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Understanding criminal law

1.1 Introduction

Proficiency in criminal law involves a number of different skills and competencies. It requires a knowledge of the rules wherein the elements of criminal offences are to be found. It requires a knowledge of the rules of evidence and procedure. It requires an ability to identify the rule(s) applicable to a fact situation and to apply them logically and coherently. Attaining these latter competencies is necessary to discharge effectively the day-to-day tasks of a criminal lawyer – solicitor, advocate or judge. However, true mastery requires something further. It requires also a critical and evaluative attitude. The criminal law in action is not just a matter of doctrine. Criminal law doctrine has as its purpose the delivery of criminal justice and criminal justice is a contingent outcome in which rule, process and context all play their part. It is not simply a logical description of what happens when rule meets (prohibited) event.

Understanding criminal law requires, therefore, an appreciation of the day-to-day workings and constitution of the criminal justice system. Moreover, it requires an understanding of the resources of the criminal law to produce substantive justice. If the mechanical application of a given rule to a fact situation acquits a dangerous or wicked person, or convicts someone neither dangerous nor blameworthy according to ordinary standards, the law may be considered not only ‘an ass’ but as confounding its own rationale. Understanding this rationale is also, therefore, a necessary preliminary to understanding the law itself since it will inform a realistic appreciation of what can be argued and what can not. At its most basic, to know what the law is may require an understanding of how to produce cogent and principled arguments for change.

This book seeks to examine the rules of criminal law in an evaluative context. It concerns itself with what makes a crime, both at a general theoretical level and at the level of individual offences. It addresses what the law is and, from the point of view of the ideas, principles and policies informing it, also what it ought to be. In Chapters 1–3 we will explore some general matters which will help to inform such an evaluative attitude. In Chapter 2 the principles and ideas informing decisions to criminalise will be considered. What is it, say, which renders incitement to racial hatred a criminal offence, incitement to sexual hatred a matter at most of personal morality and sexual and racial discrimination a subject of redress only under the civil law? Chapter 3 examines punishment and the theories used to justify it. Although this is the subject-matter of its own discrete discipline, namely penology, some understanding is necessary for the student of criminal law. It provides a basis for subjecting the rules of criminal law to effective critical scrutiny. If we have a clear idea of why we punish, we are in a position to determine, for example, what fault
elements should separate murder from manslaughter, or indeed whether they should be merged in a single offence. Without such an idea our opinions will, inevitably, issue from our prejudices rather than our understanding.

Individual offences themselves are covered in Chapters 11–17. The elements of these offences vary but they have certain things in common. In particular, they require proof of some proscribed deed on the part of the offender unaccompanied by any excusing or justifying condition, together with a designated mental attitude, commonly known as guilty mind. Since this model of liability (conduct–consequence–mental attitude–absence of defence) is fairly constant throughout the criminal law these separate elements and the ideas informing them will be explored in Chapters 4–10 before we meet the offences themselves, so as to avoid unnecessary duplication. Finally, in Chapters 18 and 19, we will examine how criminal liability may be incurred without personally executing a substantive offence, whether by participating in an offence perpetrated by another or by inciting, attempting or conspiring to commit a substantive offence.

Before tackling these issues we will, in this chapter, examine some general issues pertinent to understanding the criminal law and its operation, concentrating, in particular, upon the philosophy, workings and constitution of the criminal justice system.

### 1.2 What is the criminal law?

Crimes are characterised, and are distinguished from other acts or omissions which may give rise to legal proceedings, by the prospect of state punishment. It is this latter feature which distinguishes the criminal law from the civil law and other methods of social control such as community morality. The formal threshold at which the criminal law intervenes is when the conduct in question has a sufficiently deleterious social impact to justify the state, rather than any individual affected, taking on the mantle of the injured party.

### 1.3 What are the concerns of the criminal law?

The identifying characteristic of the criminal law, generally, is its coercive, controlling nature and its function as society’s formal method of social control. The criminal law sets boundaries both to our behaviour and to the power of the state to coerce and punish us. This affords no clue as to any essential internal characteristic of the act or omission which marks it as criminal. Indeed there are none. There is no requirement even that the proscribed conduct be immoral or anti-social. Parliament could enact that giving money to the poor or failing to brush one’s dog was punishable and no argument of morality would prevent such conduct from being criminal.

In a sense, then, the rules of criminal law are contingent. The contingency may be the enduring and universal need to ensure that human beings treat each other as human beings rather than as objects. Or, from another perspective, it may be to secure the continuity of existing patterns of power. Often, however, the contingency is nothing more than historical accident, owing little to enduring themes of human depravity or class and much more to political expediency.

Underlying the criminal law and its operation are, however, a number of ethical principles which seek to restrict its mandate. The American Model Penal Code provides what
1.3 What are the concerns of the criminal law?

is probably the nearest thing we have to an uncontroversial statement of the proper purposes of the criminal law, namely:¹

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
(b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
(c) to safeguard conduct that is without fault from condemnation as criminal;
(d) to give fair warning of the nature of the conduct declared to be an offence;
(e) to differentiate on reasonable grounds between serious and minor offences.

