chapter 1

Introduction to the Criminal Law

study points

After reading this chapter, you will be able to understand:

- what is meant by the study of the 'criminal law'
- how substantive criminal law differs from procedural or evidential law
- the definition of crime, and whether such definition is possible
- the principles and values that underpin the criminal law, and the functions of the criminal law
- the sources of the criminal law
- the process of the criminal justice system
- the basic principles of criminal liability.

1.1 Introduction

Welcome to the criminal law!

In this text, we shall be taking an expedition through the criminal law of England and Wales. The criminal law is a vast and diverse subject and arguably one of the most popular foundations of a law degree. I often explain to my own students that the criminal law is 'real life', in that it is easy to identify situations where the criminal law is involved in some way. This may be compared with other areas of law, such as equity and trusts, which, although essential to an understanding of law, does not fix itself quite so easily in the minds of students.

In this text, you will learn about the core features of the substantive criminal law. We shall explore the necessary elements for a criminal offence to exist, the participants involved in the criminal process and the main criminal offences covered on an undergraduate criminal law syllabus.

In each chapter, you will find a reference to the Solicitors Qualifying Examination (SQE) identifying which topics are assessable on SQE. We hope that this new feature will assist candidates who are using this text to assist in their preparation for SQE.

1.2 The purpose of this text

This text has been written to provide you with a clear and accurate account of the *substantive* criminal law in England and Wales. It is worth pausing here to consider why we refer in this book to the law of 'England and Wales' and not the 'United Kingdom'. England is a constituent part of the 'United Kingdom of Great Britain and Northern Ireland', alongside Wales, Scotland and Northern Ireland. However, as a result of different traditions and devolution over the years, the legal system of the UK has diverged. Legally speaking, the UK is divided into three 'constituent' countries, each of which is subject to the laws of the UK; however, each constituent country

possesses devolved powers allowing it to legislate in particular areas. This text concerns only the law of England and Wales and does not deal with Scots law or the law of Northern Ireland.

1.2.1 'Substantive criminal law'

The term 'substantive criminal law' is used here to distinguish it from the wider concept of the criminal law, incorporating criminal procedure and the law of evidence. Substantive criminal law refers to the criminal offences that exist in our legal system and the elements that must exist in order for an individual to be liable for those offences. The term 'liability' will feature throughout this text and simply refers to the legal obligations or responsibilities that may arise against a particular individual. In the context of the criminal law specifically, 'liability' means 'responsibility for illegal behaviour that causes harm or damage to someone or something' (*Cambridge Business English Dictionary* (CUP, 2011)).

We can helpfully distinguish the substantive criminal law from other areas by observing the following table.

Table 1.1 Distinguishing the substantive criminal law

Term	Explanation
Substantive criminal law	The law relating to the manner in which criminal offences are defined and the elements of the offence necessary in order for an individual to be found liable.
Criminal procedure	The law relating to court structure and the progression of a criminal case through the criminal justice system, including the investigation of the crime by the police, the prosecution of offenders and criminal appeals. Criminal procedure also includes sentencing and the principles behind sentencing powers.
Criminal evidence	The law relating to the material that may be produced at trial in order to prove, or disprove, a particular issue in a criminal offence. The law of evidence is often referred to as 'adjectival' in nature.
Criminal justice	Criminal justice refers to the theory behind the criminal law in terms of its operation and its rationale. Criminal justice also includes a concept known as 'restorative justice' which is concerned with bringing those harmed by crime and those responsible for the harm into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward.
Criminology	Criminology refers to the socio-legal study of why crime is committed, the reasons behind the commission of crime by certain individuals or groups of individuals and how legal policy may be implemented to prevent the commission of offences. A number of 'strands' of criminology exist, for example penology (the study of punishment of crime and prison management) and 'deviance' (the study of actions that violate social norms).

An example may assist you in understanding the focus of this book.

example

Jack and Jill go up the hill to fetch a pail of water. Jill pushes Jack down the hill and he is injured as a result (let's say he breaks his crown).

In this very simple scenario, our concern is whether Jill, through her actions in pushing Jack down the hill, is criminally liable for an offence. That is the focus of the substantive law. In order to determine Jill's liability, we would have to establish:

- what kind or 'category' of offence Jill may be liable for;
- what the elements of that offence are and whether Jill satisfies those elements; and
- whether Jill has a potential defence to the charge against her.

Although a simple factual scenario, a number of questions should hopefully spring to mind. For example:

- Did Jill intend to push Jack *down the hill* or did she just intend to push him to the floor?
- Did Jill intend to push Jack at all or were her actions an accident?
- What level of harm did Jack suffer? Was he seriously hurt or just bruised?
- Did the pail of water fall down with Jack, and did that cause him any harm that would not have been caused had he not held the pail of water?

These questions, although abstract in nature and non-exhaustive, are essential for assessing the true extent of Jill's liability and the direction the criminal law will take in relation to her activities.

As a result, we are not concerned, for example, with:

- how it might be proved that Jill pushed Jack down the hill, eg through the testimony of an eye witness – a matter for the law of evidence;
- how Jill will be charged, prosecuted and sentenced for the offence in question – a matter for criminal procedure and sentencing;
- why Jill pushed Jack down the hill – a matter for the study of criminology.

Although our concern is with the substantive law, the remainder of this chapter will explain a number of key concepts that will help you to understand the wider context and dynamism of the criminal law in England and Wales.

The chapter will conclude with an overview of the three key components to establishing the criminal liability of an individual. This will then provide us with a comfortable transition into a more detailed appreciation of the substantive criminal law.

1.3 Defining crime

It is worth noting immediately that there is no 'universal' definition of a crime. What constitutes a crime in one country may not constitute a crime in another. For example, in Iran, homosexual relations are illegal and punishable in some cases by death. In England and Wales, homosexual acts were illegal prior to the Sexual Offences Act 1967. In this respect, it is also relevant to note that whether particular conduct amounts to a criminal offence will vary and change as time progresses. By way of another example, prior to the Suicide Act 1961, the act of suicide was a criminal offence. Where an individual failed in such an attempt, they would be liable to a criminal conviction, with the penalty ranging between a fine and imprisonment. Historically, where an individual succeeded in taking their own life, their belongings would be surrendered to the Crown. By way of a final example at this stage, prior to the ground-breaking case of *R v R (Rape: Marital Exemption)* [1992] 1 AC 599, it was not considered unlawful for a man to rape his wife.

These examples, however, do not actually tell us how we can define 'crime'. They merely provide examples of what amounts, or has amounted, to a criminal offence. For

the most part, academics agree that the starting point in defining a crime is the attitude adopted by the state in relation to certain conduct. For instance, Farmer ('Definitions of Crime' in Cane and Conaghan (eds), *The New Oxford Companion to Law* (OUP, 2008)), contends:

> It is now widely accepted that crime is a category created by law—that is, a law that most actions are criminal because there is a law that declares them to be so—so this must be the starting point for any definition.

In *Board of Trade v Owen* [1957] AC 602 at 634, Lord Tucker in the House of Lords, relying on a passage from *Halsbury's Laws of England*, concluded that a crime could be defined as

> an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment.

This definition, unfortunately, offers no assistance as to why certain conduct is considered 'criminal'. According to Farmer, modern definitions of crime fall under two headings:

- the moral definition; and
- the procedural definition.

