

# Cyberlaw Governance and Human Rights

Criminal Law for  
Cyber-sleuths

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```
obj.1]: "translated_name": null  
obj.1]: "protected": false  
obj.1]: "verified": false  
obj.1]: "followers_count": 0  
obj.1]: "friends_count": 0  
obj.1]: "listed_count": 0  
obj.1]: "favourites_count": 0  
obj.1]: "statuses_count": 0  
obj.1]: "created_at": "2013-04-15T13:56:44Z"  
obj.1]: "utc_offset": null  
obj.1]: "time_zone": null  
obj.1]: "geo_enabled": false  
obj.1]: "lang": null
```

# Module Delivery

## Weekly 1.5 Hour Lectures

- ▶ Foundational
- ▶ Informational

## Bi-weekly 2 Hour Seminars

- ▶ Preparation
- ▶ Interactive

# Assessment

## Artefact 1: Essay

1000 Words (+/- 10%).

Choice of 4 options.

Level 5: Must answer 'critically'.

Final deadline: Wednesday 22nd  
November 2023 (12 Noon GMT)

## Artefact 2: Report

2000 Words (+/- 10%).

Write as though assisting a non-  
governmental organisation.

Give advice on choice of 4  
topics.

Must be fully academically  
informed.

Final Deadline: Wednesday 17<sup>th</sup>  
January 2024 (12 Noon GMT)

Artefact 1 is worth 40% and Artefact 2 is worth 60% of your  
final grade.

# Topics Roadmap

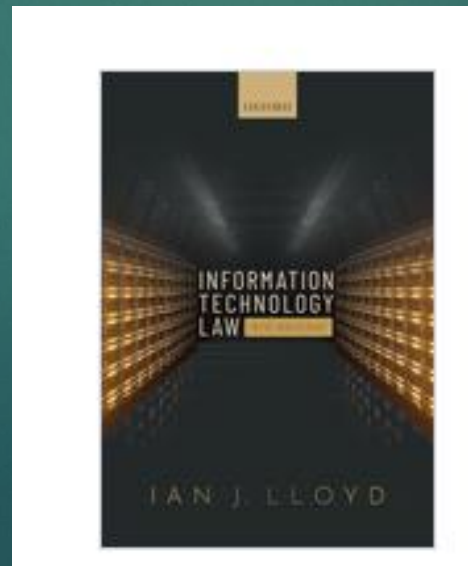
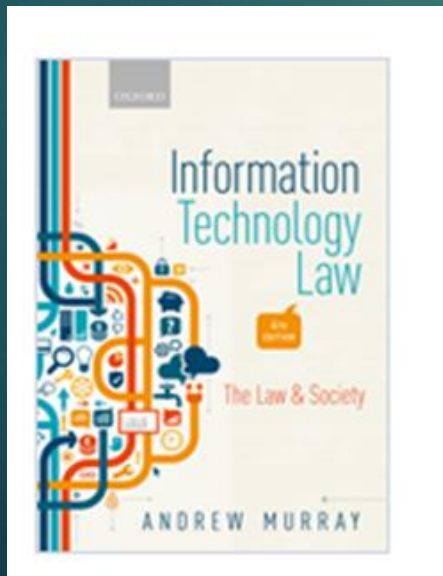
| Week | Topic                    |
|------|--------------------------|
| 1-2  | Criminal Law             |
| 3    | Computer Misuse          |
| 4    | Fraud and Identity Theft |
| 5    | CONSOLIDATION            |
| 6    | Abuse Images             |
| 7    | Harassment               |

| Week | Topic                       |
|------|-----------------------------|
| 7    | Harassment                  |
| 8    | Piracy and Copyright        |
| 9    | Privacy and Data Protection |
| 10   | Free Speech                 |
| 11   | Net Neutrality              |
| 12   | Up and Coming Issues        |

# Essential Resources



Reading List



*Law* Trove

# What is Cyberlaw anyway?

**Cyberlaw**

What do you think it might include?

**Cybercrime**

Describes two categories of offending (CPS, 2021):

Any guesses?



# Cybercrime

## History

- ▶ Previously known as 'computer crime'
- ▶ First efforts for specific law on matter from Scottish Law Commission in 1986
  - ▶ Culminated in the 'Computer Misuse Act 1990'
- ▶ However, cyberlaw so much broader than this now. Technology fare more all consuming than it was in 1980s/90s.
- ▶ No unified cyberlaw now. Many offences across many Acts (of Parliament).
- ▶ Law Commission seeks further reform of the CMA 1990 and related law (2021).

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...window._sat
...turbine
...settings:{path:"pag
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...core/src/lib/dat
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...re/src/lib/d
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...ta-product
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...shop.hacker.org/che
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...id: "+JSON.stringify(
...tas").replace("couponValues"
...replace("rec
```

# Cybercrimes

Typically Fall Into the Following Categories

Crimes against the  
PERSON

Crimes against  
PROPERTY

Crimes against the  
STATE



# Things to Keep in Mind

Cyberlaw is linked to the Criminal Justice System, which involves multiple organisations

Police

The Crown  
Prosecution  
Service

Embassies

Courts

Prisons/  
Probation

Special:  
NCA, etc

May have to include non-CJS organisations: E.g., ISPs; Security Firms; Computer Specialists; Lobby Groups