These five propositions form the basic ethical building blocks of the criminal law and its operation. Without (d) the very legality of a criminal proscription is compromised.² Unless (a), (c) the relevant conduct discloses moral fault, a person should not be blamed (and suffer punishment) however serious the consequences.³ Even (a) if fault is disclosed criminal consequences should only attend substantial interferences with or threats to public or private interests.⁴ Severity of sentence should vary according to the seriousness of the offence (e).⁵ Moral distinctions between different kinds of proscribed conduct should be reflected by the creation of different offences (e).⁶

It should be noted at this early stage, however, that this statement, principled and humane as it is, fails adequately to account for the majority of criminal laws in operation. A huge number of statutory offences, most notably those relating to traffic, environment and safety, are constituted without proof of fault. Where major public interests are at stake the operating principles underlying state coercion emphasise more our individual responsibility to act conscientiously rather than simply not to act selfishly or wickedly.

Paragraph (a) of the Model Penal Code is a convenient starting point for exploring the scope of the criminal law. It concerns itself with prohibiting and preventing conduct which harms or threatens harm to either public or private interests. It will be helpful to clarify the distinction between public and private interests since they are not coterminous. For example, the criminal law prohibits citizens from killing or even harming each other. It is contrary to the public interest that they should, and will usually be contrary also to the private interests for obvious reasons. Again, it is in the public interest that people pay their taxes. The economic and social structures of society depend on it. Yet no individual is affected by individual instances of tax evasion. State coercion is justified on the grounds of the public interests threatened rather than the victimisation of individuals. On the other side of the equation private interests will be offered support through the criminal law, but only where the protection of those interests is a matter of public interest. At the forefront of such interests is that of individual autonomy.⁷ The crimes of rape, assault and theft are examples

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¹ Section 1.02 (1).
² This is known as the principle of legality.
³ The principle of responsibility.
⁴ The principle of urgency or minimal criminalisation.
⁵ The principle of proportionality.
⁷ This will be examined in Chapter 2.
of offences where the defence of individual interests in autonomy is subsumed within the public interest.

The major concerns of the criminal law may be expressed, therefore, as follows:

A The support of public interests in –

(1) preventing physical injury. This accounts for the crimes of murder, manslaughter, arson and other crimes of violence; also certain road traffic offences, and those relating to public health and safety.

(2) proscribing personal immorality deemed injurious to society’s well-being. This accounts for the criminalisation of bigamy, incest, sado-masochism, bestiality and obscenity, drug possession and supply.

(3) preventing the moral corruption of the young through crimes such as gross indecency with children and unlawful sexual intercourse.

(4) maintaining the integrity of the state and the administration of justice through crimes such as treason, perjury, perverting the course of justice, tax evasion.

(5) maintaining public order and security through offences such as riot, affray, breach of the peace, public drunkenness.

B The support of private interests in –

Remaining free from

(1) undesired physical interference through crimes such as rape, assault, indecent assault, false imprisonment, harassment;

(2) offence through crimes such as indecent exposure, indecency in public, solicitation;

(3) undesired interference with property through crimes such as theft, robbery, taking and driving away a road vehicle, fraud.

1.4 How are the criminal law’s purposes discharged?

A Law enforcement

The criminal law’s purposes are discharged by law enforcement and the machinery of criminal justice generally. This includes both the operational prevention of crime, typically via policing, and also by bringing offenders to justice. Procedures vary according to the nature of the offence committed. Criminal offences are classified according to whether they are arrestable or non-arrestable. The former, which includes more serious crimes, allows a suspect to be arrested without warrant. The notion of arrestable and non-arrestable offences was introduced by the Criminal Justice Act 1967 and replaced the previous classification of offences into felonies and misdemeanours.

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9 Police and Criminal Evidence Act 1984, s 24 (1) and (2).
To understand properly the operation of the criminal justice system, it is important to be aware of the general context of criminal behaviour and law enforcement. Only a tiny proportion of crimes result in criminal proceedings whether culminating in conviction or otherwise. Estimates of the number of offences committed which result in conviction are steady at between two and three per cent. One obvious reason why people may escape ‘justice’ in this way is that their offences are not detected. Few offences come to the attention of the police. The police are heavily dependent on public reporting of offences. Criminal offences may not be reported either because they do not come to the public’s attention, as with many ‘crimes of the powerful’, or are not treated as worth police involvement. For example victims are not disposed to report property crimes except to support an insurance claim, or if they have evidence as to who the culprit was. Research also shows that the victims of domestic violence are particularly loath to report acts of violence committed by a partner, parent or surrogate parent.

The police also have a discretion as to how to react to crimes reported to them. The discretion extends to the decision whether to investigate, or even simply record a reported offence. Clearly the more serious the offence the more likely it will be taken seriously. It should be noted, however, that matters other than the grade of offence committed have a bearing on how serious it is perceived to be. For example, the decision whether or how to enforce the law is rarely neutral as to context. Research indicates that discretion is structured by bias, whether based on class, race or gender. This has led to calls for discretion to be exercised in an open and regulated fashion. If criminal liability is so much of a lottery, it is doubly unfair that success in the outcome should be so heavily determined by cultural or economic status. A more radical suggestion is for non-serious offences to be diverted altogether from the criminal courts.

Some offences already ‘bypass’ the criminal justice system, for example minor traffic offences which carry fixed penalty notices. The Inland Revenue and Department of Social Security have the power to levy penalties rather than prosecute tax or social security fraud. This means that prosecutorial discretion has the power to structure offences according to, say, the economic status of the offender rather than the seriousness of the harm caused or his culpability. Evidence suggests that criminal justice agencies such as the police are increasingly relying on ‘out of court disposals’ such as fixed penalty notices and cautions, even for serious core crime. The lack of proper monitoring is such a concern that it has resulted in a review of such practices by the Office of Criminal Justice Reform.
The stuff of academic criminal law ignores these various contexts but to understand how legal rules convert themselves into legal consequences it must be appreciated that, while it is a necessary condition of being subject to state coercion that the accused satisfies a relevant offence definition, it is by no means a sufficient one.

