferred to the Crown Court, trial will be before a judge and jury. The judge will be a High Court Judge, Circuit Judge, or part-time Recorder or Assistant Recorder. Juries consist of 12 people selected randomly from the electoral roll. The role of the judge is to determine questions of law and to direct the jury on the law, evidence, and facts. Juries decide questions of fact, guilt, or innocence; their verdicts must be unanimous or, if this is not possible, by a majority of at least 9:3. If the defendant pleads or is found guilty, the judge alone decides sentence. Appeal against conviction/sentence will be to the Court of Appeal (Criminal Division). Only the defendant can appeal the verdict, although the prosecution can appeal against the judge's rulings. Either prosecution or defence can appeal against sentence.

The Director of Public Prosecutions may apply to the Court of Appeal for a second retrial in serious crimes where there is new and compelling evidence of guilt and it is in the interests of justice (s79 Criminal Justice Act 2003).

See Diagram 1.2 for an overview.

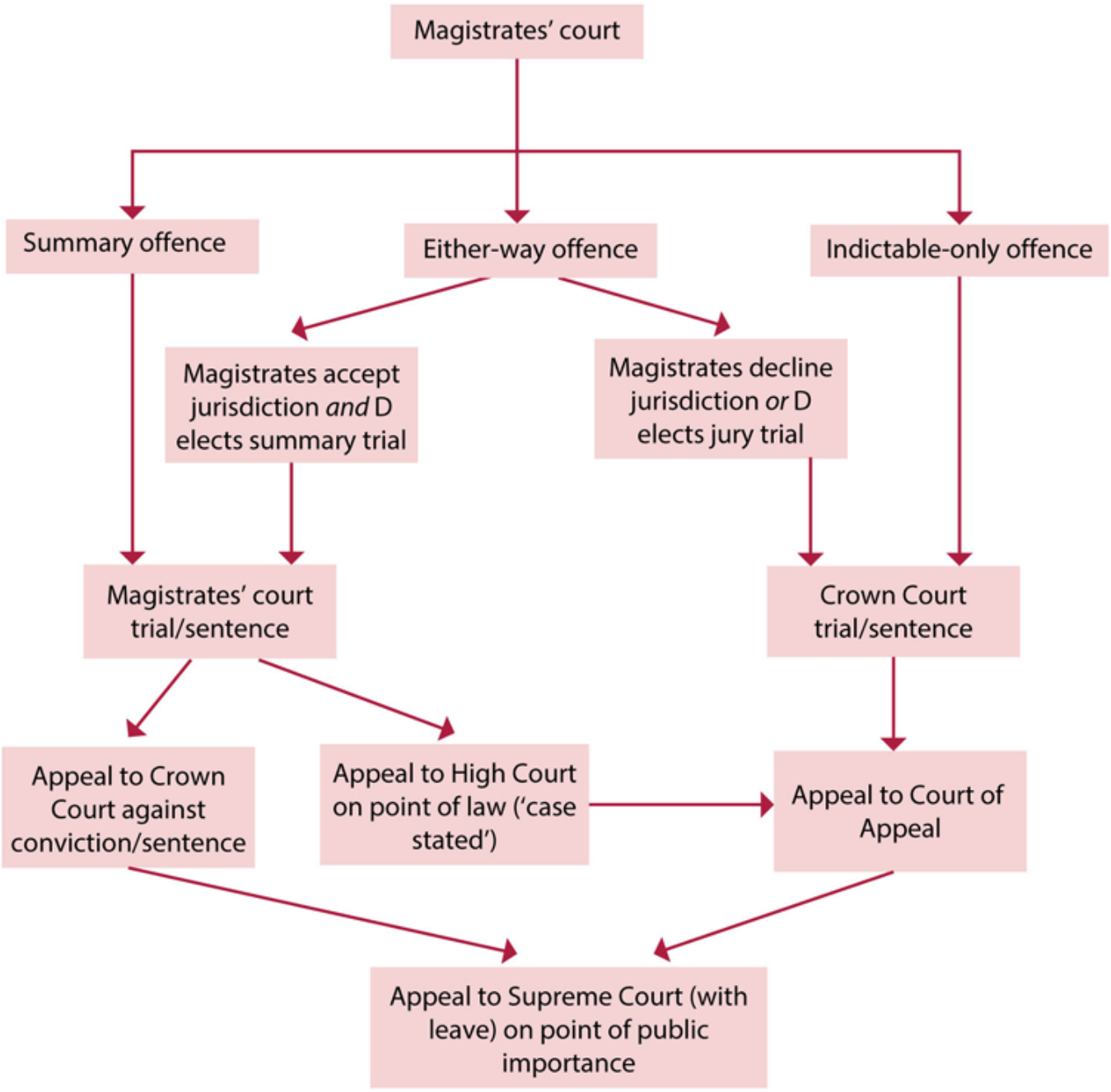

Diagram 1.2 The criminal court system

1.2.7 Procedure and fair trial rights

In both the police station and at court, the accused can be represented by a defence lawyer who will be paid for by the Legal Aid scheme. Pending trial, the accused will either be released on bail or remanded in custody. There will be pre-trial hearings concerning the management of the case. ↵ The prosecution is obliged to disclose its evidence as well as any evidence which would be useful to the defence. The defence is obliged to disclose the nature and basis of any defence (Criminal Procedure and Investigations Act 1996).

p. 15

If the defendant pleads not guilty, there will be a trial. All criminal trials will be opened by the prosecution which explains the offence it is seeking to prove and introduces the evidence upon which it wishes to rely; that is, witnesses (who may include the victim and expert witnesses) and documentary or real evidence such as the murder weapon. It examines its witnesses in chief (ie asks questions which prompt them to give an account in their own words). The witnesses are then cross-examined by the defence. The point is to test the evidence and challenge the reliability or credibility of each witness. The defence then presents its case, the prosecution cross-examining. Each side may re-examine if necessary. Closing speeches follow, the defence always addressing the court last. In the magistrates' court, the verdict is reached by the magistrates/district judge. In the Crown Court, the judge gives guidance on the evidence and law, but it is the jury which convicts or acquits. If the defendant is found guilty, or pleaded guilty, the magistrates or judge pass sentence either immediately or after probation/medical reports.