Cybercrimes introduce challenges that previously were less relevant

Borderless  
Crime

Disaggregated  
Crime

Emergence of  
Norms

Tensions  
between private  
and public

# Introduction to English Law for Cyber Sleuths

```
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```

# To begin: The law can be stupid...

- ▶ In Scotland it is illegal to be drunk in possession of a cow.
- ▶ In England: it is illegal to “handle a salmon in suspicious circumstances”. The Salmon Act 1986, Section 32.
  - ▶ Updated in 2009 to include any fish!
- ▶ It is illegal to beat or shake any carpet or rug in any street in London. However, beating or shaking a doormat is allowed before 8am. (Metropolitan Act 1839).
- ▶ It is illegal to enter the Houses of Parliament wearing a suit of armour.
- ▶ In Denmark, it is illegal to name a child something not on a list of 7,000 approved names.
- ▶ It is illegal to let your chicken cross the road in Georgia.
- ▶ You may not fire a water gun on New Year's Eve in Cambodia



# Part 1: Sources of Law and the Lawmaking Process

OR, WHAT WERE THEY THINKING?



Copyright: Cinemassacre



# The Primary Sources of Law Today

## Legislation

Acts passed by Parliament.

Absolutely binding. Judges must follow legislation.

Parliamentary Supremacy. Highest Law.



## Case Law

The system of precedent.

Judges MUST apply legislation.

Judges MUST follow the principles set by previous, similar cases.





# Creating Legislation: Summary

Proposed by:



Debated and  
approved by:



Applied by:



# Legislation and Cyberlaw

- ▶ Creating legislation can take a long time.
- ▶ Legislation can get confusing, appearing in lots of documents.
- ▶ Technical issues need to be worded very carefully to avoid misinterpretation.
- ▶ How legislation is used depends on judges (most of whom are elderly, rich white men).
- ▶ Difficult to keep up with fast moving areas of technology and culture.
- ▶ Developing law too fast can lead to unforeseen consequences.
- ▶ Jurisdictional Issues



## Example: Legal Hackback

2017: Proposed updated to USA's 'Active Cyber Defence Certainty Act'.

Reaction to the WannaCry ransomware incident of 2017.

Would allow organisations to hack back at cyber attackers, e.g., retrieve files, identify assailant, etc.

Kinder name: "Active Defence"

Well thought out?





## Grey Areas: An Example

Also in 2017, researchers proposed buying Malware produced by the Shadow Brokers.