B Bringing proceedings

The Crown Prosecution Service has the overall responsibility for instituting proceedings, assessing the weight of evidence, charging, and deciding, in the light of the evidence and the public interest, whether the prosecution should proceed.\(^17\) Once again discretion, as much as the rules of criminal law, is influential but is now controlled by a Code for Crown Prosecutors.\(^18\) A simple example of how discretion may defeat the logical application of ‘paper rules’ arises in connection with charging. Although official charging standards govern the exercise of discretion there is no necessary connection between the offence actually committed and that charged, beyond what is necessary to secure a conviction. Thus a person who has committed robbery may be charged only with theft; a person who has committed a wounding may be charged only with assault; a person who has committed murder may be charged only with manslaughter. Undercharging carries a number of benefits. First, it may have evidential advantages. It is easier to prove theft than robbery. Second, it may encourage a guilty plea. Third, it may enable the case to be heard summarily rather than on indictment. The advantage for the prosecution of summary trial is that it is less costly and more efficient. It is also thought to increase the chances of conviction. It has been estimated that only one per cent of criminal cases undergo trial by jury. This is particularly significant in the context of those serious offences triable either way, most of which are tried summarily. The neutral application of paper rules and disinterested fact-finding upon which criminal justice is premised does not come so easily in the magistrates’ court. This leads some to conclude that the substantive study of criminal law might be something of an esoteric pursuit.\(^19\)

Offences are triable (a) summarily, that is, before magistrates, (b) on indictment, that is, in Crown Court before a judge and jury, or (c) either way, that is, either summarily or on indictment. All defendants have a right to jury trial in respect of offences triable either way.\(^20\) In practice the vast majority of offences are heard by magistrates. In each case the conduct of the trial is dictated to a greater or lesser extent by the rules of evidence and procedure. Some of these will be examined in some detail now. To help comprehension, they will be considered in the context of a jury trial of a typical offence, with the rider that such an offence (triable either way) will, however, rarely be tried there.

\(^{17}\) Criminal Justice Act 2003, section 29.


\(^{19}\) See P. Darbyshire, ‘The Importance and Neglect of the Magistracy’ [1997] Crim LR 627.

C Trial

The formal accusation made against a defendant is in the form of an indictment or, where
the matter is tried summarily before magistrates, an information. This contains a state-
ment of the offence and particulars of the offence charged. Thus an indictment for burglary
will adopt the following form:

John Smith is charged as follows:


Particulars: John Smith on the first of September 1998, having entered a building known as
Buckingham Palace as a trespasser, stole therein one cushion.

1 Burden of proof

The job of the prosecution will be to prove all the elements of burglary as described in the
particulars of offence. These include the elements of theft comprehended by the word
'stole'. Theft is defined as ‘the dishonest appropriation of property belonging to another with
the intention of permanently depriving the other of it’. The purpose of the trial will be to
establish that these elements are present. This involves both legal (e.g. what does ‘appro-
priation’ mean?) and factual determinations (e.g. did John Smith do the appropriating?).

The burden of proving all the elements of the offence lies with the prosecution. They
will be required to prove that

(1) there was a taking (appropriation) of a cushion,
(2) the taking was by John Smith,
(3) the cushion belonged to someone other than John Smith,
(4) the taking was dishonest, and
(5) the taking was intended permanently to deprive the owner of it.

This means, for example, that the mere fact that the prosecution is able to prove that John
Smith entered Buckingham Palace as a trespasser does not mean that it is for John Smith
to prove that he did not steal there the cushion.21 The burden of persuading the jury (or
magistrates where tried summarily) of the accused’s guilt extends beyond proving the
elements of the offence to include the burden of disproving any defence for which the
defendant adduces evidence. Included in the meaning of defence in this context are general
defences such as duress, provocation or self-defence22 and defences arising out of the struc-
ture of the offence charged. Thus if the defendant adduces evidence to the effect that he
was coerced or thought the cushion was his own (and was therefore not dishonest) it is for
the prosecution to persuade the jury that his story is untrue.

It should be noted that a defence can only be raised by the adducing of evidence by the
defendant. It cannot be done simply by means of pleading. The prosecution does not have
to disprove every cock-and-bull story the defendant might raise.23 Thus, John Smith will
have to do something more than claim that he thought the cushion was his own. If he does

21 This is the effect of Woolminton v DPP [1935] AC 462.
22 Lobell [1957] 1 All ER 734; Gill [1963] 2 All ER 688.
not do so the jury will be entitled to assume that he is simply trying it on and that the circumstantial evidence raised by the prosecution is strong enough for a conviction. This requires him to adduce some evidence sufficient to put a doubt in the jury’s mind that he may have had this belief.\textsuperscript{24} For example he might be able to raise evidence that he had brought a cushion with him and had mislaid it. If this evidence is credible – it does not have to be overwhelming – the judge must direct the jury that the prosecution will not prove the element of dishonesty unless it persuades them to disbelieve the accused’s story.

2 Evidential burden and burden of persuasion
The above account makes clear that there are two burdens on the parties in a criminal trial. The first burden, which rests on both prosecution and defence, is of raising sufficient evidence to substantiate the reasonable possibility that a particular element which they wish to rely on may be true. This is known as the evidential burden. If, at the close of the prosecution case, it fails to discharge this evidential burden in respect of any of the elements of the offence charged, the defence may submit that there is no case to answer. Success with such a submission means an acquittal without the need for the defence to raise evidence of its own. Thus if the prosecution is able to prove that John Smith entered the palace as a trespasser but can adduce no evidence to link him with the disappearance of the cushion save that it disappeared on the day of his entry, it will fail to discharge its evidential burden on this element. Being a trespasser in a house is hardly probative of theft of a cushion.