p. 16 See Diagram 1.3 for an overview. ↵

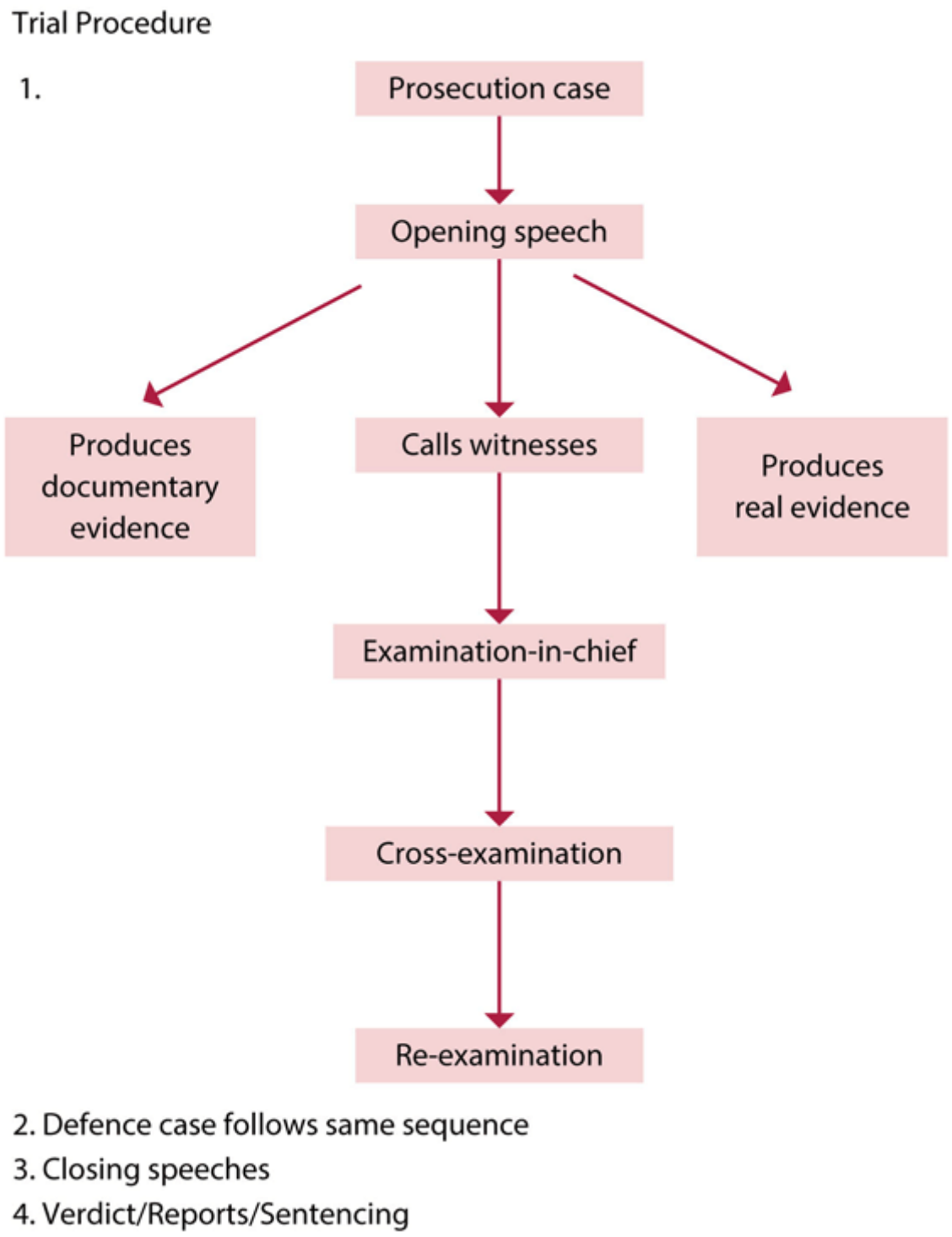

Diagram 1.3 Trial procedure

The accused has certain 'fair trial rights'. Besides the right to representation, the accused has the right to be informed of the case against them, to be presumed innocent until found guilty, to be tried and convicted on evidence lawfully obtained, to challenge that evidence, to be judged by an impartial court, not to be unfairly punished, and to appeal against both conviction and sentence.

1.2.8 Sentencing

The court will follow sentencing guidelines issued by the Sentencing Council. These set out a step-by-step process for determining the appropriate penalty. A starting point is established by assessing the defendant's culpability and the harm caused. The sentence can then be increased or decreased by any aggravating or mitigating factors (which make the offending more or less serious). If the defendant pleaded guilty at an early stage of the proceedings, their sentence can be 'discounted' (reduced) by up to one-third.

The available sentences will range from immediate imprisonment to a suspended sentence (where the defendant does not go to prison if they commit no further offences), a community sentence (eg doing unpaid work), a fine, an absolute/conditional discharge, or binding over to keep the peace. Young people may be subject to care/supervision orders. In addition, courts can make additional orders including payment of prosecution costs, disqualification (eg from driving or being a company director), compensation, sexual prevention orders, and Criminal Behaviour Orders.

p. 17

1.3 How much should we punish?

1.3.1 Over-criminalisation

In 1.1, we saw that the harm principle can be widely interpreted and that the creation of criminal offences is often justified for political reasons. The creation of these offences is sometimes a response to real societal concerns about crime. However, it can also be argued that too many new criminal offences are being created without justification and that this represents an infringement of civil liberties. This problem can be referred to as 'over-criminalisation'. The criminalisation of squatting (s144 Legal Aid, Sentencing and Punishment of Offenders Act 2012) is an example of this—there are effective alternative civil solutions to the problem of squatting. Another example is knife crime. The Offensive Weapons Act 2019 creates specific offences; however, there are a number of other statutory provisions dealing with offensive weapons which deal with this adequately. Recently, the government passed legislation to deal with breaches of new rules designed to minimise the spread of Covid-19. This will be discussed further later in the section. The harm principle implies that people should not be punished by the criminal law unnecessarily. Therefore, the criminal law should be a last resort. Read the following by A. Ashworth, 'Is the Criminal Law a Lost Cause?' [2000] LQR 225:

> The number of offences in English criminal law continues to grow year by year.
>
> Politicians, pressure groups, journalists and others often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern. At the same time, criminal offences are tacked on to diverse statutes by various government departments, and then enacted (or, often, re-enacted) by Parliament without demur. There is little sense that the decision to introduce a new offence should only be made after certain conditions have been satisfied, little sense that making conduct criminal is a step of considerable social significance. It is this unprincipled and chaotic construction of the criminal law that prompts the question whether it is a lost cause. From the point of view of governments it is clearly not a lost cause: it is a multi-purpose tool, often creating the favourable impression that certain misconduct has been taken seriously and dealt with appropriately. But from any principled viewpoint there are important issues—of how the criminal law ought to be shaped, of what its social significance should be, of when it should be used and when not—which are simply not being addressed in the majority of instances.

One reason for the proliferation of offences is the fact that society is becoming far more complex, therefore offences are needed to control new forms of activity. People are finding new ways to commit crimes (particularly internet and cyber-crime) and international treaty obligations compel our government to impose new offences upon us.

p. 18 ↵ An alternative view is presented in the following article—J. Chalmers, 'Frenzied Law Making: Overcriminalization by Numbers' (2014) 67 Current Legal Problems 483–502. The author suggests that the view that we over-criminalise is overstated.

> ... the modern critique of overcriminalisation has centred on three apparent problems: overuse of the criminal justice system, inaccessibility of the criminal law, and absurdity. Some of these criticisms, however, are overstated. First of all, the critique rests on shaky foundations. The extent—if any—to which the size of the criminal statute book has increased in recent years is unclear. Regulatory criminal law—indeed, an extensive volume of such law—is a longstanding feature of the criminal law and not a new phenomenon. Even if the volume of criminal law has increased, the link between such criminalisation and the work of the criminal justice system is a weak and attenuated one given the extent to which many criminal offences will never be prosecuted. Two caveats are important, however. First, the threat of the criminal sanction remains: this can have a chilling effect on the behaviour of individuals, and the lack of enforcement of any criminal offence does not mean that there are not real social and economic costs associated with its presence on the books. Secondly, the observations here are not intended to make any claim about whether the criminal justice system is in fact being overused, but simply to suggest that if it is this is likely to be for reasons other than the creation of substantial numbers of new offences.

The two points of view here suggest that although many criminal offences are created each year, these may not be totally unnecessary. This does not prevent concern over emerging legislation. Read the following extract from a submission by a group of criminal law academics to Parliament. It describes concerns with the expansion of legislation passed to deal with the Covid-19 pandemic, including the Coronavirus Act 2020 which gave the police powers to issue fixed penalty notices for breaches of rules.

Cross-reference

Key difficulties with the Covid-19 legislation were set out in 1.1.