Farmer explains the moral definition as

> based on the claim that there is (or should be) some intrinsic quality that is shared by all acts criminalized by the state. This quality was originally sought in the acts themselves—that all crimes were in an important sense moral wrongs, or *mala in se*—and that the law merely recognized this wrongful quality.

It can be explained then, by this definition, that certain conduct or actions are considered crimes in order to recognise public wrongs as violations of the rights and duties owed to the whole community. This view accords with that of Hart ('The Aims of the Criminal Law' (1958) 23 L & CP 401) who considered that a crime is 'conduct which … will incur a formal and solemn pronouncement of the moral condemnation of the community'.

The procedural definition is favoured by other writers such as Williams ('The Definition of Crime' (1955) 8 CLP 107), who defined a crime as

> An act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal. ... Criminal law is that branch of law which deals with conduct … by prosecution in the criminal courts.

Albeit a rather circular term (a crime is a crime if it is a crime), this definition accords with the modern practicalities of the criminal law as providing a rigid and detailed structure for the operation of charging and punishing the commission of criminal offences (see below at **1.7**).

1.4 The need for the criminal law?

In speaking of the 'need' for the criminal law, we are essentially considering the justifications for the imposition of criminal liability. In addition, we are concerned with the respective 'functions' of the criminal law in its operation. By way of overview, the 'Report on Homosexual Offences and Prostitution' (1957) (Cmnd 247) (the 'Wolfenden Report') considered the purpose of the criminal law to be

> to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable … It is not … the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.

1.4.1 Functions of the criminal law

The functions (or 'purposes') of the criminal law are many and varied. Some commentators rank certain functions above others, whilst other commentators argue that the functions act in conjunction to provide for a consistent and clear approach. Understanding these functions is often helpful when critically analysing the state of the criminal law and observing whether the substantive law achieves, or fails to achieve, one of its functions. Some of the main functions of the law can be listed as follows:

- protection of individual rights and liberties;
- maintenance of public order;
- enforcement of legal rules and orders;
- the conferral of obligations;
- the regulation of human behaviour and relationships; and
- punishment of behaviour contrary to legal rules and orders.

1.4.2 An 'overuse' of the criminal law?

Ashworth ('Is the Criminal Law a Lost Cause?' (2000) 116 LQR 225) questions the extent to which the criminal law operates in today's legal structure. With reference to the lack of real comprehension as to the number of criminal offences in existence and the ambiguity as to the creation of new criminal offences, Ashworth contends that the criminal law may be a lost cause. See Chalmers and Leverick, 'Tracking the Creation of Criminal Offences' [2013] Crim LR 543 for an interesting discussion of the number of offences alleged to have been created by the Labour Government between 1997 and 2006 (suggested to be 3,023).

1.5 Principles of criminal law

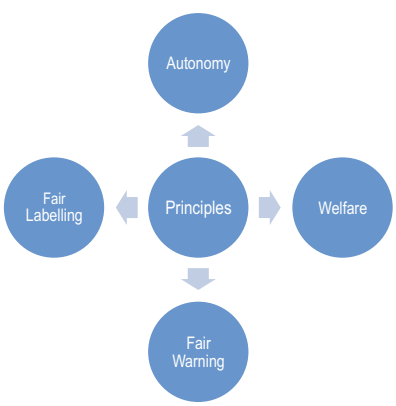

Figure 1.1 The principles of the criminal law

A number of principles or 'ideals' that underpin the operation of the substantive criminal law have been identified over the long history of our common law system. The principles, similar to the concept of the Rule of Law, are essentially the 'aims' or 'models' of behaviour and attitude expected of the criminal law.

The four key principles are identified in **Figure 1.1** and explained below at **1.5.1**–**1.5.4**.

For a more detailed account of the four principles, see Horder, *Ashworth's Principles of Criminal Law*, 10th edn (OUP, 2021).

1.5.1 Principle of 'fair warning'

This principle reflects the idea that the law should be communicated in a clear and accessible manner to the public. Given that England and Wales has a common law legal system, it has long been advocated that, in order to give true effect to this principle, the criminal law should be codified, as in civil law systems. Robinson ('A Functional Analysis of Criminal Law' (1994) 88 Nw UL Rev 857) is of the view that multiple codes are required in order to promote this principle. Robinson advocates the use of a code written in simple language explaining to the public what they can and cannot do (a 'rule articulation' code) and codes that are used for the administration and enforcement of law (a 'liability assessment' code).

The principle of fair warning is essential to understanding how an offence should be defined. References to undefined or ambiguous terms in a statute, for example, would be contrary to the principle of fair warning. By way of example, the term 'dishonesty' used in the Theft Act 1968 has not been afforded a statutory definition, despite its dominating presence in the law. The common law has had to step in to provide such a definition, but it is necessary, for the promotion of this principle, that the definition is clear, accessible and informs the general public of what they cannot do (ie what is dishonest and, as such, what they cannot do which is dishonest).

1.5.2 Principle of 'fair labelling'

Horder (*Ashworth's Principles of Criminal Law*, 10th edn (OUP, 2021)) states that the concern of fair labelling is as follows:

> … to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking.

In essence, there must be an accurate and visible link between the label (ie the name of the offence) and the conduct criminalised. The fairness of labelling is relevant for two main reasons:

- It promotes the fair warning principle in that people who understand the label associated with the offence will inevitably understand the offence and what they can and cannot do.
- It promotes transparency and objectivity in the criminal justice system by stigmatising individuals with an accurate label (eg a rapist or a murderer).

The key in this discussion, however, is on the concept of *fair* labelling. One of the biggest criticisms of the law of murder is the fact that an individual may be guilty of murder where they kill but did not intend to kill; rather, they intended to cause serious harm. Is it appropriate, or 'fair', to label these individuals as murderers in circumstances where they lacked the actual intention to kill? The label must fit the crime.

1.5.3 Principle of 'welfare'

The idea behind this principle is that the law acts in a quasi-paternalistic way by ensuring that society is protected from harm. This involves harm to individuals and harm to property. The concept of welfare, however, depends on the perception one adopts. From the standpoint of a victim, the welfare principle ought to be designed to ensure that the victim is protected from interference by another (linked closely with

the autonomy principle), and in circumstances where an interference has occurred, the legal system is designed to promote the conviction of the offender. At the same time, the welfare principle must ensure that those alleged to have committed offences are appropriately safeguarded through ensuring proper procedures are adopted, a fair trial is in place and any sentence passed, should there be one, is reflective of the offence committed. The difficulty here is finding that appropriate balance between conflicting interests and understanding the circumstances where the interests come into play.

1.5.4 Principle of 'autonomy'

The last principle is that of autonomy. The idea behind autonomy is that an individual is subject to little restraint with minimal interference from another person. Autonomy is often linked with self-determination and integrity in the sense that no undue influence, pressure or interference should be made. Naturally, of course, the criminal law is designed to restrict the manner in which we can act – therefore interfering with our autonomy. In this respect, any interference with autonomy should be kept to a minimum as over-criminalisation is likely to interfere with this sacred principle.