The other burden is that of persuading the jury of the truth of the matter relied upon. This is commonly known as the legal burden of proof, or, more helpfully, ‘the burden of persuasion’ or ‘persuasive burden’. In theory this burden lies, with very few exceptions,\textsuperscript{25} upon the prosecution. Where it lies with the defence, as where the defendant pleads insanity, the standard of proof is on a balance of probabilities. Where it lies with the prosecution the standard of proof is ‘beyond reasonable doubt’. In effect, this means that the jury should acquit if they are not sure the defendant is guilty even if they think he most probably is. An acquittal means that guilt is not proven, not that the jury believe the defendant to be innocent.

3 The presumption of innocence
The prosecution carries this latter burden as reflective of a fundamental premise underpinning the criminal law, namely that the accused is innocent until proven guilty.\textsuperscript{26} It is enshrined in Article 6(2) of the European Convention on Human Rights which the Human Rights Act 1998 incorporates into domestic law. Research suggests that the presumption of innocence is much dishonoured in English criminal law.\textsuperscript{27} Such an aberration is challenged

\textsuperscript{25} For example the burden of proving insanity or diminished responsibility is on the defendant if he wishes to rely on the defence.
\textsuperscript{26} Woolmington \textit{v} DPP [1935] AC 462: ‘throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt . . . ’ at 481 per Viscount Sankey LC.
not simply as an error of process, but as reflecting an absence of State respect for the autonomy, freedom and diversity of citizens and visitors. It seems that an increasingly large proportion of offences triable in the Crown Court include some form of derogation from the principle that it is for the prosecution to do the proving. Two ways in which this is done is via a statutory presumption or by incorporating in an otherwise strict liability offence a defence of ‘due diligence’ or ‘no intention’. Although there may often be good reasons for such derogation, it would obviously serve justice if Parliament were required to place the burden of proof on the prosecution unless good reasons for reversal were explicitly considered and debated. Until the enactment of the Human Rights Act 1998 challenges could be made only via the European Court of Human Rights under Article 6, which guarantees the right to a fair trial. The Court has declared that presumptions and statutory reversals of the burden of proof do not contravene Article 6 if confined within reasonable limits. Despite this, in Kebilene the Divisional Court ruled that reverse burdens of proof in relation to the possession of weapons under the Prevention of Terrorism Act 1989 were incompatible with Article 6, given that they undermined the presumption of innocence. On appeal, the House of Lords adopted a more cautious approach, holding that reverse burdens of proof are Convention compatible if they are capable of being interpreted as imposing an evidential rather than persuasive burden on the accused. Otherwise, if they impose a persuasive burden, compatibility depends upon matters such as the relative difficulty of proving the relevant matter for both prosecution and defence and the seriousness of the threat the provision is designed to combat. The House of Lords has now ruled that in criminal proceedings against an employer after an accident at work, it was sufficient for the prosecution to prove merely a risk of injury arising from the way in which work was managed, without identifying and proving specific breaches of duty by the employer. Following that, a prima facie case of breach was established. The onus then passed to the employer to make good the defence of reasonable practicability.

4 Judge and jury
As should be apparent from the foregoing discussion, judge and jury have separate roles in the conduct of the trial. The jury are the judges of fact. This means that it is for them ultimately to decide how much weight to ascribe to the various pieces of evidence adduced by prosecution and defence. They will not do this unsupervised. In the course of the trial the judge may refuse to admit certain evidence likely to be more prejudicial than probative.

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29 Forty per cent on Ashworth and Blake’s estimate.
30 A. Ashworth and M. Blake, ibid., at 316; a less radical proposal is to be found in the CLRC Report on Evidence Cmd 4991 of 1972, paras 137–42.
33 An example of statutes expressly imposing an evidential burden include Terrorism Act 2000 s 53.
34 An example is Criminal Justice and Police Act 2001, ss 39(3) and 40(3).
The judge may also tell the jury to ignore things said in the witness-box if such things are irrelevant to the proof of guilt of the defendant or, if relevant, less probative than prejudicial. After prosecution and then defence have presented their cases the judge will sum up and will review the facts for the jury. The idea behind this is that the jury members will need help in discriminating between those facts which are relevant to prove guilt and those which are not. Thus judges will pinpoint key issues for the jury to consider and will also highlight inconsistencies, weaknesses and strengths in either case. It is open to judges to make clear their view as to how credible a piece of evidence is as long as they leave the final determination to the jury. Ideally they should do all this in as simple and direct a fashion as possible and link it to the relevant legal issue. Returning to the case of John Smith, one of the legal issues is that of dishonesty. To make this determination as easy as possible for the jury, the judge will try to explain the relevance of any claim made by the defendant to that issue, bearing in mind the evidence adduced by prosecution and defence; and will remind them that the burden of persuasion is on the prosecution at all times and that the standard is beyond reasonable doubt. The summing up, on the issue of dishonesty, may take a form similar to the following in which legal, factual and evidential issues are knitted together:

(Members of the jury), did you believe his story that he thought the cushion was his own? If you think that he may have done you must acquit since it would indicate his taking of the cushion may not have been dishonest. Remember it is not for the defendant to prove that he was not dishonest but for the prosecution to prove that he was. They must do this by removing any reasonable doubt from your mind that the defence he raised may have been true. Have they done this? Let me remind you of the evidence. The defendant said that he thought the cushion was his own – the one which he had brought with him and had then mislaid. But what was the defendant doing breaking into Buckingham Palace with a cushion? He gave evidence on oath that it was for comfort. But the prosecution said he found the cushion in a cupboard. How could he think it was his own cushion if he found it in a cupboard? Or do you disbelieve the evidence of the housekeeper who said she had put it there? Members of the jury, who do you believe? You may think the housekeeper had no reason for making this up but even housekeepers have short memories when it comes to remembering things that they ought to have put away. On the other hand, why did the accused have the key to the cupboard in his hand? You may consider this fact conclusive of his guilt. It would not be unreasonable. It is a matter for you.