They argue that the legislation criminalised conduct unnecessarily and deprived coronavirus restrictions of democratic legitimacy (M. Collard et al (2021), 'Written Evidence', https://committees.parliament.uk/writtenevidence/25592/pdf/ *<https://committees.parliament.uk/writtenevidence/25592/pdf/>*):

> It is a principle of criminalisation that new offences ought to be considered and justified in public fora, principally Parliament. This is to ensure that criminalisation has democratic legitimacy, offences have public notice (ideally acceptance), and that criminalisation does not undermine public trust in the legal framework for assuring social and public order. In making extensive use of the made affirmative procedure, the government has bypassed ex ante scrutiny of new criminal offences. As Adam Wagner observes, 'only twice—with the November lockdown and the principle of establishing the "three tiers"—has parliament voted before new rules came into effect, and in both these cases it was only one day before'. The practice of criminalisation by statutory instrument raises important matters of principle and practice. Criminalisation without public justification may corrode public trust, with two important implications. First, without trust in the purpose behind criminalisation, compliance may become simply a matter of avoiding punishment; this may lead to systematic violation of the law when the risk of detection is low. Second, criminalisation contributes to social and public order beyond the deterrence of harmful conduct, by reassuring the public that their interests are being protected. If the message behind criminalisation is unclear or insufficiently justified, this may erode public trust both in criminal offences and in the broader framework of social and public order. In respect of coronavirus criminalisation, the worry is that lack of trust in the enforcement of regulations may compromise public trust in the overall handling of the pandemic. This may hinder broader efforts in relation to the pandemic, such as confidence in the vaccination programme, particularly by those populations who are disproportionally affected by criminalisation in this area, such as minority ethnic groups. In summary, the government's extensive use of criminalisation through the made affirmative procedure has deprived coronavirus restrictions of democratic legitimacy and may have reduced public understanding, acceptance, and trust in the legal response to Covid-19.

p. 19 ↵ Alternatively, new legislation can be seen as an appropriate response to an urgent issue. You may think that emergency legislation is justified in a crisis.

Thinking Point 1.4

Do you agree that there are too many crimes? Does a crisis justify the creation of more?

In the next section, we explore perceptions of crime.

1.3.2 Fear of crime vs reality

Despite our fears of becoming victims of crime, the evidence is that crime has been falling since the mid-1990s. Diagram 1.4 illustrates the actual likelihood of becoming a victim. Yet, fear of crime is pervasive. After all, we are made aware in the media, almost on a daily basis, of the many ways that human beings inflict horrific crimes upon one another. It has been argued that our fear of crime, which is disproportionate to the evidence, has been manipulated and 'dramatised' by the media and politicians. Fear of crime has increased due to economic, social, global, and cultural transformations leading to personal insecurity and a weakening of support for the poor and the welfare state. This has in turn fed the politicisation and increased severity of criminal justice policy. The result is 'over-criminalisation' and 'penal populism': political enactment of popular crime control measures.

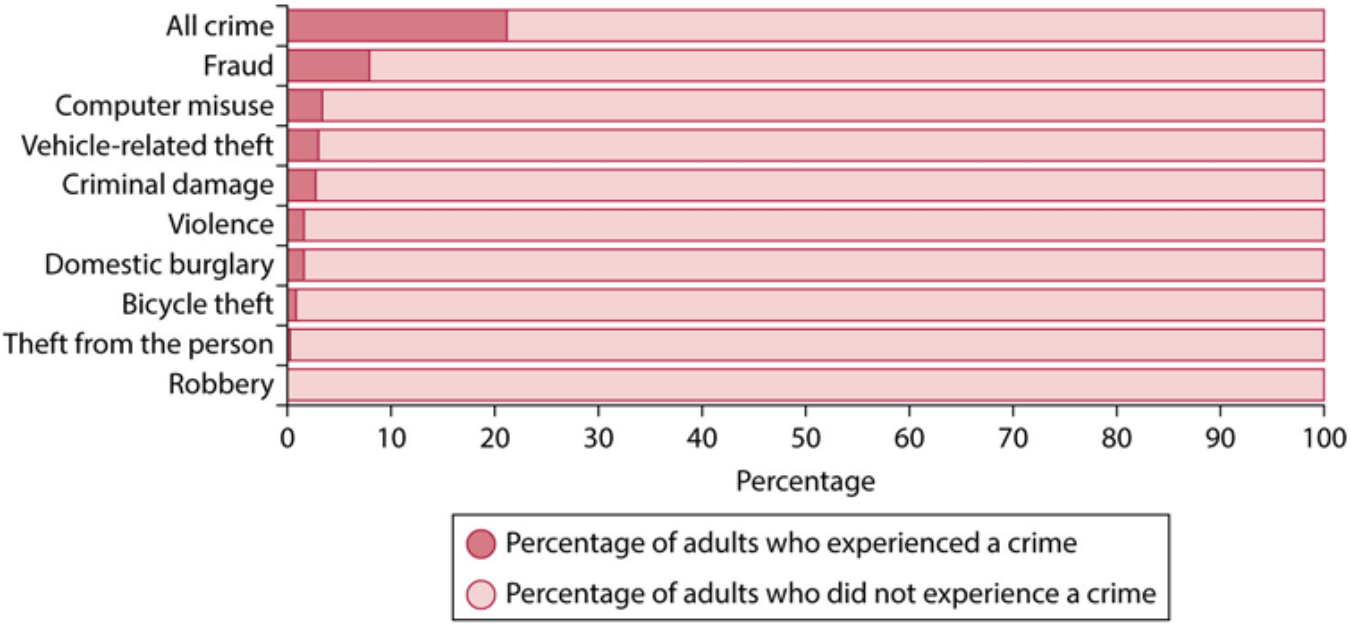

Diagram 1.4 The likelihood of being a victim of crime

Source: Office for National Statics—Telephoned-operated Crime Survey for England and Wales (TCSEW)

Read this by D. Garland in *The Culture of Control* (OUP, 2001), p 10:

> Since the 1970s fear of crime has come to have salience. What was once regarded as a localized, situational anxiety, affecting the worst-off individuals and neighbourhoods, has come to be regarded as a major social problem and a characteristic of contemporary culture. Fear of crime has come to be regarded as a problem in itself, quite distinct from actual crime and victimization and distinctive policies have been developed that aim to reduce fear levels rather than reduce crime. ... The emergence of fear ↵ of crime as a prominent cultural theme is confirmed by public opinion research that finds that there is a settled assumption on the part of a large majority of the public in the US and the UK that crime rates are getting worse, whatever the actual patterns, and that there is little public confidence in the ability of the criminal justice system to do anything about this.

p. 20

The fear of crime and its relationship with the reality of crimes committed is measured and analysed by the Crime Survey for England and Wales. This was the first large-scale survey to attempt to measure fear of crime in the UK. It included questions asking if respondents felt safe out alone at night and whether they worried about becoming the victim of various crimes. The first report suggested that fear of crime was inflated by media accounts of crime and argued that those who were least at risk tended to worry most. Public concern remains high about cyber-crime (which is increasing), about terrorism, and about specific forms of violence such as knife crimes.

In the next section, we will consider punishment. It might help us to evaluate the need for criminalisation if we ask why we punish.

1.3.3 Should we be punishing more?

Justifications for punishment

The reasons for punishment are based on the following philosophies, all of which may be described as utilitarian. This means that punishment should only be permitted in order to prevent greater harm to society.

Deterrence—this principle justifies harsher sentences on the basis that people will be discouraged from committing crimes due to the punishment which may be imposed. Sentencing for drug offences is an example. This, of course, assumes that people always decide to offend as a matter of freedom of choice. Deterrence can be *individual* (a harsh sentence to deter that defendant from repeating their behaviour) or *general* (a harsh sentence to deter other people from behaving in the same way).