1.6 Sources of criminal law

Throughout this textbook, references will be made to a multitude of legal authority stemming from both domestic and international sources. Before it is possible for you to get to grips with these sources of law, it is first necessary identify the basis, use and relevance of the authority in England and Wales. Being able to identify the relevant source of law is key when answering questions in criminal law.

1.6.1 Common law

For many years, the common law acted as the driving force for legitimising and providing authority for legal principles. The common law has developed over hundreds of years from the judgments and decisions of the judiciary in the senior appellate courts. Through the operation of case precedent and the principle of *stare decisis* ('let the decision stand'), England and Wales has operated, and continues to operate, as a common law system. Although many rules and principles have now been codified in legislative provisions, the common law continues to act alongside and fortify legislation in major areas of the criminal law. One important example of this is the law of murder, which continues to this day to operate as a common law offence defined, and interpreted, by judicial decision making. In addition, as part of their role, the judiciary are responsible for interpreting and giving effect to legislative provisions – such interpretations add to the common law and the judicial law-making system that we have today.

1.6.2 Legislation

The term 'legislation' is used, and preferred here, over the term 'statute' to refer to any law, primary or secondary, created by Parliament. Although the majority of criminal legislation is set out in statute, ie Acts of Parliament, a number of provisions continue to operate by other forms of legislation, such as byelaws (a form of delegated legislation). Unfortunately, there is no 'catalogue' of legislation for the criminal law. Many offences are contained within statutes which, for the most part, do not concern the criminal law. For example, the Companies Act 2006 is the largest statute in

England and Wales, consisting of 1,300 sections and 16 Schedules (in its original form), but creates only a handful of statutory criminal offences.

1.6.2.1 Case law and legislation

Although the starting point in any case is to consider the wording of the statute that creates the offence, if there is one, this is merely the first step. In order to properly understand legislation, one needs to appreciate how the courts interpret such legislation. For example, s 18 of the Offences Against the Person Act (OAPA) 1861 prescribes the offence of maliciously causing grievous bodily harm with intent. Without an appreciation of the meaning of such words as 'maliciously', 'causing' and 'bodily harm', one cannot truly understand the circumstances in which the offence applies. In this respect, case law is as important, if not arguably more important, than its legislative counterpart. Indeed, the Law Commission in a 1992 Consultation Paper, 'Legislating the Criminal Code: Offences against the Person and General Principles' (Law Com No 122, 1992) noted that some of the most important offences under the OAPA 1861 'have become in effect common law crimes, the context of which is determined by case-law and not by statute'.

For a discussion of the principles of statutory interpretation, see Sanson, *Statutory Interpretation*, 2nd edn (OUP, 2016).

1.6.3 International influences

Although the English legal system is distinct and admired across the world, it cannot of course be said to be perfect. Nor can it be said that the English legal system operates in a vacuum without any influence or information from other international states and organisations. This section will briefly consider international influences on the criminal law.

1.6.3.1 European Union

The origins of the EU, as we know it, can be located in the Treaty establishing the European Economic Community (EEC) 1957 (Treaty of Rome), signed by six founding states. This was the Treaty that set the foundations that the EU is built upon today. The UK joined the EEC in 1973 following the enactment of the European Communities Act (ECA) 1972.

The EU is built on three pillars and its role was traditionally understood as regulating trade and commercial matters in Member States. Criminal law matters have remained, largely, a matter for the Member States to decide for themselves. In this respect, it can be said that, traditionally, the EU lacked the competency to legislate in criminal law matters – this would explain the lack of consistency or uniformity across EU Member States in such matters as the age of criminal responsibility (see **Chapter 7**) and the age of consent to sexual conduct (see **Chapter 10**). In more recent years, however, EU law has been seen to have some impact on the domestic criminal law in the context of trafficking offences, consumer protection, VAT evasion, environmental offences and European arrest warrants.

Ultimately, however, English and Welsh criminal law remains largely a matter of national regulation. Importantly, s 1B of the European Union (Withdrawal) Act 2018 provides that 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day' (inserted by s 2(1) of the European Union (Withdrawal Agreement) Act 2020).

This means that EU law that has impacted domestic criminal law continues to have effect unless and until it is changed.

1.6.3.2 European Convention on Human Rights (ECHR)

The ECHR was drawn up by the Council of Europe, a body set up after the end of the Second World War. The Council (which is *entirely distinct* from the EU) was established to prevent any repetition of the atrocities that had occurred during the war and the period leading up to it. The ECHR was signed in Rome in 1950, ratified by the UK in 1951 and came into force in 1953. From 1966 onwards, citizens of the UK had the right to petition the ECtHR (which sits in Strasbourg) where there was an alleged breach of human rights.

The ECHR was transposed (ie incorporated) into national law by the Human Rights Act 1998, which came into effect on 2 October 2000. Prior to the incorporation of the ECHR in domestic law, there was no opportunity for citizens to enforce their Convention rights in the domestic courts, meaning that individual petition directly to the ECtHR was the only way to seek a remedy for alleged breaches.

Convention rights

Unlike domestic legislation or the common law, which sets out the offences that an individual may commit and the defences they may equally plead to a charge, the ECHR sets out a number of 'Convention rights' that apply to all natural persons. **Table 1.2** lists these rights and considers examples of their application in the criminal law.

Table 1.2 Convention rights under the ECHR

Article	Application
Article 2: Right to life	All persons are granted the right to life and the protection of such right by the state. In cases where a defendant kills another in self-defence, the law has to be interpreted in light of Article 2.
Article 3: Prohibition of torture	All persons are granted the freedom from torture and other inhuman and degrading treatment. Whether the chastisement of children (by parents or those responsible for children (eg teachers in schools)) falls within the prohibition in Article 3 has long been the subject of argument. Torture is a criminal offence under s 134 of the Criminal Justice Act 1988.
Article 4: Prohibition of slavery	All persons are granted the freedom from slavery and other forms of forced labour. Slavery is now criminalised under s 1 of the Modern Slavery Act 2015, which is particularly relevant in the context of human trafficking and sexual exploitation.
Article 5: Right to liberty	All persons are granted the right to liberty and security. Article 5 is particularly relevant in terms of pre-trial imprisonment and detention pending trial and is also relevant regarding the state's obligations to those found to be legally insane.
Article 6: Right to a fair trial	All persons are granted the right to a fair trial and to have their case heard and decided by an impartial tribunal. This right grants the presumption of innocence to a defendant and enforces obligations on the prosecution to prove the case against the defendant.
Article 7: Prohibition on retrospective law	All persons are granted the freedom from retrospective application of laws. Article 7 also requires sufficient clarity and consistency in the law and a minimised allowance of discretion.