The judge may not, then, direct the jury to convict but can highlight the logical deficiencies of the defendant’s case. On the other hand, if the prosecution has failed to adduce enough evidence to justify a conviction, the judge may direct them to acquit.

The satisfying picture painted by the above sample summing-up is of a judge who takes care of all things legal and evidential, and a jury which decides the factual issues necessary to establish guilt, each keeping politely to the appropriate function. This picture is not entirely accurate, however. Apart from the influence judges are able to exert over the fact-finding process, there are also ways in which the jury may participate in deciding essentially legal questions. This confusion is more marked in the magistrates’ courts where magistrates are in effect judges of both law and fact.

In the Crown Court, legal and factual roles are particularly confused over the interpretation of words in common parlance. For example, if a crime is defined by statute as including the mental element of ‘intention’, ‘recklessness’ or ‘dishonesty’, does the judge allow jurors to apply their own meaning of these words or do the words carry a technical meaning which the judge must convey to the jury? There are no hard and fast rules on the matter. A major problem posed by handing the interpretation of provisions to the jury is the inconsistency and consequent problems of justice this may engender.

1.5 Where do the rules of criminal law come from?

The rules of criminal law, like any other standards of behaviour, are the product of human minds. The traditional view holds that the essence of ‘law’ is the authoritative guidance of conduct by means of source-based rules. Murder or theft are crimes because the conduct described by these words has been designated criminal by an appropriate source. The three main sources of the criminal law are common law, legislation, both domestic and European, and the European Convention on Human Rights.

A Common law

1 Historical perspective

Until the nineteenth century the criminal law was almost entirely common law, that is, judge-made. Included amongst the inventory of common law crimes were murder, manslaughter, rape, assault and battery, burglary and larceny. Particularly influential upon the development of the common law were the works of commentators, notable amongst whom were Hale, Hawkins, Foster, and Blackstone. The commentaries reported important decisions in criminal cases and also attempted some form of rationalisation and systematisation. This latter process was important for the future development of the criminal law because the criminal law, in comparison with some other areas of substantive law (and equity), lacked secure doctrinal foundations. To appreciate why, consider the kind of reasoning necessary to decide whether A owes B money, and that necessary to decide whether A is responsible for B’s death. It is relatively easy to formulate coherent and internally consistent rules governing the creation and discharge of a debt. It is less easy to formulate coherent and consistent rules governing the imputation of criminal liability. We may know a villain when we see one but how do we capture the elements of villainy in the form of a rule capable of providing a consistent blueprint for the disposal of offenders?

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39 See below at pp. 126–7.
40 The House of Lords has confirmed that international law was not a source of criminal law. The House of Lords could not therefore rule that action taken by the armed forces was criminal by virtue of it being allegedly contrary to international law. *Jones et al.* [2006] UKHL 16.
How do we decide what people may or may not do? How do we decide whether they are to blame for what they do such that they deserve punishment?

As an illustration of how these questions may provoke contradictory responses and a consequent need for doctrinal rationalisation, it may be worthwhile examining the crime of rape. Rape was constituted as a felony by judicial decision at a relatively early stage in the development of the common law. An enduring issue has been the status of coerced intercourse by husbands upon their wives. Is this a form of ‘private violence’ which, although deplorable, has no public dimension sufficient to warrant state coercion? Or is it just another variation on a consistent theme of non-consensual intercourse? Until a few years ago the former account dominated legal thinking. This was the outcome not of a judicial decision but of the general commentary on the law of rape given by Hale. He deemed this to be private violence lacking a public dimension on the ground that wives give irrevocable consent to intercourse with their husband as an incident of a marriage contract. It followed that, since absence of consent is of the essence of rape, husbands cannot practise it on their wives. The commentary added meaning to the rule and, in effect, became law for no better reason than that legal custom honoured it as such. Astonishingly perhaps, it was not until 1992 that the House of Lords felt able to consign the marital rape exemption, and the reasoning behind it, to the dustbin of legal history. This example should alert readers to the contextual nature of legal reasoning. No doubt Hale’s proposition looks irrational. At the time he uttered it, however, it was entirely rational in the sense that it expressed accurately the reasoning of the age. That the criminal law has authoritative sources tells us nothing about the enduring wisdom of its utterances.