Incapacitation—to remove people from society where they pose a risk of reoffending or danger.

Rehabilitation—to return people back to society in a reformed state of mind. Prisons provide prison education and training schemes and therapeutic and medical treatment programmes; community sentences may aim to address offending behaviour. More recently, there has been a more punitive attitude to punishment.

Retribution—'just deserts'; that is, that criminals deserve punishment but that the punishment should be no greater than is proportional to the harm. The less serious the crime, the lower the punishment. Account is also to be taken of mitigating factors.

Populist views have, since the mid-1990s, dominated criminal justice policy so as to produce greater punitiveness in crime policy. That era marked a high point in the crime rate and politicians began to express slogans such as 'Prison works', 'Tough on crime and tough on the causes of crime', and 'No more excuses' (originally used by Tony Blair, Prime Minister, 1993). More recently, governments have announced tough crime policies, such as longer prison sentences.

Read this by M. Tonry, *Confronting Crime* (Willan Publishing, 2003), pp 2, 3:

> ... Parliament enacted tougher sentencing laws, Home Secretaries put those tougher laws into effect, magistrates and judges sent more people to prison and for longer times, the Parole Board became more risk averse and rates of recall and revocation increased, and the probation service shifted away from its traditional supervision and social service ethos to a surveillant and risk-management ethos. In other words, every component of the English criminal justice system became tougher ... England's record and rising prison population is a remarkable phenomenon because it occurred during a period of generally declining crime rates ... we know that crime rates have been falling in every Western country since the mid-1990's, irrespective of whether imprisonment rates have risen ... or held steady.

p. 21 ↵ Section 142(1) Criminal Justice Act 2003 sets out the purposes of sentencing, in no particular order of priority: public protection, punishment, reparation, prevention, and crime reduction. Sentencers have to attempt to balance competing justifications for punishment in place of focusing solely on the seriousness of the individual offence. The creation of mandatory sentences (for Class A drug offences, repeat burglary, and serious sexual offences) and extended sentences for 'dangerous offenders' have all contributed to a dramatic rise in imprisonment. The result is that England and Wales has one of the highest rates of imprisonment in Western Europe: 83,618 as of September 2021. It also has the highest number of life-sentenced prisoners in Europe, more than Germany, Italy, the Russian Federation, and Turkey (M.F. Aebi, M.M. Tiago, and C. Burkhardt (2017), Council of Europe Annual Penal Statistics, www.coe.int *<https://www.coe.int>*). The overwhelming majority of people in prison are working class; around 25 per cent have been in care, almost half have no educational qualifications, and more than 70 per cent have at least two mental disorders (www.prisonreformtrust.org.uk *<https://www.prisonreformtrust.org.uk>*).

Carol Steiker, 'Criminalization and the Criminal Process' in *The Boundaries of the Criminal Law* (OUP, 2010), pp 29 and 23 stated that we have reached a situation of 'mass incarceration' which impacts most heavily on the poor and minority communities, but there is little recognition of the family and social problems created by mass imprisonment. The Ministry of Justice itself announced in July 2013 that 'while the number of offenders coming to court is falling, alongside falling crime rates, more people who do commit crime are receiving prison sentences ... Statistics published today also show a sharp rise in the use of longer sentences ...' (*Reducing Reoffending and Improving Rehabilitation* (25 July 2013)).

In recent years, some policies have aimed to divert less serious offenders away from prison by requiring payment of compensation or imposing suspended sentences.

How sentencing works

Sentencing was briefly considered in 1.2.8. When a judge passes sentence, they must keep in mind the principles of sentencing described in the previous section. Indeed, a judge is required to do this by s142 Criminal Justice Act 1988. In addition, the judge must take account of the maximum sentence for the offence, set out in the relevant legislation for the crime, and use sentencing guidelines. A sentence is decided according to two principles—harm and culpability. The harm caused by the offence determines the seriousness of the offence committed. The culpability generally means the blameworthiness of the offender. Finally, the offender's criminal record and any personal aggravating and/or mitigating factors must be considered. If the offender pleads guilty, this generally results in a lesser sentence. A detailed consideration of sentencing practice is outside the scope of this book. If you would like to explore it further, you might like to visit www.sentencingcouncil.org.uk/sentencing-and-the-council/how-sentencing-works/ *<https://www.sentencingcouncil.org.uk/sentencing-and-the-council/how-sentencing-works/>*.

It is sometimes argued that sentences are not harsh enough. This may be due to a misunderstanding of the way that offenders are sentenced and the various factors which are to be taken into account. Crime is generally falling and often media reports do not cover all the facts of an individual case.

Cross-reference

Types of sentence were considered in 1.2.8.

1.4 What does the prosecution have to prove?

p. 22

Key Case

DPP v Woolmington [1935] AC 462—the burden of proof is on the prosecution.

We have seen that if a defendant pleads not guilty to an offence, the prosecutor (usually the CPS) must prove that they have committed the crime.

Cross-reference

Court procedure was outlined in 1.2.7.

There are fundamental principles which underly this process. The first is the presumption of innocence; the second is the burden and standard of criminal proof. These will be explored in detail below.

1.4.1 The presumption of innocence and the burden of proof

The following case enshrines a fundamental principle of the common law: that it is for the prosecution to prove the guilt of the accused, not for the accused to prove their innocence. This means that the prosecution has the burden of proving all the facts upon which it relies to establish the guilt of the accused.

Woolmington v DPP [1935] AC 462, House of Lords

D's wife left him after a few months of marriage and went to live with her mother. He wanted her to return. One morning, he called at her mother's house and shot his wife dead. He maintained that it was an accident. His account of the facts was that he had taken an old gun belonging to his employer to show it to his wife to demonstrate his threat to commit suicide if she did not return to him. When she refused to return, he threatened to shoot himself and went to show her the gun but it accidentally went off. A note was found in his pocket in which he had written that he wanted to kill both his wife and himself. He claimed to have written it after the shooting. D was convicted and appealed to the Court of Appeal, which dismissed the appeal. He then appealed to the House of Lords which allowed the appeal.

The trial judge, Swift J, had directed the jury as follows:

> Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified.
>
> ...
>
> The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident.

Lord Sankey LC in the House of Lords:

> If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty, and that, unless he discharged that onus, the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the ↵ judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence …
>
> *Throughout the web of the English criminal law one golden thread is always to be seen—that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. …* [Emphasis added.]

p. 23

Note 1.1

1. The standard of proof on the prosecution is to prove guilt 'beyond all reasonable doubt'. In other words, the magistrates or jury must be sure of the defendant's guilt.
2. The defendant does not have to prove innocence and is entitled to a presumption of innocence until proven guilty. In other words, the defendant has the benefit of the doubt.

Flowing from the presumption of innocence are several other important constitutional protections for the defendant: the right to silence and the privilege against self-incrimination. These are now protected by Art 6(2) ECHR which embodies fundamental fair trial rights.

Cross-reference

ECHR rights are outlined at 1.5.3.

The right to silence implies that the accused does not need to assist the state to prove its case. It has symbolic significance in confirming the presumption of innocence and placing the legal burden of proof on the prosecution. It defines the balance between the state and the individual and is a vital protection for protecting the innocent, especially suspects who are vulnerable because of age, mental disorder, or learning disability.

It was qualified by s34 Criminal Justice and Public Order Act 1994. An arrested person is not only told that they have the right to remain silent and that anything they do say may be used in evidence against them. They are also advised that if they later rely upon a fact which it would have been reasonable for them to mention, an adverse inference may arise (ie it may be inferred that they did not mention the defence during interview because they invented it later). An adverse inference, of course, potentially undermines the right of silence.