Article	Application
Article 8: Right to private life	All persons are granted the right to private and family life. This right means that the life of an individual cannot be interfered with by another. Such rights include the right to privacy and the protection of personal information. In *Bloomberg LP v ZXC* [2022] UKSC 5, the Supreme Court held that a person under criminal investigation has a reasonable expectation of privacy in respect of information gathered in the course of an investigation. The expectation of privacy only extends, however, until the person is charged with the offence.
Article 9: Freedom of thought, conscience and religion	All persons are granted the freedom from other persons interfering with their thought or religion. Specific offences have been created to reflect the freedom of religion, eg aggravated offences based on religion or belief.
Article 10: Freedom of expression	All persons are granted the freedom of speech and the freedom to express themselves in a particular way. This right must be balanced against the right to privacy in Article 8.
Article 11: Freedom of assembly and association	All persons are granted the freedom to assemble. Article 11 is particularly relevant where the defendant is liable for a public order offence involving the assembly of more than one person (eg riot).
Article 12: Right to family life	Further to Article 8, all persons are granted the right to family life. One debate focuses on whether unmarried couples should be treated differently under the law to married couples.
Article 13: Right to an effective remedy	All persons have the right to an effective remedy where an individual's rights have been breached. Under s 8 of the HRA 1998, a court may grant such relief or remedy as it considers just and appropriate where it finds that an act by a public authority is unlawful.
Article 14: Right to non-discrimination	All persons have the right not to be discriminated against in terms of their Convention rights.

By s 6 of the HRA 1998, it is unlawful for 'public authorities' to violate any Convention right or act in a way that is incompatible with a Convention right. 'Public authority' includes courts and tribunals and private individuals and organisations performing public functions (s 6(3)(b)) but does not include either House of Parliament (s 6(3)).

Obligation on the courts

Section 2 of the 1998 Act provides that judges must take into account the jurisprudence of the ECtHR when determining an issue arising in connection with a Convention right. This is the relevance of the ECHR to domestic law. In addition to their obligations under s 2, s 3 of the HRA 1998 also provides that judges must interpret national legislation 'so far as is possible' in line with the Convention. In circumstances where the legislation cannot be interpreted in line with the Convention, domestic courts must make a declaration of incompatibility (HRA 1998, s 4). The effect of this declaration is not to make the law invalid but to require Parliament to consider the need for reform (see *AG's Reference (No 4 of 2002)* [2004] UKHL 43).

Convention rights and political protests

In recent years, high media attention has been given to cases where criminal offences are committed in the act of protest. In these cases, ECHR rights are commonly brought into question. By way of brief examples:

- *DPP v Ziegler* [2021] UKSC 23: The defendants were charged with obstruction of a highway, contrary to the Highways Act 1980. At trial, they claimed to have acted with a lawful excuse and that the public authority had interfered with their Convention rights under Articles 10 and 11. The Supreme Court ruled that the

prosecution had to prove that a conviction would be proportionate to a defendant's rights under Articles 10 and 11 for offences that are subject to a defence of 'lawful excuse'. The same would also apply to an offence which is subject to a defence of 'reasonable excuse', once a defendant had properly raised the issue.

- *R v Brown* [2022] EWCA Crim 6: The defendant was charged with public nuisance and argued that the conduct complained of was no more than him exercising his Convention Rights under Articles 10 and 11 (relying on *Ziegler*). The Court of Appeal disagreed. Lord Burnett CJ would explain that *Ziegler* 'appears to have been misunderstood by some as immunising peaceful protestors from arrest and from the operation of the criminal law in broad circumstances, which on any view it does not' (at [29]). Proportionality was therefore not a matter for the judge to consider in respect of the defendant's charge of public nuisance.
- *DPP v Cuciurean* [2022] EWHC 736 (Admin): The defendant was charged with aggravated trespass. The judge at first instance ruled that the prosecution was not a proportionate interference with the defendant's Articles 10 and 11 rights. This acquittal was set arise. Lord Burnett CJ once more explained that *Ziegler* does not lay down any principle that for all offences arising out of 'non-violent' protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under Articles 10 and 11 of the ECHR. *Ziegler* was concerned *specifically* with the defence of lawful excuse under the Highways Act 1980.

These principles have been recently affirmed by the Supreme Court in *Reference by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32. In particular, the Supreme Court concluded that an assessment of proportionality is not a question of fact. Rather, it involves the application, in a factual context, of a series of legal tests, together with a sophisticated body of case law and statutory provisions. The Court laid down a three-stage test to be considered:

(1) Where a defendant relies on Articles 9, 10 or 11 ECHR as a defence to a protest-related offence, are those Articles engaged? (Violent protests are outside the scope of those Articles.)

(2) If Articles 9, 10 or 11 are engaged, is the offence one where the ingredients of the offence themselves strike the proportionality balance, so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of their Convention rights? If the offence falls within this category, the Court does not have to go through the process of verifying that a conviction would be proportionate on the facts of the individual case.

(3) Where Convention rights are engaged but proportionality is not inherent in the ingredients of the offence, then the possibility arises that a conviction might be incompatible with the Convention rights. This gives rise to a third question: whether there is a means by which the proportionality of a conviction can be ensured (eg the defence of lawful excuse).

1.6.3.3 International law

According to the website of the United Nations (<www.un.org>), international law 'defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries'. International law sets rules and policies that govern relations between international states and their citizens.

Beginning with a membership of 51, the United Nations, amongst other bodies, is responsible for addressing the needs of 193 Member States. According to Article 2, para 1 of the UN Charter, international law is 'based on the principle of the sovereign equality of all its Members'. Each Member State is thus considered equal and not subject to any form of supranational authority without the consent of the Member State concerned.

International law can be considered as relevant to the domestic criminal law in two respects:

- *International criminal offences:* The Rome Statute 1998 had the effect of creating the International Criminal Court (ICC) and defining core international criminal offences, such as genocide, war crimes and crimes against humanity. These crimes were incorporated into domestic law by the International Criminal Court Act 2001. These offences are not considered in any further detail in this text, but for a full treatment, you may wish to consult, for example, Guilfoyle, *International Criminal Law* (OUP, 2016).
- *Influence on domestic law:* Given that the majority of offences lack any international sphere (eg a battery is unlikely to have any international implications), domestic law rarely integrates with international law and conventions. However, certain offences, for example fraud and blackmail, can be committed on such a large scale that their relevance moves towards the international remit.

1.6.3.4 The law of other jurisdictions

The criminal law is territorial in nature, meaning that it applies, for the most part, in England and Wales. However, law from such jurisdictions as Canada, New Zealand, Australia, and the USA may be relevant when considering our own law in comparison. On many occasions, the Supreme Court, in determining a matter of interpretation, will turn to the law of another state to understand how a term has been defined there. In this respect, the law of other jurisdictions (not to be confused with our concept of 'international law' above) is a useful and potentially persuasive aid to the interpretation of our own law. On a more academic level, law from other jurisdictions is vital in evaluating the law and identifying the strong (and equally weak) points in our own legal system.

1.6.4 Reform

The substantive criminal law is continuously under review as a result of judicial interpretation, Parliamentary reform and academic commentary. Such detailed review means that the criminal law is far from being a static subject; rather, it can best be described as a dynamic and cumulative body of rules influenced by a social and political backdrop. Throughout this text, references will be made to the 'reform' of a particular area of law. Such content will allow us to delve deeper into the substantive law and evaluate its effectiveness. In order to do so, however, we first need to be able to comprehend the different bodies responsible for reviewing and reforming the criminal law.

1.6.4.1 Law Commission

The Law Commission was set up in 1965 following the enactment of the Law Commissions Act (LCA) 1965 for the purpose of 'promoting the reform of the law'

(LCA 1965, s 1(1)). The Commission is headed by a Chairman (at the time of writing, Sir Nicholas Green) and four Commissioners, including Professor Penney Lewis, who is the Commissioner for criminal law. The Commission is an independent body, though it is sponsored by the Ministry of Justice. The aim of the Law Commission is to ensure that the law is:

- fair;
- modern;
- simple; and
- cost effective.