The general power of judges to invent crimes and their constituent elements was clearly attributable to the absence of any other effective legislature. The judges were the law-makers to all intents and purposes and this power was for a long period relatively unfettered. Judges invented new crimes as the need arose, commonly justifying their creations as instances of a more general power to criminalise conduct which ‘outraged public decency’, corrupted ‘public morals’ or effected a public mischief. Examples of such offences included blasphemy, attempt, conspiracy and incitement, grave-snatching, and public nudity. By the middle of the nineteenth century the power of the courts to create new crimes was questioned, not least by the judges themselves. This phenomenon coincided with the emergence of Parliament as an effective instrument of legal and social reform and the general intellectual revolt against the idea of unelected judges legislating to restrict freedom. Recommendations were made to abolish common law crimes and replace them with a criminal code. These calls were resisted in England although taken up in some other common law jurisdictions. Some substantial attempts have been made, from time to time, to put the criminal law on a statutory footing. The most notable of these include the consolidating Act of 1861 on Offences Against the Person and the Theft Acts of 1968 and 1978.

43 Jones v Randall 98 ER 706.
44 Taylor (1676) 1 Vent 293.
45 Vaughan (1769) 4 Burr 2494.
46 Higgins (1801) 2 East 5.
47 Lynn 168 ER 350 (1788).
48 R v Price (1884) 12 QBD 247, per Stephen J.
2 The modern perspective

From time to time in the twentieth century, judges have reasserted a residual power to create new crimes using the old umbrella terms of corrupting public morals, outraging public decency, and effecting a public mischief. Examples have included the making of a false accusation of robbery,50 the publication of a magazine containing advertisements from prostitutes,51 and, most recently, taking photographs up women’s skirts.52 In neither case was the activity, when actually performed, a recognised criminal offence. It became so only as the result of a judicial decision to fill an empty doctrinal vessel (effecting a public mischief/corrupting public morals) with the substance of conduct of which they disapproved. Such cases suffered a great degree of criticism because, while inventing offences may address matters of genuine social need,53 it is now generally accepted and expected that the proper forum for determining that need, and the measures required to satisfy it, is Parliament.54

(a) Judicial creativity: the impact of precedent

Such law-making power as remains issues from the system of precedent. The trial courts (Crown Courts and Magistrates’ Courts) do not set precedents although, by convention, first instance decisions at Crown Court are of persuasive authority.55 Therefore, no ruling made by the judge in the case of R v John Smith will take effect as law. The appellate courts, which are in reverse order of hierarchy the Queen’s Bench Divisional Court, Court of Appeal (Criminal Division) and House of Lords, have the power to set binding precedents on courts lower in the court hierarchy. With the exception of the House of Lords, which is free to depart from previous decisions, appellate courts will also normally be bound by their own decisions. In theory, even courts of higher standing will respect the precedent of a lower court unless it is manifestly wrong. Outside this hierarchy, decisions of the European Court must be taken into account if relevant to the proceedings.56 Privy Council decisions are also of highly persuasive authority, and decisions from other common law jurisdictions are treated with ever-increasing respect.57

In practice, judicial development of the law is a lot ‘fuzzier’ than the above scheme would appear to suggest. Although judicial rule-following is overwhelmingly the norm, particularly in trial courts, judges sometimes overrule precedents, even those of long standing, and where they cannot or choose not to, they may refuse to follow a precedent or distinguish it. Although the occasions on which judges are now prepared to invent new offences have diminished almost to vanishing point58 they still retain, then, power to adapt and develop the common law.59 In effect, this power is legislative power and it can be used both to reduce and to extend the reach of the criminal sanction.60 It would be reassuring

50 Manley [1933] 1 KB 529.
51 Shaw v DPP [1962] AC 220.
52 Hamilton [2007] EWCA Crim 2062.
53 Such as unarguably appears in Manley.
54 W.T.S. Stallybrass, ‘Public Mischief’ (1933) 49 LQR 183.
57 In recent years the opinions of academic writers have also become more influential.
58 See on this point Shaw v DPP above, and Lord Reid in Knudler v DPP [1972] 2 All ER 898 at 905.
59 A significant recent example has been the development of the common law offence of assault.
60 And in its latter tendency, since judge-made law operates retrospectively, may breach the fair warning principle.
to think that there are some ultimate rules governing the practice of judges in this respect but there are none which command general agreement and obedience. There are few judges of any standing who have not sometimes played ‘fast and loose’ with the system of precedent where it was thought desirable.\(^{61}\)

Examining the case of marital rape is again instructive in this regard. In the leading case of \(R\) v \(R\), Owen J, at first instance, accepted the authority of Hale’s rule that a husband was generally exempt from punishment for rape.\(^ {62}\) He nevertheless ruled that the exemption did not apply where, as here, the parties had separated, extending earlier authority where married couples were separated by court order or its equivalent. In the same year in another case a different judge came to a different conclusion. He denied that there had ever been a legally binding rule. The exemption was simply the product of the musings of an antique commentator which nobody had seen fit to doubt.\(^ {63}\) Finally, the Court of Appeal and House of Lords in \(R\) v \(R\) stated, in effect, that the fiction of implied consent could not be supported in a society where the dominant ethic was one of equal rights, both economic and political. If there was a rule, it was overruled.