The privilege against self-incrimination confers the right not to be compelled to speak in a potentially incriminating way, whether in police detention or in court.

Further rights guaranteed by the ECHR are dealt with later in this chapter.

p. 24

1.4.2 Exceptions to the prosecution bearing the burden of proof

Insanity and diminished responsibility

There are exceptions to the general rule that the prosecution bears the burden of proof beyond all reasonable doubt. As we saw earlier, the prosecution must always prove the actus reus and mens rea of the offence; but some defences must be proved by the accused—this is referred to as a 'reverse burden'. Where a burden of proof is placed on the accused, they are only required to prove facts on a balance of probabilities (ie that they are more likely than not to be true), not beyond reasonable doubt.

The defences of insanity and diminished responsibility impose legal burdens of proof on the accused. They apply where the mental capacity of the accused at the time of the crime was in doubt. This means that anyone wishing to rely on either defence must provide sufficient medical evidence to convince a court that it was *more likely than not* that, at the time of the offence, they were acting under a mental disability. As we shall see, insanity can be a defence to any crime whereas diminished responsibility applies only to murder. If successful, it results in a conviction of manslaughter. Various justifications for this reversal of the burden are given by courts from time to time, not the least of which is that an accused who wishes to rely on such a defence is the one best placed to prove it. This is a questionable argument.

A legal burden of proof on the accused is more demanding than the evidential burden which must be satisfied where the accused relies on most other defences. An evidential burden means that the accused must have sufficient evidence of their defence to raise the issue, but need not prove it. For example, in a case of self-defence the defendant must produce some evidence that any assault they committed was in response to an imminent attack. This may be by their own testimony, eyewitnesses, CCTV film footage, or by some other means.

A legal burden of proof upon the accused risks contravening the presumption of innocence and Art 6 ECHR (the right to a fair trial). The risk is that they could be convicted where they are unable to prove a defence despite there being a reasonable doubt as to guilt.

Statutory offences

The majority of offences in the criminal justice system are statutory. While the general rule is that an accused does not have to prove their innocence, many statutory offences also contain a defence which either expressly or implicitly reverses the burden of proof. This means, again, that Parliament expects an accused to prove their innocence on a balance of probabilities.

An example of such an offence is found in s57(1) Terrorism Act 2000:

> A person commits an offence if he possesses an article in circumstances which give rise to reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

Section 57(2) provides a defence if it can be *proved* that possession of the article was not for a purpose connected with terrorism.

Reverse burden offences have caused the courts some problems when the statute does not make it clear which party bears the burden of proving the defence in question and these provisions have sometimes fallen foul of the principles and freedoms protected in the ECHR. A detailed consideration of reverse burdens is an evidential matter and is outside the scope of this book.

This section has considered the various practical ways in which a case is brought to court, and the steps which the prosecution must go through in order to prove, beyond reasonable doubt, ↵ that the defendant has committed the offence. We also looked at the classification of offences and the trial process. One of the details discussed earlier was the definition of criminal offences, which can be found in statutory or common law definitions of criminal law. The next section explores these origins in further detail.

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1.5 How is criminal law created?

1.5.1 Statute and common law

Some of our criminal law derives from common law. For example, murder and manslaughter are common law offences for which there are no statutory definitions. These crimes may well be defined in language that is now regarded as historic and imprecise.

As part of an ongoing process of law reform, however, a good deal of criminal law is now defined by statute. Property and sexual offences, for example, are mostly codified by the Theft Acts 1968 and 1978, the Fraud Act 2006, and the Sexual Offences Act 2003. Statutory reform tends to be piecemeal and there may be several statutes concerning any particular area of law.

1.5.2 The Draft Criminal Code 1989

This was drawn up by a team of criminal academics. It is not in force—that is, it is *not* part of the current law—but is referred to by the courts for guidance from time to time. There is no comprehensive criminal code in England and Wales. The Law Commission is involved in long-term law reform and periodically produces reports and draft bills to supplement the Draft Criminal Code. We will examine some of them throughout this book.

1.5.3 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The ECHR was signed in 1950, ratified by the UK in 1951, and came into force in 1953. It was inspired by the principles declared by the United Nations Universal Declaration of Human Rights in 1948. It is a document of the Council of Europe (not the European Union, which is a separate organisation). It does not include social or economic rights. The rights guaranteed represent minimum human rights which should be protected by the law of each member state which has ratified the ECHR. These rights can be enforced in criminal proceedings in two ways:

1. They can be the basis of a claim to the European Court of Human Rights at Strasbourg (ECtHR) after all domestic remedies have been exhausted. The ECtHR at Strasbourg has no power to annul UK law or overrule UK court decisions. It will find the UK government to be in violation of a protected right wherever there is ambiguity between domestic law and the ECHR. The UK is bound by the judgment and must execute it (which may mean introducing or amending legislation, for example).

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2. The Human Rights Act 1998 provides that most Convention rights can be directly enforced in the domestic courts. This does not prevent anyone from applying directly to Strasbourg after attempting domestic appeals. Section 6 provides that all public authorities, including courts and tribunals, must, if possible, act in a way which is compatible with the Convention. This includes central and local government, police, immigration officers, and prisons. Section 7 provides that individuals who believe their rights have been infringed by a public authority can assert their rights

as a defence in criminal proceedings, in an appeal or judicial review, or, if no other legal avenue is open, by bringing civil proceedings for damages. No court has the power to strike down incompatible legislation but it can make a Declaration of Incompatibility which means that the task of amending the law is left to Parliament. Section 3 provides that, so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with Convention rights. This means that the courts must be guided by the rules of statutory interpretation. In addition, they may introduce or remove certain words or meanings so as to achieve compatibility (reading 'in' or 'out'). Alternatively, reading 'down' involves confining the meaning of words in the legislation so as to make it compatible with Convention rights.

The following guaranteed rights and freedoms are set out in Section 1 of the Convention and have relevance to the criminal law:

Article 2 The right to life and the prohibition of arbitrary deprivation of life.

Article 3 The prohibition of torture, inhuman, and/or degrading treatment or punishment.

Article 4 The prohibition of slavery and forced labour.

Article 5 The right to liberty and security of the person including the right of an arrested person to be informed promptly of the reasons for arrest and of any charges against them.

Article 6 The right to a fair trial by an impartial court: the right to be presumed innocent of a criminal charge until proven guilty and the right to be defended by a lawyer and to have free legal assistance when 'the interests of justice so require'.

Article 7 The right to certainty and the prohibition of retrospective application of the criminal law.

Article 8 The right to respect for private and family life.

Article 9 Freedom of thought, conscience, and religion.

Article 10 Freedom of expression, including the right to receive and impart information and ideas without interference.

Article 11 Freedom of assembly and association, including the right to form and join trade unions.

Article 12 The right to marry and found a family.

Article 13 The right to an effective remedy in domestic law for arguable violations of the Convention.

Article 14 The right to non-discrimination under any Convention right.

Some rights are qualified. Under Article 5, for example, a person's liberty may be denied by lawful arrest. Article 8 may be qualified if necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the prevention of crime and disorder, the protection of health or morals, or the protection of rights and freedoms of others.

The ECtHR has found the UK to be in breach of the ECHR in relation to the following areas:

■ Article 2: ineffective investigation of deaths in Northern Ireland at the hands of security forces: *Collette and Michael Hemsworth v UK*, Appl. no. 5855/09, Judgment of 16 July 2013; *McCaughey and Others v UK* [2013] 7 WLUK 493.