The work of the Law Commission in reforming the criminal law has been pre-eminent for a number of years (and has effectively superseded the work of the Criminal Law Revision Committee (CLRC)). The Commission will produce a consultation paper before then publishing a full report, with the potential inclusion of a draft Bill. Many reports have been successfully adopted by the government of the day (see, for example, 'Assisting and Encouraging Crime' (Law Com No 131, 2006) which was implemented by the Serious Crime Act 2007). These reports are useful for providing detailed summaries of the law as it stands, the problems with the law and the proposals for reform. Other reports have not been accepted by the government (eg 'Intoxication and Criminal Liability' (Law Com No 314, 2009)).

1.6.4.2 Draft Criminal Code

Many countries, mostly civil law countries, have a Criminal Code, which sets out the definitions for all criminal offences, defences and procedures. These Codes are comprehensive in nature. The Law Commission, for many years, has proposed the adoption of a Criminal Code for England and Wales. In 1989, the Law Commission proposed a draft Criminal Code ('Criminal Code for England and Wales' (Law Com No 177, 1989)) which would have codified the majority of the existing laws on the general principles of criminal liability and specific offences against the person, property and those relating to public order. The Code lays out the fundamental rules of the criminal law and provides detailed definitions, explanations and circumstances to aid in the understanding of the criminal law.

Bennion ('Codification of the Criminal Law – Part 2: The Technique of Codification' [1986] Crim LR 105) took the view that the proposed reform was over-generalised and incomplete. Particularly, Bennion was critical of the simplified nature of the Code, expressing that 'you do not simplify by oversimplifying'. Ashworth ('Codification of the Criminal Law – Part 3: The Draft Code, complicity and the inchoate offences' [1986] Crim LR 303) furthers this view, contending that an oversimplified version of the Code would have provided judges with too much discretion.

Where relevant in this text, we shall be referring to key proposals made in the draft Code. At the time of writing, Parliament is yet to adopt the Code, and it is unlikely that the Code will ever be adopted, which Child and Ormerod (*Smith, Hogan, & Ormerod's Essentials of Criminal Law*, 4th edn (OUP, 2021)) consider to be 'regrettable'. The Law Commission's response to this is to produce so-called 'mini-codes' that deal with specific areas of legal reform.

1.6.4.3 Judicial law making

It is essential to open this section by explaining that the role of judges and the courts is not to make law – it is to interpret law. Prior to the decision in *Knuller v DPP* [1973] AC 435, the appellate courts were understood as holding a power to create new criminal offences. In *Knuller*, however, the House of Lords renounced this power on the basis that any such changes should be made by Parliament.

Despite the decision in *Knuller*, many examples exist of the appellate courts exercising law-making powers. For instance, in *R v R (Rape: Marital Exemption)* [1992] 1 AC 599, the House of Lords took it upon itself to rule that non-consensual sexual intercourse within marriage should no longer be exempt from criminal liability. In essence, the House of Lords created a new offence of marital rape. I prefer to view *R v R* as more of a reflection of the gradual development of the common law. Indeed, this was the view taken by the ECtHR in *CR v UK* [1996] 1 FLR 434 upon a referral of *R v R*. The Court was of the view that, although Article 7 of the ECHR restricts and prevents the operation of retrospective laws, it does not prevent the evolution of the common law.

With the implementation of the Human Rights Act 1998, judicial law-making powers must now be read in accordance with their international obligations of consistency. As a result of the inherent change it was about to face, the House of Lords in *C (a minor) v DPP* [1996] AC 1 gave the following guidance to judges (per Lord Lowry at 28):

> (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial interventions than purely legal problems. (4) Fundamental legal doctrines should not lightly be set aside. (5) Judges should not make change unless they can achieve finality and certainty.

1.7 Criminal procedure and evidence: an overview

As discussed earlier, the substantive criminal law is concerned with the definition and categorisation of offences; it concerns what features or elements must be present in a given case for a person to be 'liable' for a criminal offence. It is, however, naïve to believe that the substantive criminal law operates to the exclusion of other areas of criminal justice. The following section considers briefly some of the fundamental principles that shape the criminal justice system as we know it today. You are advised to consult a textbook on English legal system for a broader discussion (see, for example, Thomas and McGourlay, *English Legal System Concentrate*, 2nd edn (OUP, 2020)).

1.7.1 Criminal procedure

Criminal procedure refers to the manner in which an individual, charged with an offence, proceeds through the criminal justice system. The rules governing this procedure are set out in the Criminal Procedure Rules (Crim PR) (available at <www.gov.uk>).

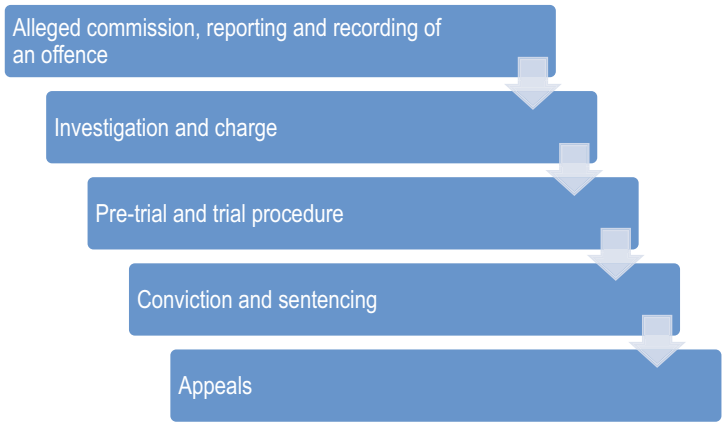

Figure 1.2 Process of the criminal justice system

For our purposes, we will focus on classification of offences and sentencing, as these considerations will feature when discussing the substantive criminal offences.

1.7.1.1 Investigation and charge

The responsibility for the investigation of alleged crimes rests with the police. Following the alleged commission of the offence and any investigation thereafter, if there is sufficient evidence against the individual suspected of committing the offence, that individual will be 'charged'. The decision to charge a suspect rests, largely, with the CPS. In order for a suspect to be charged, the 'Full Code Test' must be satisfied. The Full Code Test is provided under section 4 of the Code for Crown Prosecutors and is set out in two parts. The Code states that the individual or body considering a charge must be satisfied that:

(a) there is sufficient evidence to provide for a realistic prospect of conviction (known as the *evidential stage*); and
(b) it is in the public interest to prosecute (known as the *public interest stage*).

If the relevant individual is content that the Full Code Test has been met, he or she may proceed to charge the suspect with an offence. See the fascinating case of *SXH v CPS* [2017] UKSC 30 in which the Supreme Court had to consider whether it was a breach of Article 8 of the ECHR (right to private life) to prosecute an individual for a criminal offence.

1.7.1.2 Classification of offences

In charging an individual with an offence, it is essential to understand how criminal offences are classified in England and Wales. Such classification is generally provided by the statute creating the offence by way of the description of the nature of the penalty on conviction. Three types of classification can be identified:

(a) *Summary-only offences:* These are the least serious of the three classes of offences and are triable only in the magistrates' court.
(b) *Either-way offences:* Either-way offences may be tried either in the magistrates' court or in the Crown Court. Where an either-way offence is tried in the magistrates' court, it is tried as a summary offence, and where tried in the Crown Court, it is tried as an indictable offence.