Three important insights can be drawn from these cases. The first is that a piece of doctrine which had stood unchallenged for centuries was dismissed as if it counted for nothing. The second is that no judge, of whatever standing in the court hierarchy, had any difficulty in refusing to follow it. One judge distinguished it, another denied its binding quality, another overruled it. All that matters, it seems, is that they did not like it. The third is that the effect of each decision was to extend the scope of criminal liability retrospectively to the husband. In effect, he was punished by a law which was not in existence at the time of action. At a moral level, there can have been few people who, on hearing of the decision, did not feel that the world was a better place for the judges’ decision. But the case raised two fundamental issues of principle. The first is whether it is proper for unelected and unaccountable judges to try to make the world a better place in a Parliamentary democracy. The second is whether, in trying to make the world a better place, the historically legitimated expectations of individuals that they cannot be punished for what they do in a private domain may be ignored. So abstract is this latter sentiment and so concrete is the social evil represented by marital rape, that one might prefer to dismiss it as vacuous. It is noteworthy that the decision was affirmed by the European Court of Human Rights (ECHR) despite the fact that it apparently breached Article 7 of the European Convention proscribing retrospective criminalisation.\(^ {64}\)

It must be remembered, however, that judicial power exercised for the obvious good of human-kind can also be exercised for less worthy purposes. We might find it less acceptable, for instance, if judges, without the explicit authority of Parliament or the ECHR, legislated that spouses could not engage in consensual oral sex or sado-masochism for purposes of sexual stimulation, or that parents could not lawfully punish their children.\(^ {65}\)

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\(^{62}\) [1991] 4 All ER 481.

\(^{63}\) Simon Brown J, \(R\) v \(C\) [1991] 1 All ER 755.

\(^{64}\) In SW and CR v UK (1995) 21 EHRR 363.

\(^{65}\) Cf. A v UK (1998) Crim LR 892 where the ECHR ruled that the UK was in breach of Article 3 of the European Convention (proscribing inhuman and degrading treatment) for allowing too broad a defence of reasonable chastisement. The Children Act 2004 withholds such a defence from those who punish with cruelty or causing actual bodily harm. Cf. also R v Emmett, *The Times*, 15 October 1999.
A model of law-making which avoids some of these dangers has sought to refine the function of judges in hard cases such as *R v R* where rule contradicts morality. It emphasises the requirement that judges should balance competing legal principles as well as blindly following legal rules. Sometimes a rule which operates to give effect to one legal principle confounds another. In such circumstances it is thought the judge should weigh the relevant principles in the balance and give effect to the principle most valued by society. Applied to the case of marital rape, the two most obvious competing principles were the rights of husbands not to be punished without fair warning of the criminality of their acts, and the rights of wives to have their autonomy and privacy respected. On this view it seems, then, that the judges found the latter more descriptive of society’s overall values than the former. Although this may not have been obvious to the defendant, he must have known he was ‘sailing close to the wind’ and so could hardly complain if he was treated like every other ‘rapist’.

Whatever the moral justifications for this development, such initiatives stand uneasily with the principle that judges should neither create new offences nor expand the impact of existing ones. *R v R* by no means stands alone as an example of this tendency. In recent years the House of Lords has expanded the scope of the law of assault, and the reach of both assault occasioning actual bodily harm and inflicting grievous bodily harm. Lest it be thought that judicial law-making is all one-way traffic aiming to increase the number of villains who pay the penalty for wrongdoing it should be noted that the courts also have been known to expand the coverage of defences. An instructive example, which has coincided with the narrowing of the scope of duress by threats, is the recognition of the defence of duress of circumstances and the gradual widening of the defence of necessity. Intriguingly, therefore, as the circumstances under which a person can escape liability for capitulating to a threat of injury from a third party are decreasing, so the circumstances are increasing where a person can escape liability for capitulating to the compulsion of circumstances. It is to be hoped that some sort of doctrinal equilibrium will soon be achieved.

(b) The tensions underlying judicial decision-making

It is difficult to discern any consistent framework to account for these divergent themes. Judicial behaviour, like weather, is not easily reducible to mechanistic laws. As with modern climatology, understanding judicial decision-making in the field of criminal law requires an acceptance that it is ultimately ‘chaotic’ but underscored by enduring patterns of behaviour. Unless we know what these patterns are it is difficult, if not impossible, for the student of criminal law to understand what at all is going on. Sometimes judges legislate. Usually they do not. Sometimes they reserve to themselves a law-making function.

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69 *R v Burstow* [1997] 4 All ER 225.

70 Which has been withdrawn from murder and attempted murder. See chapter 10.

Usually they deny such a function and implore Parliament to intervene. It is tempting to suppose that some judges are conservative and others radical and that patterns of judicial law-making are reducible to the ebb and flow of different currents of opinion. While this is undoubtedly true to a degree, it does not help us to understand why sometimes conservative judges legislate and radical judges hold back.

The enduring patterns of behaviour referred to derive from, at their most basic, the eternal tension between the social need for villains to be punished and the equally urgent requirement that non-villains escape punishment. Resolution of this tension requires a clear vision of what kind of people we wish to punish and why. The rules governing criminal liability are susceptible to judicial manipulation, not only to ensure that society’s baddies are taken care of, but also to ensure that society’s goodies are not prejudiced by the necessarily abstract nature of criminal prohibitions. The balancing exercise is not made easier by other tensions to be discovered, for example, the tension between the judge’s rationalising instincts and the more usual cautious deference to the rule of law. It must be appreciated that the impact of these tensions derives to a large degree from the absence of a codified criminal law. Where there is one, or at least a consolidating statute, the inevitable tendency will be for ‘the judge (to) start his thinking about the law at the relevant section. (But when) the common law is in control there is no guarantee that judicial thought concerning a particular problem will always start in the same place’. It goes without saying that the mere existence of common law offences poses a challenge to the legality principle, which has been heavily influential in the call for codifying the criminal law.