■ Article 3: life sentences with 'whole life' orders: *Vintner v UK* [2013] 7 WLUK 244.

p. 27 ■ Article 5: the indefinite detention of terrorist suspects based 'solely or to a decisive degree on closed material' amounts to a breach of procedural fairness as guaranteed by the ECHR: *A v UK* (2009) 49 EHRR 29, [2009] All ER (D) 203 (ECHR) [220].

■ Article 8: retention by police of fingerprints, cell samples, DNA, and photographs in the absence of criminal conviction: *S v UK* [2009] 48 EHRR 50; retention for life of a caution on a criminal record: *MM v UK* [2012] 11 WLUK 360.

■ Article 14: differential age of consent for homosexuals (18) and heterosexuals (16): *Sutherland v UK* [1998] EHRLR 117. Equality in the age of consent was provided for by the Sexual Offences (Amendment) Act 2000.

■ Article 3 of Protocol 1: there have been several cases on the blanket ban on prisoners' right to vote.

The ECHR has had a much greater impact on procedural rights than on substantive law. However, as we progress through this book we shall meet various areas which can be challenged from a human rights perspective. For example, many fundamental criminal concepts of mens rea such as intention and dishonesty are far from certain. The same applies to many common law offences such as common law conspiracy, offences by omission, and gross negligence manslaughter. Throughout this book we will touch upon these issues as we consider the rules and principles underlying the criminal law of England and Wales.

As the Council of Europe is separate from the European Union, the UK's membership and the application of the ECHR are not affected by Brexit.

1.6 Is there adequate access to justice?

1.6.1 Access to justice

Access to justice depends upon the ability to get legal advice and upon access to courts. Defendants are entitled to free legal advice in the police station. It will be given by a duty solicitor or accredited police station representative; these are defence lawyers (typically from local solicitors' firms) who act on a rota basis and are independent of the police. They may give the advice in person or, for less serious offences, by telephone; in either case, the consultation should be private. However, the police are able to delay access to legal advice in certain circumstances, for example where other suspects might be alerted or evidence destroyed or in terrorism cases.

Defendants' access to free legal advice in court depends upon whether they are eligible for legal aid. This is decided by a two-part test: the interests of justice test and the means test. The first part considers whether legal representation is needed in the interests of justice, for instance because the defendant might lose their liberty or livelihood or suffer serious damage to their reputation, or because the case involves a substantial question of law or requires expert cross-examination of witnesses. (Cases being tried in the Crown Court will pass this test but many magistrates' court cases will not.) The second part, the means test, assesses the defendant's finances to decide whether they are eligible for free legal aid, must pay a contribution towards the cost, or are not eligible.

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Access to justice also requires access to courts. Delays cause difficulties and distress to many defendants (and witnesses and others), but particularly to those remanded in custody. However, court closures and lack of funding mean that a backlog of cases had built up even before the Covid-19 pandemic. The restrictions caused by the pandemic worsened the problem: by the end of July 2020 (four months after 'lockdown' measures began), the number of outstanding cases had risen by 27 per cent to 568,678 (Law Society (2020), *Law Under Lockdown: the impact of covid-19 measures on access to justice and vulnerable people*).

1.6.2 Miscarriages of justice

Three significant landmarks in criminal justice history were the Philips Royal Commission on Criminal Procedure (1981), the Runciman Royal Commission on Criminal Justice (1993), and the MacPherson Inquiry (1999).

The first two investigated the causes of several serious miscarriages of justice: the wrongful conviction of three youths for the murder of Maxwell Confait and the cases of the Guildford Four, the Maguire Seven, and the Birmingham Six—all Irish nationals who had been convicted for bombings and murders on mainland Britain of which they were innocent. Some were incarcerated for many years. These miscarriages were the result of systemic failings: inadequate defence representation in police stations, undue pressure to confess, police brutality, withholding of vital forensic evidence, fabricated confessions, the lack of an independent review of the decision to prosecute, and a slow and cumbersome appeals procedure. The Philips Royal Commission's recommendations led to the Police and Criminal Evidence Act 1984, while the Runciman Royal Commission resulted in the Criminal Cases Review Commission (1995) which investigates and refers unsafe convictions to the Court of Appeal.

The MacPherson Inquiry concerned the failure of the police to prosecute the killers of murdered black teenager Stephen Lawrence. It also addressed violent racism in society and police inability to address it. The outcome was a finding of 'institutional racism' against the police and a number of recommendations to improve policing and criminal justice.

There have been well over 40 new Acts of Parliament on criminal justice since 1997, many of which erode defendant's rights. For example, the Criminal Justice Act 2003 permitted greater admissibility of previous convictions and hearsay evidence in criminal trials, placed new disclosure duties on defendants, and

abolished the rule against double jeopardy in serious crimes (ie you can now be prosecuted more than once for the same offence). All reforms were aimed at convicting the guilty, protecting victims, management, and efficiency.

1.6.3 Victims

The Criminal Justice Act 2003 was swiftly followed by several other Acts and proposals all in the spirit of rebalancing the criminal justice system in favour of victims and the public. Victims are now apparently at the heart of criminal justice policy. Yet, victims' experiences in the criminal justice system remain problematic for many: lack of information, delays, and in some cases such as sexual offences, the disclosure of highly personal information continues to make the process traumatic.

Cross-reference

Victims of sexual offences are considered in Chapter 9, 9.2.6.

Meanwhile, tipping the balance of justice too far away from defendants in favour of victims and the fight against crime threatens to undermine defendants' rights and increases the risk of wrongful convictions. It may also be argued that victims' rights are not met by convicting ↵ the wrong person. Victims' rights, which were always under-valued in practical terms, were given new impetus under the Domestic Violence, Crime and Victims Act 2004 and the Criminal Justice Act 2003. There is now a Code of Practice for prosecutors to follow in keeping victims informed of proceedings and a Commissioner for Victims.

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Thinking Point 1.5

Do you think that criminals have too many rights in the criminal justice system?

What sort of a criminal justice system would you prefer:

1. One where the guilty are only convicted by evidence beyond any doubt at all?
2. One where the guilty will be convicted by evidence beyond all reasonable doubt?

Option 1 rules out the possibility of wrongly convicting the innocent but it would be virtually impossible to convict anyone. Option 2 includes the possibility that the guilty might be wrongfully acquitted. Is that better than wrongfully convicting the innocent?

1.6.4 Unequal effects of crime

Criminal justice statistics are published regularly by the Home Office, the Office for National Statistics (ONS), and the Ministry of Justice. The Crime Survey for England and Wales (CSEW) measures crime by asking for people's experiences. It shows that crime levels, stable in recent years, may have dropped significantly in the year ending March 2020, although crime recorded by the police increased by 3 per cent (at least partly accounted for by improved recording).

Naturally, statistics must be regarded with a certain amount of scepticism. Those for the following year, to March 2021, were significantly affected by the Covid-19 pandemic: as people stayed at home much more, crime fell by 19 per cent overall; but fraud and computer misuse offences rose by 36 per cent (ONS, *Crime in England and Wales: year ending March 2021* <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2021>). CSEW results may also have been affected by the use of telephone instead of face-to-face survey interviews in 2020 and 2021. Even in more normal years, only a small proportion of crime is reported to or recorded by the police. It is estimated that the CSEW fails to account for nearly half of violent crime against women, for example (*The Guardian*, 10 June 2015, p 2). The fact remains that fewer than 8 per cent of recorded crimes are prosecuted (*The Guardian*, 15 August 2019).

See Diagram 1.5 for a breakdown of some of the latest figures.