(c) *Indictable-only offences:* These are the most serious of the three classes of offences and are triable only in the Crown Court with a jury.

Examples of such offences are provided in **Table 1.3**.

Table 1.3 Understanding the classification of offences

Type of offence	Court in which it will be heard	Examples
Summary-only	magistrates' court	Common assault
Either-way	magistrates' court/Crown Court	ABH Theft
Indictable-only	Crown Court	Murder Rape

1.7.1.3 Conviction and sentencing

Following trial, whether in the magistrates' court or the Crown Court, it will then be the responsibility of the jury or magistrates to return their verdict. Should the verdict be one of not guilty, the defendant is acquitted and is free to go. Should the verdict be one of guilty, the defendant is convicted and sentence must be passed.

The law on sentencing in criminal cases is detailed and complex. Textbooks, both academic and practitioner, are available solely dealing with the topic of sentencing. The majority of principles relating to sentencing have now been consolidated within the Sentencing Act 2020 (also known as the Sentencing Code). We do not consider sentencing in this textbook.

1.7.1.4 Appeals

Where a defendant has been convicted of a criminal offence, they may have grounds to appeal against their conviction or sentence. In limited circumstances, the prosecution may appeal against the acquittal or sentence of a defendant too.

1.7.2 Evidence

The law of evidence refers to the materials which may be produced in open court to prove that the defendant has, or has not, committed the offence in question. Although in theory (ie in the substantive law), a defendant may appear to be liable for a criminal offence, whether such liability is proven in practice will ultimately depend on the evidence available, the use of that evidence and how the arbiters of fact treat that particular evidence.

The principles and types of evidence will not be discussed in this textbook. For a thorough account of the law of evidence, see Doak, McGourlay and Thomas, *Evidence: Law and Context*, 5th edn (Routledge, 2018). We will, however, briefly consider the law relating to the burden and standard of proof as this is relevant to a number of matters relating to substantive criminal law.

1.7.2.1 Burden and standard of proof

Burden of proof

In criminal cases, the fundamental principle is that the prosecution bears the burden of proving that the defendant committed the offence in question. This fundamental principle is known as the 'golden rule' and was emphasised by the House of Lords in *Woolmington v DPP* [1935] AC 462, where Viscount Sankey famously stated (at 481):

> Throughout the web of 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.

This principle is reinforced by Article 6(2) of the ECHR which prescribes that an individual is to be considered innocent until proven guilty. There are, however, exceptions to the principle that the prosecution bears the burden of proof. Before we consider these, however, it is first necessary to explain what burdens of proof exist. Two burdens of proof exist, namely:

- the legal (persuasive) burden; and
- the evidential burden.

The legal burden, also known as the 'persuasive' burden, is the obligation placed on a party to prove a fact in issue (ie a contested issue between the parties). In the majority of cases, the prosecution bears the burden of proving the legal burden, ie it has the burden of proving all of the facts necessary to establish the defendant's guilt. This is so even if this involves proving negative elements; for example, in a case of rape, the prosecution bears the burden of proving that sexual activity took place (a positive element) and that the complainant did not consent (a negative element) (*R v Horn* (1912) 7 Cr App R 200). Whether the legal burden is discharged is a matter of fact for the arbiters of fact.

The legal burden can be compared with the evidential burden, which is merely an obligation on a party to adduce sufficient evidence to raise a fact in issue, ie to make an issue live. Such examples may be the need to raise sufficient evidence of the existence of a defence, such as self-defence. Whether the evidential burden is discharged is a matter of law for the judge. Where the evidential burden has been discharged, the judge can place the evidence before the arbiters of fact who can use it in determining whether the legal burden has been discharged.

As explained above, the golden rule (or 'thread' as it is also known) is that in all criminal proceedings, the prosecution bears the legal burden of proof. This is, however, subject to a number of exceptions which Doak, McGourlay and Thomas, *Evidence: Law and Context*, 5th edn (Routledge, 2018) argue have 'tarnished' the golden thread. These exceptions are more likely to concern the requirement to prove the existence of a defence, as opposed to disproving an element of an offence. The ways in which such exceptions come about are detailed briefly in **Table 1.4**.

Table 1.4 Tarnishing the golden thread

Exceptions to the golden rule	Explanation
Common law	The only common law rule which reverses the burden of proof involves the defence of insanity, where the defendant bears the burden of proving that the defence exists (*M'Naghten's Case* (1843) 10 Cl & Fin 200) – see **Chapter 7**.
Statute (express)	In many cases, legislation will stipulate quite clearly that there is a reverse burden and the defence must prove certain circumstances to be in existence in order to make use of an available defence. For example, s 2(2) of the Homicide Act 1957 provides that the defendant must prove the defence of diminished responsibility – see **Chapter 8**.
Statute (implied)	In other cases, the legislation will not prescribe that a reverse burden exists, but, as a result of s 101 of the Magistrates' Courts Act 1980, where the defendant intends to rely on any 'exception, exemption, proviso, excuse or qualification' in the statute, it is his obligation to prove such exception. This rule only applies to cases tried in the magistrates' court but the common law has extended the principle to cases tried in the Crown Court also (*R v Edwards* [1975] QB 27).

These reverse burdens are controversial given the potential effect they may have on a defendant's right to a fair trial. It is contended that such reverse burdens do not affect a defendant's right to a fair trial as they affect only the requirement to prove the existence of a defence and not to disprove an element of the offence. The presumption of innocence remains intact by requiring the prosecution to prove that an offence took place; it is only fair that the defence bears a limited burden of proving the existence of a defence. In circumstances where the reverse burden appears to require the defendant to disprove an element of the offence, the courts have been quick to 'read down' the provision under s 3(1) of the HRA 1998, such that it merely imposes an evidential burden. This was evident in the case of *R v Lambert* [2001] UKHL 37 concerning a charge of possession of drugs.

In *AG's Reference (No 4 of 2002)* [2004] UKHL 43, the House of Lords held that in order for a reverse burden of proof to be legitimate, there must be compelling reasons justifying why it is fair and reasonable to deny the accused person the protected right under the ECHR. See Dennis, 'Reverse Onuses and the Presumption of Innocence' [2005] Crim LR 901 for a discussion of the lawfulness of such reverse burdens.

Standard of proof

In criminal cases, the standard of proof refers to the level or degree of proof that must be established. Two standards of proof exist, namely:

- the criminal standard: 'beyond a reasonable doubt'; and
- the civil standard: 'on the balance of probabilities'.

The criminal standard is expressed as a requirement to satisfy the burden of proof 'beyond a reasonable doubt'. This standard is quite often expressed as 'a', 'all' or 'any' reasonable doubt and has been defined by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 as follows:

> It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted of fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt but nothing short of that will suffice.

This criminal standard applies in all criminal trials, whether before magistrates or on indictment before a jury, and if there is a reasonable doubt created by the evidence adduced either by the prosecution or by the defence, the prosecution has not made out its case and the burden is not satisfied. The criminal standard has also been expressed over the years in terms of 'so that the jury are "sure"' (*R v Majid* [2009] EWCA Crim 2563). In *R v Folley* [2013] EWCA Crim 396, the Court of Appeal expressed these two terms as synonymous with each other.