Shadow Brokers had previously leaked NSA passwords etc.

Is this funding hacking, or a tool in the counter-crime suite?

Should it be legal to do this?



Source: Giant Bomb, 2023. Copyright Electronic Arts

# Legislation and Cyberlaw

## Some Key Legislation:

### **The Computer Misuse Act 1990**

Hacking; Denial of Service; Electronic Theft; Creation, Possession and Use of Malware.

### **The Fraud Act 2006**

Phishing; Identity Theft; False Representation;

### **Criminal Justice Act and Immigration Act 2008**

Covers (part of) the law on indecent images.

### **Investigatory Powers Act 2016**

Explains when the government can monitor you!



# Making a new criminal law is a big deal...

- ▶ Any new criminal law inherently removes rights from citizens
- ▶ Equally, failure to introduce regulations of any kind can erode individual rights of some.
- ▶ Need to ensure that no unintentional side effects occur.

# Try it yourself

- ▶ There is a problem with tools being made that enable hacking.
- ▶ Create a new criminal law that deals with this problem.

# Example of Careful Wording

Say you want to make it illegal to design hacking tools. Your new law says “It is illegal to create a hacking tool”.

You have just criminalised: anyone who makes any program that could even theoretically result in hacking, even if this was not intended.

Potentially, you have failed to criminalise the actual target, if the term tool is taken to require a bespoke program.

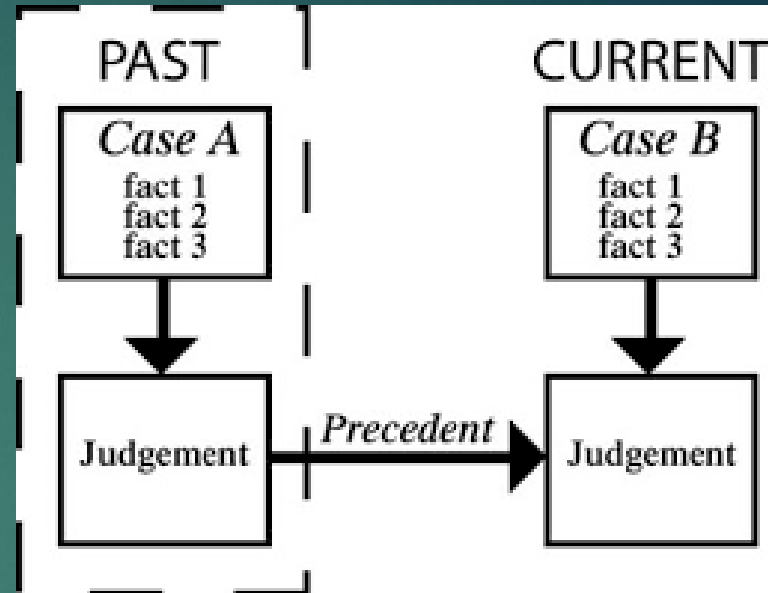
# Example of Careful Wording

This was the exact problem seen in Article 6 of the Council of Europe's Convention on Cybercrime. It is very careful to:

- State that device includes 'computer program'.
- Require specific intent that the tool be usable for hacking.
- Clarify that the tool's primary (but not only) aim be to do with hacking.
- Include protection for, e.g., software security workers.

# Creating Case Law: Legal Precedent

- ▶ The system whereby judges follow decisions is called “precedent.”
- ▶ Look back to similar situations and decide in the same way.
- ▶ To find out what the law is, you have to try to find a report of the case, and look at what the judge decided.



- ▶ Key value: Consistency.
- ▶ Where to find the law: Case reports



# Key Points for Cyberlaw

- ▶ If there is no legislation, judges literally create new law.