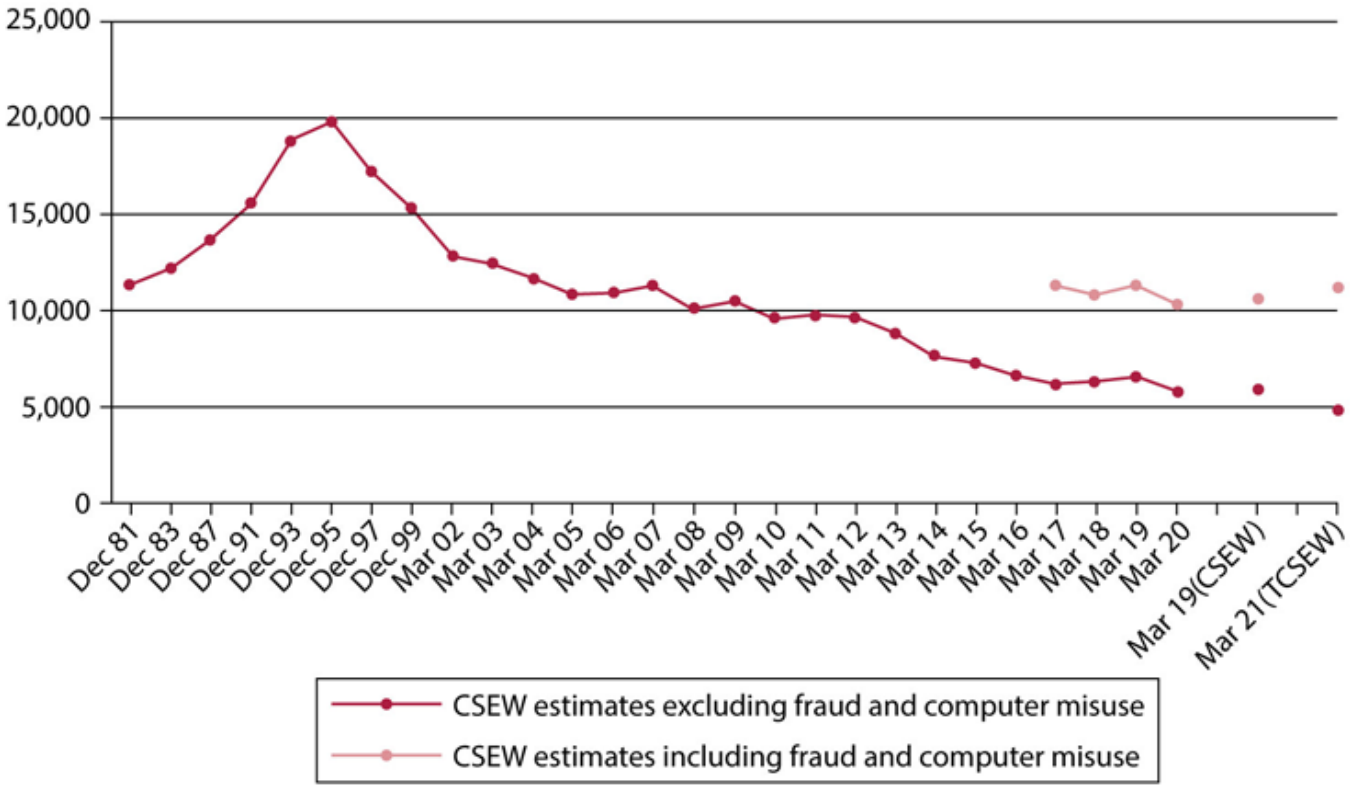

Diagram 1.5 Crime estimates from the Crime Survey for England and Wales, year ending December 1981 to March 2020, and Telephone Crime Survey for England and Wales estimates for May 2020 to March 2021.

Notes:

1. Data from the TCSEW are published as Experimental Statistics.

2. Data on this chart refer to different time periods: 1981 to 1999 refer to crimes experienced in the calendar year; and from year ending March 2002 onwards the estimates relate to crimes experienced in the 12 months before interview, based on interviews carried out in that financial year.

3. TCSEW data presented here for 2021 are not comparable with CSEW estimates. CSEW data relate to adults aged 16 years and over or to households. TCSEW data relate to adults aged 18 years and over or to households. See Appendix Table A3 for comparable data.

4. New questions on fraud and computer misuse were incorporated into the CSEW from October 2015. The questions were asked of half the survey sample from October 2015 until September 2017 and have been asked of a full sample from October 2017.

Source: Office for National Statistics—Crime Survey for England and Wales (CSEW) and the Telephone-operated Crime Survey for England and Wales (TCSEW)

Contemporary crime is in addition characterised by globalisation, cross-border organisation, and the use of the internet, particularly in respect of transnational fraud and drug and human trafficking. This creates new problems in detection, investigation, and evidence gathering. Other internet crimes which are escalating, such as cyber-hate offences, incitement to racist, xenophobic or anti-Semitic hatred or violence pose new challenges for prosecutors.

Women in the criminal justice system

Women are more likely to be victims of intimate violence (ie domestic violence from a partner or family member) than men and they are far more likely to be murdered by someone they know rather than by a stranger. As defendants, they commit far less crime than men but those for which they are most commonly sentenced are theft and handling stolen goods (34 per cent), ↵ followed by fraud, violence, and drug offences. A significant fact is that a higher proportion of women than men sentenced to custody have no previous convictions. Women are more likely to receive punishments other than custody, such as fines or community sentences, but there is evidence of harsher sentences than for men in drug offending (J. Loveless, 'Women, Sentencing and the Drug Offences Definitive Guideline' [2013] Crim LR 594). In 2020, there were an average of 3,362 women in prison in the UK out of a total of 80,366 prisoners. This number has fallen slowly but steadily for over a decade (Ministry of Justice, *Annual Prison Population: 2021*). By contrast, the average population of women in prison increased dramatically by 173 per cent between 1992 and 2002. It is noteworthy that 20 per cent of women in prison were in care as children and around half have experienced violent relationships. Around 13 per cent are foreign nationals and 80 per cent have a diagnosable mental health problem. There is little research on the familial consequences of imprisoning women. (All statistics from F. Gerry and L. Harris (2016), *Women in prison: is the justice system fit for purpose?*, www.halsburyslawexchange.co.uk <https://www.halsburyslawexchange.co.uk>; Ministry of Justice (2011), *Women in the Criminal Justice System*, www.gov.uk <https://www.gov.uk>; Corston Report (2007), *Review of Women with Particular Vulnerabilities in the Criminal Justice System*.)

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Ethnic minorities

Recent statistics show significant differences in the experiences of ethnic minority people throughout the criminal justice system. The summary here highlights some of the key areas of concern; note that the full statistics indicate significant and sometimes complex differences between different ethnic groups.

The risk of being a victim of personal crime is higher for black and Asian adults than for white adults, and for those from a mixed background than for any other group. For Asian people, stop and search occurs three times more, and for black people nine times more than for white people (Gov.uk (2020), *Stop and search* <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest>). In 2017, the Lammy Review, commissioned in 2016 by Prime Minister David Cameron and led by David Lammy MP, identified a range of issues. Arrest rates are three times higher for black men, and twice as high for black women, as for white people. Ethnic minority groups are overrepresented in the prison system at 25 per cent—and 40 per cent in youth custody—while forming 14 per cent of the general population. The review concluded that ethnic minority defendants were disproportionately likely to receive prison sentences for drug offences, even when other factors were taken into account; and many ethnic minority defendants lacked trust in the court and prison systems (www.gov.uk/government/publications/lammy-review-final-report <https://www.gov.uk/government/publications/lammy-review-final-report>).