The civil standard is expressed as a requirement to satisfy the burden of proof 'on the balance of probabilities'. Lord Denning offered a definition of this term, also in the *Miller* case, as: 'If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged, but, if the probabilities are equal, it is not.' (at 374)

The correct 'use' of the standard of proof depends on the party who bears the particular burden of proof. This is detailed in **Table 1.5**.

Table 1.5 The appropriate standard of proof

Where the burden is on the …	The standard is…
Prosecution	'Beyond a reasonable doubt'
Defence	'On the balance of probabilities'

1.8 Nature of criminal liability

'Actus non facit reum nisi mens sit rea.'

Interpreted by Lord Hailsham LC in *Haughton v Smith* [1975] AC 476 at 491 as meaning '[a]n act does not make a man guilty of a crime, unless his mind be also guilty', this Latin maxim is the cornerstone of English criminal law.

Lord Hailsham LC went on to state (at 491–2) that 'It is thus not the *actus* which is *reus* but the man and his mind respectively.' In basic form it means that in order for a defendant to be *reus* (Latin for 'guilty') of a criminal offence, they must complete an 'act' and also have the 'intention' to commit the act. Evil thoughts or bad intentions, therefore, are not sufficient to impose liability on an individual. They may, however, be used as evidence against him should he act on such thoughts.

The maxim does not tell the whole story though. There are certain offences where the need for a 'guilty mind' is unnecessary. These are generally known as 'strict liability' offences and often concern minor offences or offences that are regulatory in nature. We shall consider strict liability in greater detail in **Chapter 3**.

For the majority of crimes, there are three key elements that must be satisfied before a defendant can be liable for an offence. These are:

- *actus reus*;
- *mens rea*;
- no defence.

Figure 1.3 Elements of a criminal offence

Where a defendant is charged with a criminal offence and has pleaded not guilty, the prosecution is obligated to prove (beyond a reasonable doubt) that the defendant satisfied each element of the offence in question. This will involve proof of the *actus reus*, *mens rea* and a lack of defence. Failure to prove one of these elements (or a sub-element therein) will mean that the defendant is 'not guilty' or 'not liable' for the offence in question.

We shall now consider each of these elements in brief detail before then developing these key concepts in their respective chapters.

in practice

The difference between 'liability' and 'guilt' is important. It is often expressed that if an individual is 'liable' for an offence, they are also 'guilty' of that offence. However, this is a misnomer. Whether an individual is liable is a question of both fact and law, observing the circumstances of the case. The police will identify an individual as 'liable' for an offence when charging them with such. The Crown Prosecution Service will identify an individual as 'liable' for an offence when it proceeds with the prosecution. However, neither of these parties will identify the 'guilt' of that individual; guilt (if contested) is to be determined by the arbiters of fact at trial (whether they be the jury or the magistrates). For the purposes of this text, therefore, we shall be referring only to whether an individual is 'liable' for a criminal offence (and you are advised to do the same in your own criminal work) – whether they are 'guilty' of that offence or not is out of our hands.

1.8.1 *Actus reus*

Rather loosely used to describe the 'guilty act', the *actus reus* (plural: *actus rei*) of an offence is often the physical element of a crime requiring the defendant to perform a certain act or engage in certain conduct in order to commit a criminal offence. The word 'act', however, is far too narrow a concept to be applicable in all circumstances.

Refer back to our example of Jack and Jill at **1.2.1,** where Jill pushes Jack down the hill. Jill's conduct of pushing Jack is an 'act', and thus the *actus reus,* or one element of the *actus reus,* for a potential offence against Jack may have been satisfied. Suppose, however, that Jack were to fall and asked Jill to help him to prevent him tumbling down the hill. Should Jill refuse to help, she has not performed an 'act'. Rather, Jill has failed to act, also known as an omission.

Whether the failure to act will result in criminal charges being brought against Jill is a matter dependent on the circumstances. However, what can be made clear at this moment is that to define *actus reus* as a 'guilty act' fails to account for the other circumstances and surrounding facts that may play a part in a criminal offence. As a result, therefore, it is more appropriate to use the term 'guilty conduct and circumstances' instead. An even broader definition of *actus reus* is provided by Ormerod and Laird (*Smith, Hogan, & Ormerod's Criminal Law*, 16th edn (OUP, 2021)) who comment that it includes 'all the elements in the definition of the crime except D's mental element'.

The following can be characterised as potentially amounting to the *actus reus* of a particular crime:

- acts;
- conduct;
- omissions;
- consequences;
- surrounding circumstances; and
- state of affairs.

When dealing with criminal offences in Parts II and III of this text, it will be made clear what form of *actus reus* we are concerned with. For the most part, we are concerned with what can helpfully be described as the 'three Cs'.

We can examine the three Cs in more detail now:

Table 1.6 Detailing the three Cs

Word	Explanation
Conduct	Represents any acts or omissions required by the defendant in order to commit the respective *actus reus* of the offence. For example, the offence of theft requires an 'appropriation'.
Circumstances	Represents any surrounding factual circumstances or matters that must be present for the offence to take place. For example, the offence of theft requires property to 'belong to another'.
Consequences	Represents the requirements for an end result to occur in order for an offence to be committed. Many offences do not require it. For example, the offence of theft does not require the actual property to be stolen; a mere *intention* to steal is sufficient.

Certain offences may involve numerous different elements. As a quick example, take the offence of burglary. Burglary is a statutory offence contained within s 9 of the Theft Act (TA) 1968. Burglary is divided into two forms, contained in s 9(1)(a) and 9(1)(b) respectively. For our example, we shall consider s 9(1)(b), which concerns the circumstances where 'having entered any building or part of a building as a trespasser, the defendant steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm'.

Table 1.7 demonstrates the individual elements of the *actus reus* of a s 9(1)(b) burglary. This is but one example of many that will arise throughout this text. There may be offences which do not contain all of the 'three Cs', for example rape does not require the existence of an 'end result' or 'consequence'. Rape requires the intentional penetration of the vagina, anus or mouth of another person with a penis (conduct) and such conduct must be done without consent and without a reasonable belief in consent (circumstance). Further examples are provided in **Chapter 2**.

Table 1.7 Elements of the offence of burglary

Elements of burglary	Form of *actus reus*
Entry	Act/conduct
Building or part of a building	Surrounding circumstance
As a trespasser	Surrounding circumstance
Commits or attempts to commit theft or GBH	Act/conduct and consequence

1.8.2 *Mens rea*

Rather loosely used to describe the 'guilty mind', the *mens rea* of an offence is the mental element of a crime, often requiring a defendant to intend the end result. Intention alone, however, does not satisfactorily encompass the spectrum of the *mens rea*. The first point to note is that the *mens rea*, like the *actus reus*, is unique to each particular crime. This was made clear by Lord Hailsham, in *DPP v Morgan* [1976] AC 182, who stated (at 213) that '[t]he beginning of wisdom in all the "*mens rea*" cases … is … that "*mens rea*" means a number of quite different things in relation to different crimes'.