- ▶ Even when there is legislation, how judges apply it essentially dictates its function.
- ▶ Due to the hierarchy of the courts, a 'wrong' decision can be difficult to change.

The Literal Rule

The Golden Rule

The Mischief Rule

The Purposive  
Approach

# The Precedent System

## Today: Court Hierarchy 1



Court  
Hierarchy

|                        | Binds            | Bound By          | Binds Self?   |
|------------------------|------------------|-------------------|---------------|
| <b>Supreme Court</b>   | All Lower Courts | None*             | No            |
| <b>Court of Appeal</b> | All Lower Courts | Supreme Court     | Yes (usually) |
| <b>High Court</b>      | All lower courts | All higher Courts | No            |
| <b>Crown Court</b>     | All lower courts | Persuasive Only   | No            |

Adapted from Elliott & Quinn (2016/7)

# The Precedent System

## Today: Court Hierarchy 2

### Some Key Terms-

“Binding”: The decision in a previous case **MUST** be followed.

“Persuasive”: The decision in a previous case need not be followed, but should be taken heavily into account.

“Follow”: When a court makes the same decision as a previous court for the same reasons.

“Distinguish”: The court decides they do not have to follow a previous case because the facts were different. This does not replace the old precedent.

“Overrule”/“Overturn”: When a court with the power to do so decides a previous ruling should not be followed, even though the facts are similar. This replaces the old precedent.

Reverse: If the **SAME** case is *appealed* to a higher court, the higher court may make a different decision so as to replace the original decision entirely.

# The “Ratio” of the case: The system of Stare Decisis.

- ▶ **Stare Decidendis** – This system we’ve been examining whereby courts must follow each other is known as “Stare Decisis”, literally meaning “to stand by things decided”.
- ▶ **Ratio:** When a legal case makes a new rule, that rule is known as the Ratio of the case. It means “that which is decided”.
- ▶ **Obiter Dicta:** Not everything the judge says in a case is part of the ratio, but some of it may help to understand what was meant by the ratio. This term means “things that were also said”.

# Other Sources of Law in England and Wales

- ▶ **European Law-** European Communities Act 1972 obliged UK courts to give effect to (most) EU law. Courts needed to make a declaration whenever the UK law is incompatible with EU law. UK left EU fully in 2020.