1.7 Conclusion

The criminal justice system is changing. Criminologists identify specific features of contemporary crime and criminal justice that would have been unrecognisable in the past: a culture of managerialism in the criminal justice agencies, the return of retributivism in punishment, the political elevation of victims' rights at the expense of those of the defendant, an escalation of fear of crime within society, the reversal of creating alternatives to prison, commercialisation of criminal justice services, payment for probation services by results, and a loss of confidence by the public in the system. We have examined the social, moral, and political influences on the decision to criminalise, and the reality of crime in England and Wales today. Throughout this book, we will touch upon these issues as we consider the rules and principles underlying the criminal law of England and Wales.

p. 31 ↵ This chapter has also introduced some key structures and principles of the criminal justice system. These included: the role of the police, the CPS, and the courts; the sources of criminal law; and some fundamental principles such as the presumption of innocence and the burden of proof. You will find it helpful to keep these in mind as you consider the criminal law in more detail throughout the following chapters.

Summary

- The reasons for criminalising conduct.
- The burden and standard of proof in criminal proceedings.
- The exceptions to the prosecution bearing the burden of proof.

- The classification of crimes and the criminal court structure.
- The sources of the criminal law.
- The four theories of punishment.
- Crime in England and Wales today.

How to answer examination questions

At the end of each chapter of this book is an examination-style question for you to attempt before looking at the answer outline on the online resources: www.oup.com/he/loveless8e *<https://www.oup.com/he/loveless7e>*.

Problem Questions

Earlier in this chapter, we considered what the prosecution has to prove in order to convict. The actus reus and the mens rea of a criminal offence must be proven. In order to do this, the common law and/or statutory definition of the offence must be worked through logically. In answering examination or coursework questions, in which you are asked to give legal advice, you will need to do the same. A useful tool to bear in mind when structuring your answer to problem questions is the following—known as the IRAC method. You then need to break this down into the actus reus (AR) and mens rea (MR) of each offence, and the elements of any defence which applies. The facts of a problem question will rarely fall squarely into a particular decided case or legal rule so you will need to consider a range of cases or rules to answer the question adequately and highlight these at the outset for further discussion. You will probably find it helpful to deal with each element—AR, MR, defences—in turn, using the IRAC structure to discuss each one.

- **I: Issue**—identify the relevant issue(s)
- **R: Rule**—explain the rule (s)
- **A: Application**—apply the law to the facts
- **C: Conclusion—**conclude and give advice

Identify the relevant issues

This means that you will need to work out in general terms what area(s) of criminal law the question is about. You will need to identify which criminal offences arise in the question in relation to each defendant. The issue is whether the defendant is guilty of that offence, or part of that offence. Quite often, it will be important to break down the offence into parts, dealing with each separately.

Explain the rule(s)

Having identified the issues, you will need to set out the legal definitions or main elements of all relevant offences/ defences. These come from the common law or statute which defines the offence. ↵ No prosecution lawyer would p. 32 go into court without first knowing what offence they had to prove; nor would a defence lawyer be much good without knowing the elements of their client's defence. Defences should generally be explained once the main offence has been explained. Sometimes the rules are uncertain because there are conflicting cases. You can include academic articles here or other discussion to enhance your answer or to support a particular point of view. Do not concentrate on the facts of cases, but rather the legal point which a case makes (the *ratio decidendi*).

Apply the law to the facts

Once you have fully explained the law relating to each issue, you should then apply the law to the facts of the question. This involves identifying the key parts of the authority (the ratio of the case or the statutory provision) and explaining why it is relevant, bearing in mind the facts of the problem. It is best to deal with each defendant separately. You will need to bear in mind that there is not one single right ↵ answer. The questions are not p. 33 designed to enable you to say, 'Of course, D is guilty because this case says so!' They are never that clear-cut. You will need to examine the law and then argue for or against guilt or innocence in the light of your preceding discussion. A clear and authoritative explanation of the law and a coherent argument/application to the facts is far more important than thinking that there is one correct answer.

Conclusion

This is where you consolidate your arguments to advise whether the defendant is likely to be guilty or not guilty. Do any defences make a difference to this likely outcome? You will be expected to examine the law from the point of view of both prosecution and defence. It should be possible for you to construct an argument for both by referring to different cases or to different arguments within some of the judgments.

Essay questions

Examinations tend to include a mix of essay and problem questions. An essay question will ask you to examine/ analyse/compare and contrast a particular area(s) of law in depth rather than to advise on a particular set of facts. Here, you would be required to engage in a far more detailed examination of a narrower area of law than with a problem question. Usually the area of law will be controversial or at least the subject of debate. Again, you should support your answers with cases and statutory definitions. Greater reference to academic articles is expected. You may need to compare different points of view and you will need to offer your own critical analysis. Ensure that you understand what the instruction words mean. Evaluate/compare/explain and discuss mean different things and should be treated as such.

Further Reading

Crime in England and Wales (for statistics and research): www.ons.gov.uk <https://www.ons.gov.uk>.

A. Ashworth, 'A Decade of Human Rights in Criminal Justice' [2014] Crim LR 325

Considers the impact of the ECHR and Human Rights Act 1988 on criminal law.

F. Bennion, 'Mens Rea and Defendants Below the Age of Discretion' [2009] Crim LR 757

Argues that the doctrine of *doli incapax* has and should not have been abolished by the House of Lords.

J. Chalmers, ''Frenzied Law Making'': Overcriminalization by Numbers' (2014) 67 Current Legal Problems 483–502

Argues that the criticism that there are too many offences being created is overstated as these are largely regulatory and many offences are not prosecuted.

F. Gerry and L. Harris, *Women in prison: is the justice system fit for purpose?* (2016) www.halsburyslawexchange.co.uk <https://www.halsburyslawexchange.co.uk>

Brings together the most recent research and makes recommendations for improvement.

D. Husak, 'The Criminal Law as Last Resort' (2004) 24 OJLS 207

Takes a critical look at increasing criminalisation and asks if it should be a last resort.

G. Lamond, 'What Is a Crime?' (2007) 27 OJLS 609

Considers what distinguishes criminal liability from civil liability and considers crimes as public wrongs.

C.C. Murphy, 'The Principle of Legality in Criminal Law under the European Convention on Human Rights' (2010) 2 EHRLR 192

Discusses case law on Art 7 ECHR (the right to certainty in criminal law and the prohibition of retrospective application).

D. Ormerod, 'Coronavirus and Emergency Powers' [2020] Criminal LR 473–7, 475

Discusses emergency powers introduced by legislation in response to the coronavirus pandemic.

Websites

parliament.uk <https://www.parliament.uk>—bills and Hansard

lawcom.gov.uk <https://www.lawcom.gov.uk>—Law Commission publications

police.uk <https://www.police.uk>—news and information on crime and policing

gov.uk/police-powers-of-arrest-your-rights <https://www.gov.uk/police-powers-of-arrest-your-rights>—general information regarding police powers

ons.gov.uk <https://www.ons.gov.uk>—criminal justice statistics

gov.uk/government/organisations/ministry-of-justice <https://www.gov.uk/government/organisations/ministry-of-justice>—website of the Ministry of Justice with gateways to legislation, reports, research, statistics, and data

sentencingcouncil.org.uk <https://www.sentencingcouncil.org.uk>—for sentencing guidelines

cps.gov.uk <https://www.cps.gov.uk>—Code for Crown Prosecutors and legal guidance on prosecutions

Online Resources

This chapter is accompanied by:

- Multiple-choice questions <https://iws.oupsupport.com/ebook/access/content/loveless8e-student-resources/loveless8e-chapter-1-multiple-choice-questions?options=showName>
- Guidance on answering the thinking points <https://iws.oupsupport.com/ebook/access/content/loveless8e-student-resources/loveless8e-chapter-1-answer-guidance-for-thinking-points?options=showName>