Take, for example, the *mentes reae* (plural of *mens rea*) of murder and common assault. Murder requires the intention to kill or cause grievous bodily harm (GBH), whereas the offence of common assault requires the intention to cause the apprehension of unlawful physical force or be reckless as to the thought of such

apprehension occurring. As can be seen, both offences are unique in what is required to satisfy the mental element of the crime. The distinction between the two offences arises as a result of their classification as 'specific' and 'basic' intent offences, which we shall consider in **Chapter 3**.

Despite this, however, there are a number of concepts on which the mental element of a criminal offence is based; these are:

- intention;
- foreseeability;
- recklessness; and
- negligence.

We shall deal with each of these concepts in greater detail in **Chapter 3** alongside the requirement of contemporaneity (or coincidence) of the *actus reus* and *mens rea*.

Importantly, as made clear above, there are offences that do not require any form of *mens rea* or fault. These offences are known as 'strict liability offences' and shall also be dealt with in **Chapter 3**. In summary, a defendant may be liable for a criminal offence simply by satisfying the *actus reus* without any corresponding *mens rea*. We shall also look at the term 'absolute liability' in **Chapter 2** and compare that with strict liability.

1.8.3 No defence

The final element required for a defendant to be liable for an offence is the lack of a 'defence'.

in practice

When defence counsel first reads the papers regarding the alleged offence committed by their client, they will consider primarily whether the defendant has actually committed any offence, before then considering the potential defences that may be raised. The same applies to the study of criminal law and a simple exercise will always keep this process in mind: before there can be a *defence*, there has to be an *offence*.

Defences operate with different requirements, outcomes and burdens. With some defences, the defendant remains liable for a less serious offence, whereas, with other defences, the defendant escapes liability completely. Further, some defences impose the legal burden of proof on the defendant, whereas others merely impose an evidential burden of proof (see above at **1.7.2.1**).

Table 1.8 demonstrates these distinctions with examples, and we shall consider these in greater depth in **Chapter 7** when we consider defences.

Table 1.8 Distinguishing defences

Type of defence	Outcome	Example
'Complete'	Defendant is rendered 'not guilty'	Self-defence
'Partial'	Defendant's offence may be 'reduced' to a less severe offence	Intoxication
'Special'	Reduces a potential murder conviction to a conviction of voluntary manslaughter	Diminished responsibility

A point of interest that we shall return to in **Chapter 7** is whether defences form part of the definition of a crime (ie the constituent elements) or whether they are outside the definition, operating independently. Williams (*Criminal Law: The General Part*

(Steven & Son, 1961)) takes the former view and argues that defences are not a separate element of liability as they simply form part of the *actus reus*. Kadish ('The Decline of Innocence' (1968) 26 Camb Law Journal 273), on the other hand, argues that there must be an absence of a defence (as a distinct element) given that the *mens rea* requires an element of blameworthiness. The latter view is also adopted by Lanham ('Larsonneur Revisited' [1976] Crim LR 276).

In respect of this argument, one would have to distinguish between those defences which are justificatory in nature, those defences which provide the defendant with an excuse for his crime, and those which negate an element of the offence. For example, intoxication is not a defence *per se* but rather is a denial of the *mens rea* of an offence (*R v Heard* [2007] EWCA Crim 125). This is because intoxication acts to demonstrate that the defendant could not have formed the necessary *mens rea* for the offence, eg intention, because he was intoxicated. As a result, the 'defence' of intoxication is better understood as an element of an offence (in that it extinguishes *mens rea*), rather than as a distinct defence to a crime. This can be compared to self-defence (also known as private defence) which, if successful, amounts to a justification for the defendant's actions. This is because the defendant, through self-defence, is not claiming that he lacked the necessary mental element. Rather, he is seeking to 'justify' why he acted in such a manner. In this respect, we can say that self-defence, unlike intoxication, is a true defence. It is therefore a separate and distinct element which removes the already established liability from the defendant. At the same time, however, one could argue that the effect of self-defence is to make the defendant's conduct lawful. The offence of battery, for example, requires the unlawful application of physical force. If the defendant's conduct of acting in self-defence makes his conduct lawful, that would mean that self-defence was an element of the offence, and not a defence. Further discussion of this argument is had in **Chapter 8**.

To help with this distinction, let us look at three examples involving Jack and Jill with slightly different facts:

(1) Jill stabs Jack in the chest, and Jack dies as a result. Jill possesses the *actus reus* of murder and intended to kill Jack. Jill is liable for murder.

(2) Jill stabs Jack in the chest, and Jack dies as a result. Jill was intoxicated and claims that she had no idea what she was doing. Jill possesses the *actus reus* of murder but, as a result of her intoxication, may not have had the intention to kill or harm Jack. Jill may not liable for murder, but may be liable for manslaughter.

(3) Jill stabs Jack in the chest, and Jack dies as a result. Jill acted in defence of herself when Jack came home intoxicated and began to attack her. Jill feared for her life and stabbed Jack. Jill possesses the *actus reus* of murder, and the *mens rea*, given her intention to cause GBH to Jack (to stop him). Jill is liable for murder unless she was acting in defence of herself and her conduct is considered reasonable and necessary in the circumstances. Jill may therefore not be liable for murder.

It is these three components (*actus reus*, *mens rea* and defences) that shall form the bulk of our discussion in Part I of this text. In Part II, we shall consider how these principles apply to specific offences against the person, and in Part III how they apply to specific offences against property.

in practice

The prosecution must prove all elements of an offence in order for a defendant to be liable. By 'prove', we simply mean that the prosecution must convince the magistrate or jury that each element of the offence has been made out from the evidence to the appropriate standard (ie beyond reasonable doubt). Take the offence of assault occasioning actual bodily harm. Whilst the prosecution may succeed in proving that the defendant committed an assault, if it fails to prove that the victim actually suffered harm (eg the prosecution fails to ask the victim whether they suffered injury/harm), then the offence has not been proven. It is essential, therefore, to maintain a practical focus and be aware of what actually must exist in order for a defendant to be 'liable'.

1.9 Further reading

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Ashworth, 'Punishment, Compensation and the State' (1986) 6(1) OJLS 86
Ashworth, and Blake, 'The Presumption of Innocence in English Criminal Law' [1996] Crim LR 306.
Ashworth, *Sentencing and Criminal Justice* (6th edn, 2015).
Baker, 'The European Union's "Area of Freedom, Security and (Criminal) Justice" Ten Years On' [2009] Crim LR 833.
Bingham, 'A Criminal Code: Must We Wait Forever?' [1999] Crim LR 694.
Chalmers and Leverick, 'Fair Labeling and Criminal Law' (2008) 71 MLR 217.
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- The criminal law refers to the study of criminal liability.
- Liability simply refers to the requirements that need to exist in order for a person to be guilty of a criminal offence.
- The criminal law functions to protect society, enforce rules and punish rule-breakers.
- The criminal law is built on a number of principles, including autonomy and welfare.
- Substantive criminal law must be distinguished from procedural law and evidential law.
- The elements of any offence are made up of the *actus reus*, *mens rea* and a lack of defence.

Essay

'The criminal law is designed to promote individual autonomy and fair warning. In its present state, it fails in its task'.'

Critically consider this statement in light of the so-called 'principles' of criminal law.