Despite leaving the EU, significant swathes of European Law were “carried over”.

- ▶ **Secondary Legislation-** Main legislation can give power to others to make smaller pieces of legislation such as “Code”, e.g., the Highway Code. Whether or not these are binding depends on what the parent Act says

Henry VIII Clause: Loopholes in legislation that allows government to make binding law!.

- ▶ **Custom** – a long-established custom may come to be treated as law. The idea is debated as to whether it is truly law, or if it needs to be affected by a court or legislature first.

Custom is more relevant for Scots law and International law than for English law...but cyber means we have to think about other jurisdictions.



Query: What does 'summary' and  
'indictable' mean?

Query: How do you pronounce the  
"v"?

# Identifying and Interpreting the Law

Query: There's prep for the  
seminar? :s

# Identifying the Law

Sometimes it is straightforward, sometimes it is not.

## Example 1: The law relating to Fraud

The first question is to ask if there is legislation on the matter.

You will find that fraud offences are defined in the Fraud Act 2006

If not, you have to look to legal cases.

Although you know what the law is, you still need to look at cases somewhat for more detail.

Either way, you will need to refer to legal cases to find out how that law has been applied.

What is dishonesty?

1. R v Ghosh (includes subjective test)
2. [Ivey v Genting Casinos \[2017\] UKSC 67](#) (removes subjective test)
3. Which one? Answered in *Booth and another v R [2020] EWCA Crim 575* (see CPS guidance)

# Identifying the Law

Sometimes it is straightforward, sometimes it is not.

## Example 2: The law relating to Murder

The first question is to ask if there is legislation on the matter.

You will find that there is no particular Act defining murder.

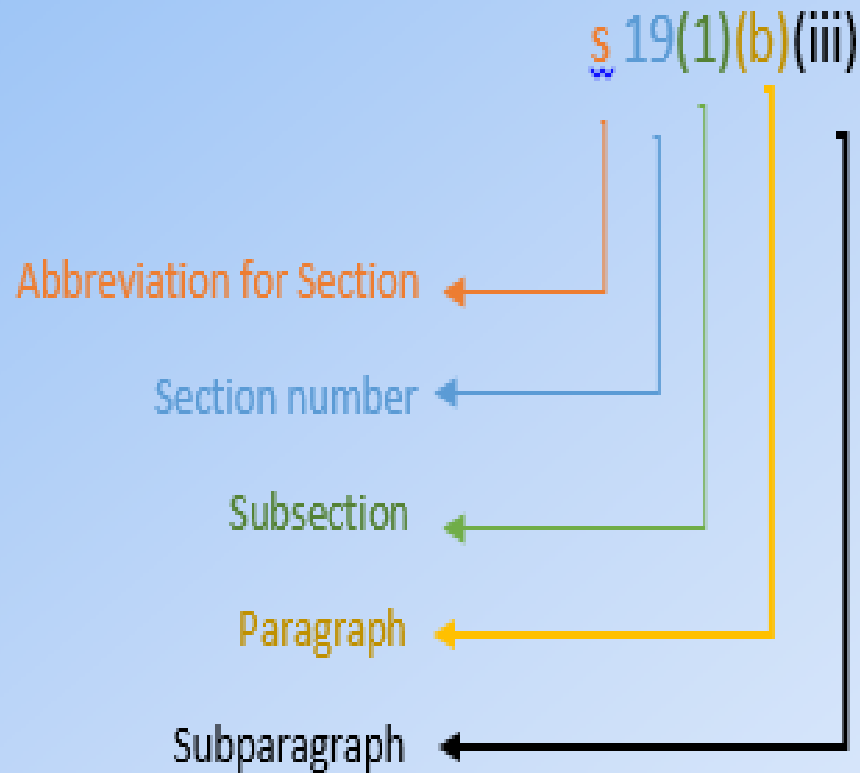
If not, you have to look to legal cases.

The case law is quite fragmented, e.g., there is no single definition. From looking at a collection of cases, you can discern that murder occurs when someone kills someone else either intentionally or recklessly.

Either way, you will need to refer to legal cases to find out how that law has been applied.

This is why your textbooks etc are so helpful- the scholars read and interpret these cases, arranging them to try and form a picture of law.

# Reading the Law: Legislation



# Consider the following

- ▶ Chicken and duck eggs are prohibited.
- ▶ Women without her man is nothing.
- ▶ Vehicles are not allowed in the park.
- ▶ It is an offence to bully a person via PMs on Facebook.



The Simpsons shows  
shocking insight into law...

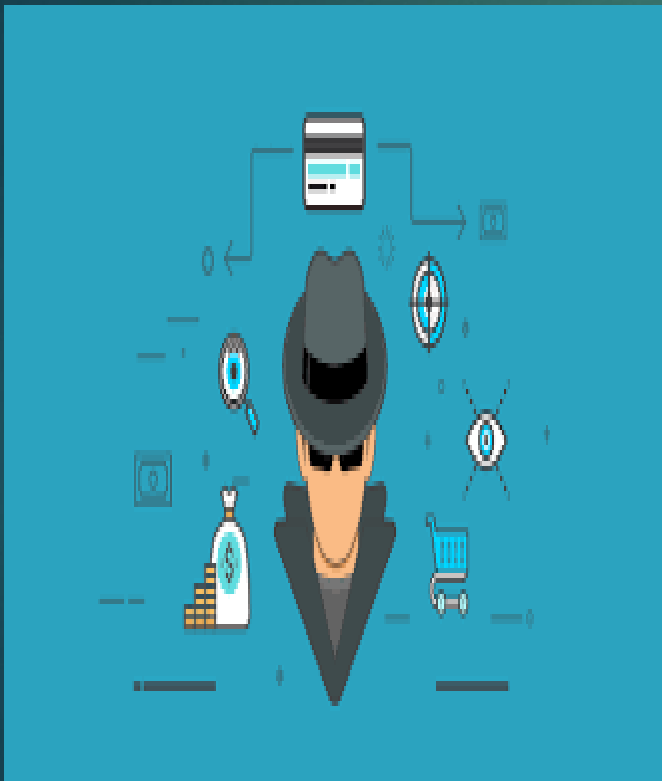




# Elements of Criminal Offences

Let's get tangled up so we can gain clarity later!

## The Fraud Act 2006



Section 1 creates a general offence of **fraud** and introduces three ways of committing it set out in Sections 2, 3 and 4.

- ▶ Fraud by false representation (Section 2);
- ▶ Fraud by failure to disclose information when there is a legal duty to do so (Section 3); and
- ▶ Fraud by abuse of position (Section 4).

In each case:

- ▶ the defendant's conduct must be dishonest;
- ▶ his/her intention must be to make a gain; or cause a loss or the risk of a loss to another.
- ▶ No gain or loss needs actually to have been made.
- ▶ The maximum sentence is 10 years' imprisonment.

CPS Guidance on Fraud

It would be impossible to try to define all the types of fraud at once, so we need to essentially treat the different types separately for the purpose of working out how you actually commit (and hence, prosecute) them.

# Lets break that down

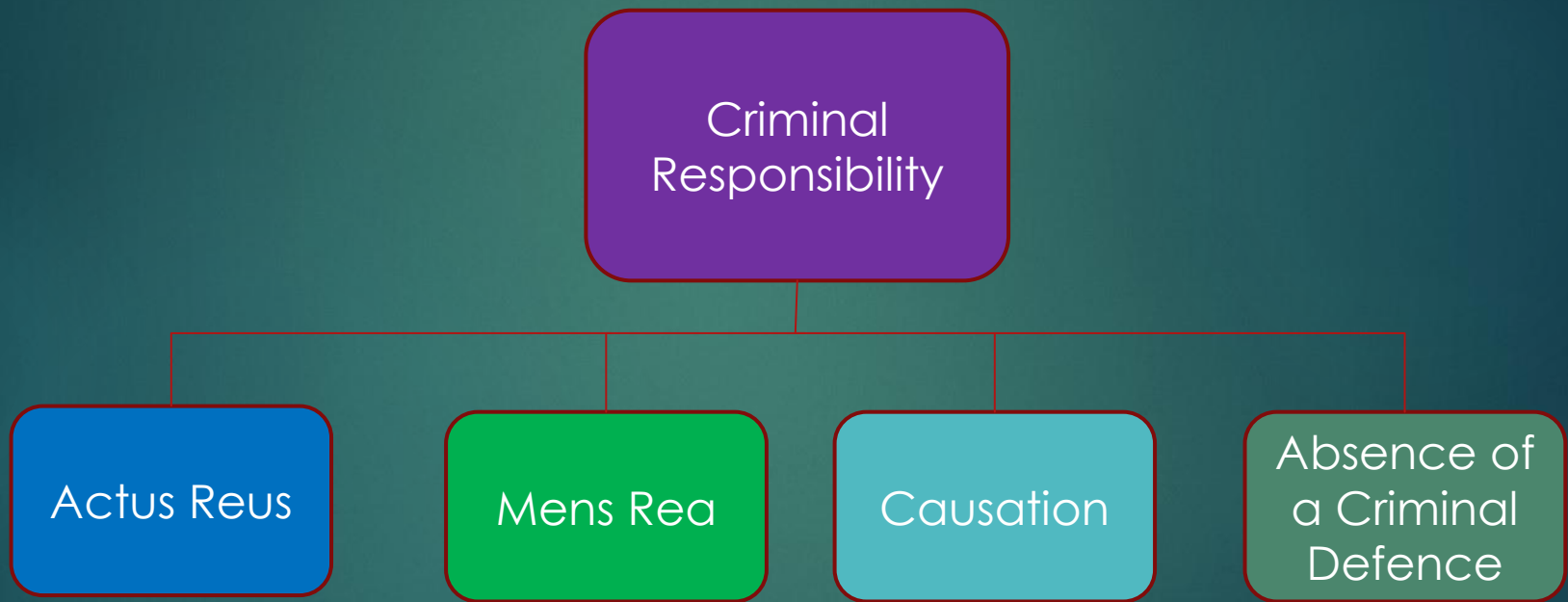
**To commit the offence of Fraud by False Representation, the defendant must have:**

- ▶ made a false representation
- ▶ dishonestly
- ▶ knowing that the representation was or might be untrue or misleading
- ▶ with intent to make a gain for himself or another, to cause loss to another or to expose another to risk of loss.

Which elements of this relate to **conduct**? Which elements relate to **mindset**?



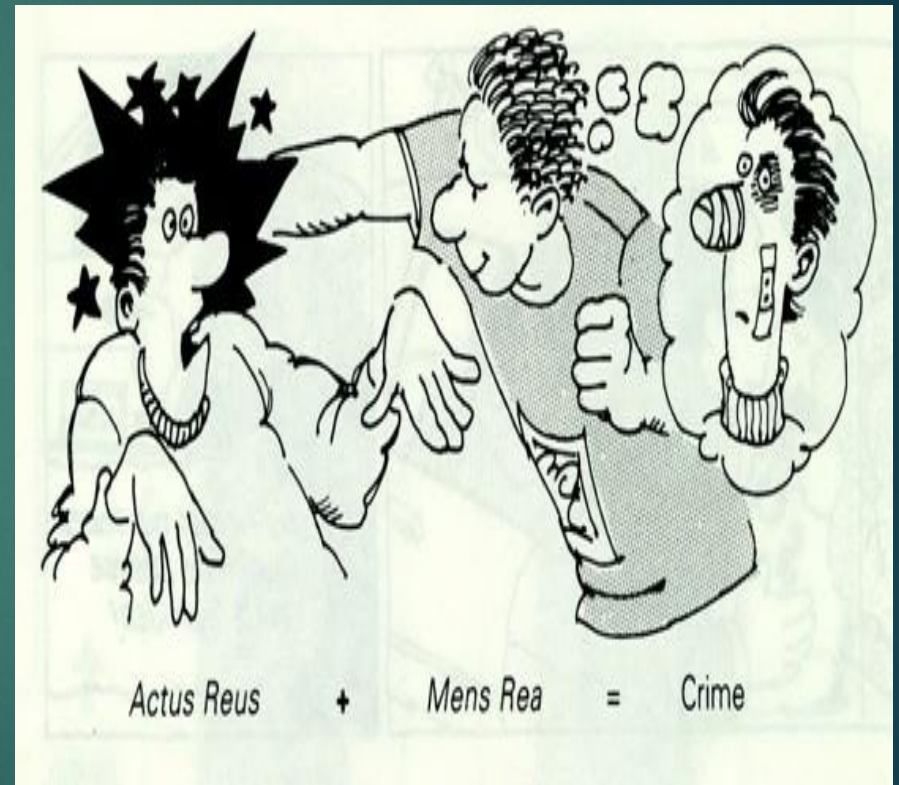
# Establishing Criminal Liability

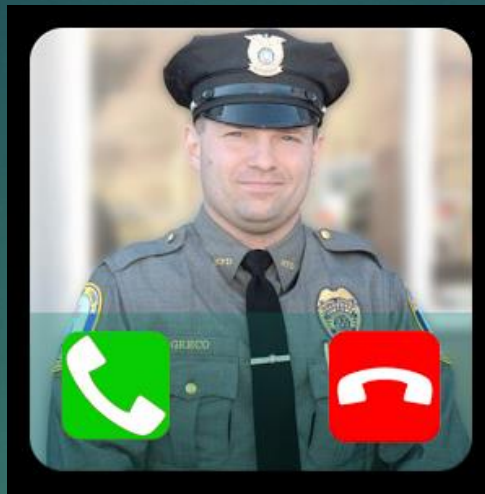


# Actus Reus

From Latin: literally the “guilty act”.

- ▶ Conduct/physical element of a crime.
- ▶ Some crimes require both an action AND a result from that action. Eg, Murder.
- ▶ Others entail only conduct. No particular result is required. Eg, Rape.
- ▶ Usually a positive act. Can also be an “omission” or a “state of affairs”





"Officer, something has been taken by a stranger!"

Small changes in detail can dictate which actus reus has been committed



Theft



Burglary



Abduction



Robbery

# Voluntary Conduct

- ▶ Actions or omissions must be voluntary (controlled muscular or bodily movement or lack of it)
- ▶ Involuntary acts cannot constitute actus reus e.g. driving and stung by bees/sneezing/heart attack
- ▶ Not enough that you did not mean it. It must literally have been beyond your control. This will be covered more when we look at defences.





# Omission



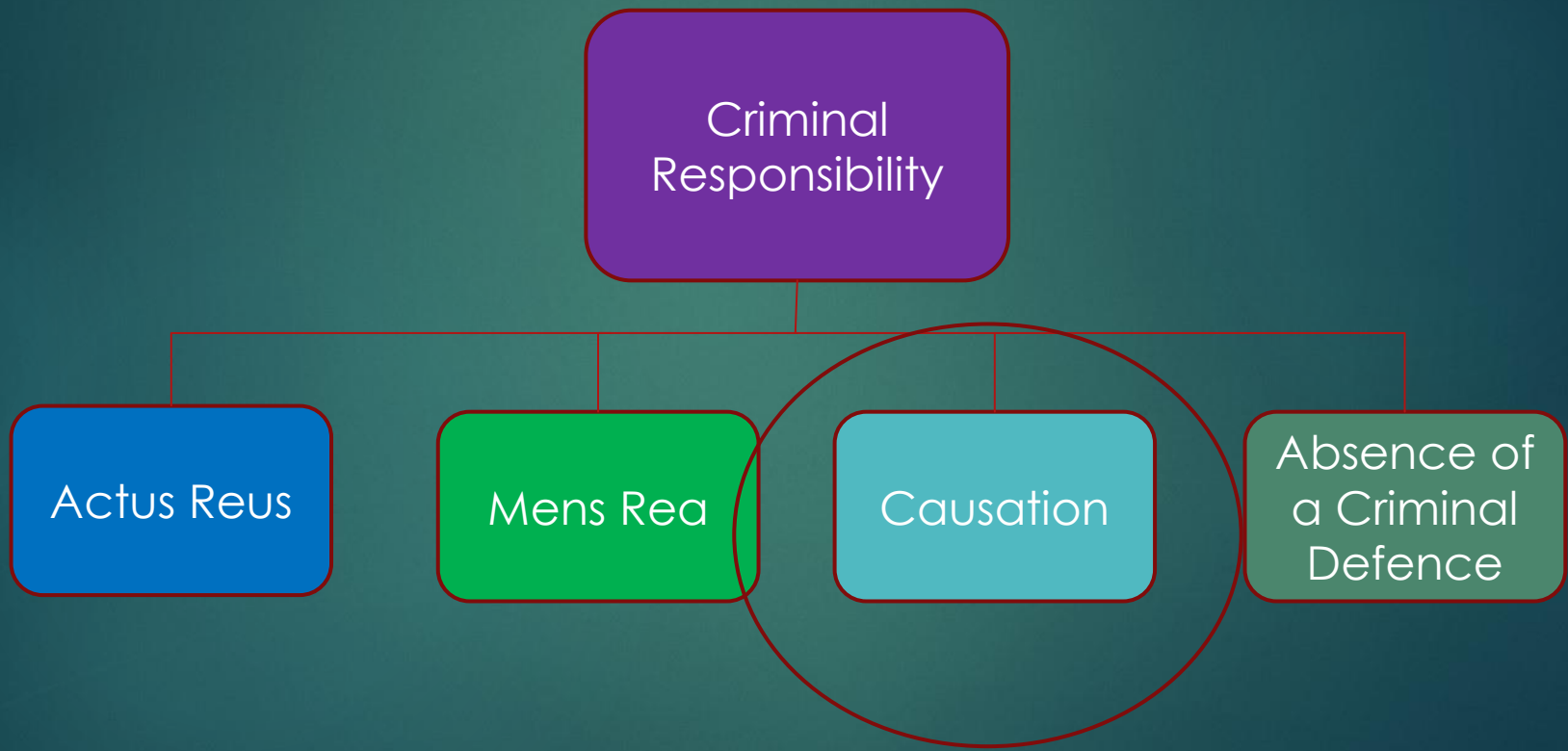
- ▶ English Law originally only punished positive acts.
- ▶ There is no general duty to act, BUT:
- ▶ Eventually accepted that: If there exists a specific **duty to act** – then omission should be punishable
- ▶ Requirements:
  - A. Crime must be capable of being committed by omission (result crime)
  - B. Duty to act




# Omissions: Duty to Act

- ▶ Dangerous situation created by the defendant – Miller [1983] 2 AC 161 D (squatting – fire- criminal damage).
- ▶ Voluntary undertaking of a duty or assumption of a duty to act – Stone and Dobinson (1977) (Anorexic sister; manslaughter).
- ▶ Special relationship – parent/child, doctor/patient – R v Gibbins and Proctor (1918) (Child not fed; murder).
- ▶ Contractual duty - a contract of employment - Pittwood (1902) (crossing signalman; gross negligence).
- ▶ Duty through one's official position - Dytham (1979) (Police officer; prevent crime).
- ▶ Statutory duty, e.g., tax returns.

# Establishing Criminal Liability





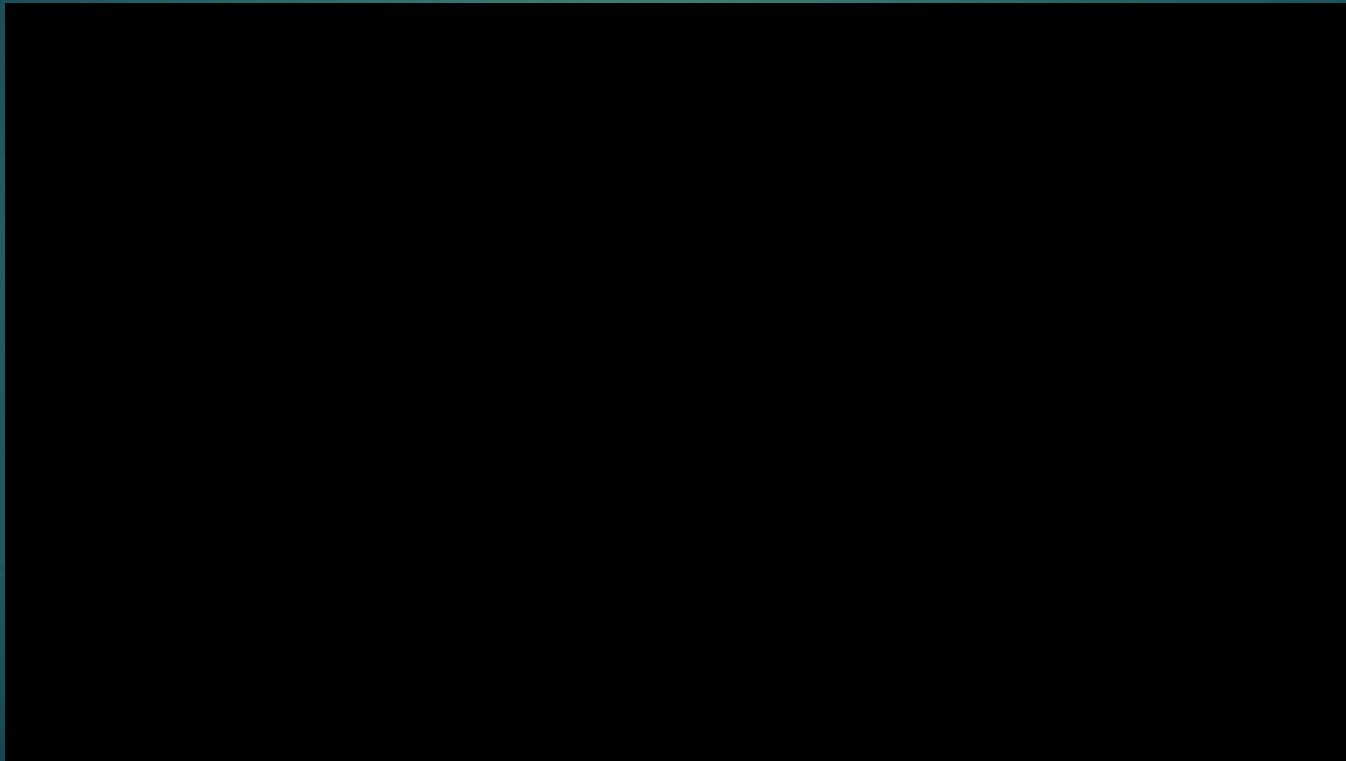
If you forget everything  
about causation,  
remember these words...

**“BUT FOR”**

The harm would not have occurred BUT FOR the action of the defendant

# R v White [1910]

- ▶ The action must cause the harm in order for causation to occur. Consider this famous case:

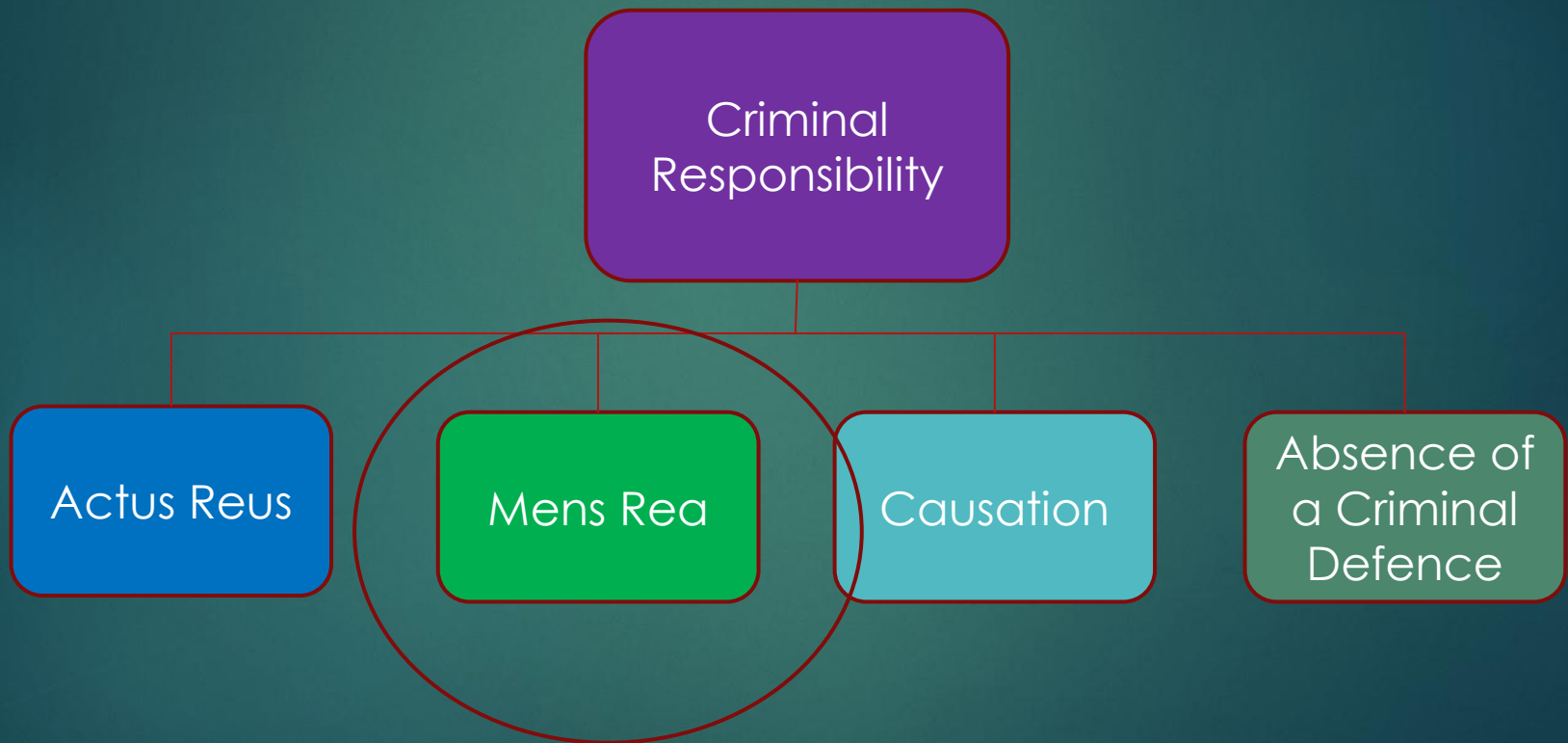


# Breaking the “Chain” of Causation

- ▶ Intervening Act of a third party
- ▶ Intervening “Act of God”: Novus Actus Interveniens
- ▶ Actions of the Victim
- ▶ Note the Eggshell Skull Rule- Unusual weakness on part of victim does NOT break the chain.



# Establishing Criminal Liability



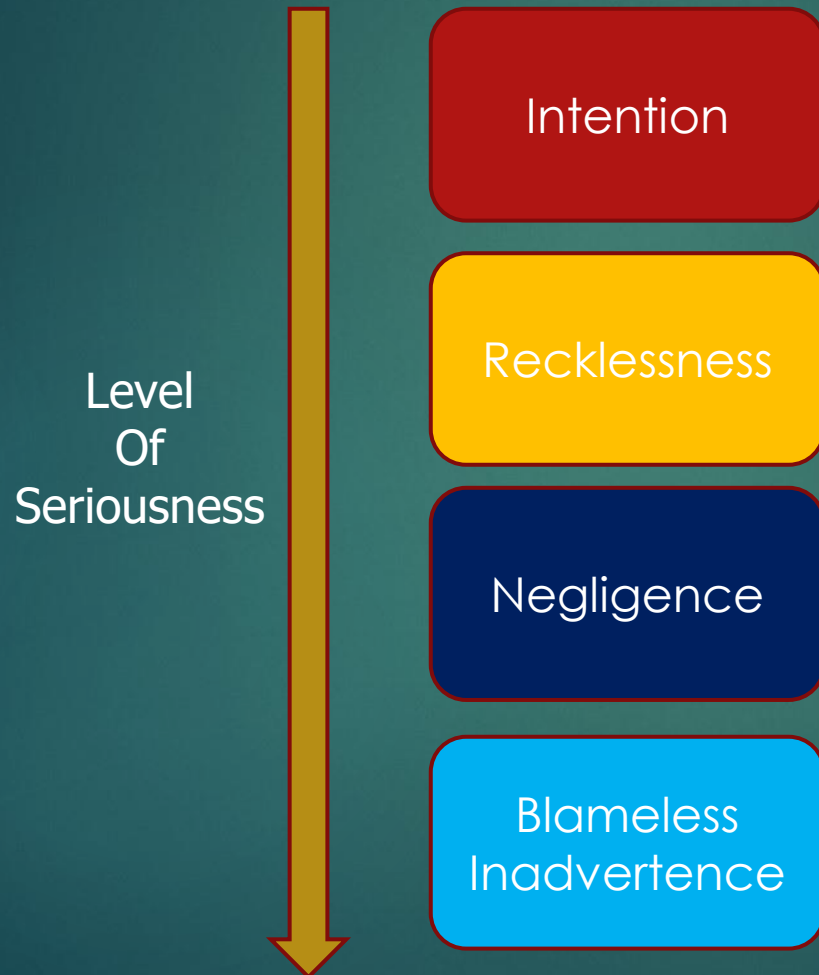
# Mens Rea



From Latin: the “guilty mind”.

- ▶ Mental element/state of mind of defendant when committing the actus reus
- ▶ Motive is NOT relevant in law. Moral justification won't excuse an act if the defendant intends prohibited harm. Similarly, motive is not proof of a guilty mind.
- ▶ Some offences do not require a guilty mind. These are called “Strict Liability” offences and require only an Actus Reus to occur.

# Types of Mens Rea



# Remember Fraud? It requires one to be 'dishonest'

Until 2017, from R v Ghosh 1974:

- ▶ *The conduct complained of was dishonest by the lay objective standard of ordinary reasonable and honest people;*
- ▶ *If it is established, the defendant must have realised that ordinary reasonable and honest people would regard his behaviour as dishonest.*

As of the case of Ivey v Genting Casinos, only the first part is relevant.

-This means it is now entirely OBJECTIVE.

# Defences

## Capacity Defences

-Age

-Insanity

-Diminished Responsibility

-Automatism

-Voluntary and Involuntary  
Intoxication

## Circumstance Defences

-Self Defence

-Duress

-Necessity

-Loss of Control

-Mistake



# The Trojan Horse Defence

**Accused:** I didn't do it.

**Prosecution:** But we can prove your computer was involved.

**A:** OK, but my computer was hijacked by a Trojan Horse, so it wasn't me.

**P:** But forensic examination shows no evidence of a Trojan Horse.

**A:** Yeah but the Trojan Horse deleted itself.

**Jury:** ACQUITT HIM!!!

*A dramatic retelling of the 2003's R v Aaron Caffrey Case by C. Collie*

Since 2003: Used primarily in Child Pornography cases, e.g., someone planted it; other user.



**Fun fact:** Defences like this now known as SODDI, or “Some Other Dude Did It” Defences

# Final Thoughts

## **Who's At The Keyboard? Authorship Attribution in Digital Evidence Investigations**

Carole E. Chaski, Ph.D.  
Institute for Linguistic Evidence, Inc.

### **Abstract**

In some investigations of digital crime, the question of who was at the keyboard when incriminating documents were produced can be legitimately raised. Authorship attribution can then contribute to the investigation. Authorship methods which focus on linguistic characteristics currently have accuracy rates ranging from 72% to 89%, within the computational paradigm. This article presents a computational, stylometric method which has obtained 95% accuracy and has been successfully used in investigating and adjudicating several crimes involving digital evidence. The article concludes with a brief review of the current admissibility status of authorship identification techniques.