A recent attempt has been made at providing judicial guidelines for the orderly development of the common law, whether in expanding the coverage of existing offences or expanding the reach of defences. In the case of C v DPP a first instance decision to abolish the presumption that children under the age of fourteen are incapable of forming mens rea was reversed by the House of Lords. Although they were not disposed to disagree with the substance of the judge’s reasons, they were also not prepared to abrogate a long-standing rule governing the scope of criminal responsibility in a ‘classic case (requiring) Parliamentary investigation, deliberation and legislation’. What distinguished this case from such as R v R, it was said, was the fact that abolishing the rule would be politically controversial and that recent Parliamentary consideration of the issue had not resulted in a change of the law. Lord Lowry set out the guidelines as follows:

1. if the solution is doubtful the judges should beware 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 intervention than purely legal problems;
4. fundamental legal doctrines should not lightly be set aside;
5. judges should not make a change unless they can achieve finality and certainty.

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75 C v DPP [1995] 2 All ER 43 at 64 per Lord Lowry.
76 At 52.
Lest it might be thought, however, that these guidelines would seriously restrict the power of judges to develop the rules of criminal responsibility it should be pointed out that very few of the more notable changes made by judges over the past 20 years\(^{77}\) would be caught by them. Enactment of the Human Rights Act 1998 has created another tension, with a corresponding increase in judicial activity designed to reconcile domestic law with the perceived requirements of the ECHR. On the strength of it, Dianne Pretty, who was suffering from motor neurone disease, sought a declaration that her husband could lawfully help her to commit suicide. Although ultimately unsuccessful it illustrates the potential of the ECHR to challenge fundamental features of domestic doctrine on the grounds that they are infringements of human rights.\(^{78}\) In *R (Purdy) v DPP* this potential was finally realised.

B Statute law

1 Interrelationship of statute and common law

Although the overall structure of the criminal law has been created by the common law, the majority of criminal offences are now statute-based.\(^{79}\) These offences may be the original creatures of statute or may be common law offences whose elements have been incorporated into statute. In the latter case such statutes will not always define the full common law offence. This will leave the common law with a significant role still to fulfil. It may be instructive to consider the interaction of common law and statute in such circumstances. Once again rape serves as a useful illustration. When the common law offence of rape was put on a statutory footing by the Sexual Offences Act of 1956 the elements of rape were left largely undefined. The common law continued to apply, therefore, in respect of these undefined elements. Many of these same elements were then incorporated into the Sexual Offences (Amendment) Act 1976. These included the requirement of an absence of consent, that the intercourse be *per vaginam* and be unlawful. This latter element was not itself defined. The common law rule continued to apply, therefore, that a husband could not rape his wife, since the common law deemed sexual intercourse between man and wife ‘lawful’ whatever the contingency. This latter rule was itself abrogated by the House of Lords in 1991 as we have seen. A later statutory amendment extends the scope of the offence to cover male, as well as female victims.\(^{80}\) Finally by the Sexual Offences Act 2003 the concept of rape was extended to include anal and oral intercourse and the fault element was expanded to include absence of a reasonable belief in the victim’s consent. The act as a whole brought into existence for the first time a schematic approach to sexual offences generally.

2 The principle of legality

The basic ethical structure governing both the enactment and interpretation of criminal statutes is the principle of legality. It is commonly represented by the maxim *nullum crimen*

\(^{77}\) Including changes to the definition of intention and recklessness, changes in the coverage of manslaughter and modifications to defences as mentioned above.


\(^{79}\) There are exceptions, notably murder and manslaughter.

\(^{80}\) Criminal Justice and Public Order Act 1994, s 142 substituting s 1, Sexual Offences Act 1956.
Chapter 1 Understanding criminal law

`sine lege, nulla poena sine lege` or ‘no crime or punishment without law’. This is a matter of general legislative morality since it requires an individual to be given fair warning of what he or she may or may not do. Moreover, it discourages state use of the criminal law for political rather than social ends.\(^{81}\) There are two key incidents of the legality principle. First, criminal laws should not be retroactive. In modern liberal democracies the enactment of criminal statutes having retrospective effect is utterly exceptional. Second, offence definitions should not be unduly vague. A citizen is not given fair warning of the criminality of his action if, using standard procedures for discovering the law,\(^ {82}\) a reasonably intelligent person would be left unsure as to whether the relevant conduct was proscribed or not.\(^ {83}\) The major impediment to the successful realisation of the fair warning ethic is the unavoidable vagueness of generalised criminal prohibitions and the resulting need for judicial interpretation.

3 Interpreting criminal statutes

The same premise governs approved approaches to statutory interpretation as the system of precedent, namely that a judge administer ‘justice according to law’. Judges typically ascribe for themselves a far less dynamic role when engaging in statutory construction than when developing the common law. To focus readers’ attention, I shall, in the pages following, examine this contention by reference to case decisions in one relatively narrow field, namely street offences. Any conclusions drawn will, of course, be of more general application.

(a) The principle of strict construction

Adherence to the principle of legality has given rise to the principle of interpretation that criminal statutes should be interpreted strictly so as to minimise any penal effect. An example of a provision being construed strictly arose in \textit{Darroch v DPP}.\(^ {84}\) The appellant was convicted of persistently soliciting women for the purposes of prostitution contrary to section 2(1), Sexual Offences Act 1985. On more than one occasion he had been seen driving ‘around and around’ a red-light district and had been seen to communicate with prostitutes. Allowing the appeal, the court held that something more than driving round was necessary to show that this communication was ‘persistent’ solicitation.

(b) Purposive approaches to statutory interpretation

The principle of strict construction is increasingly disregarded throughout the criminal law.\(^ {85}\) Current orthodoxy holds that it should be observed only if it is not clear from either the provisions of the Act itself or the purpose for which the statute was enacted that the

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\(^{81}\) A prime example is the violation of the principle of legality implemented by Nazi and Soviet systems. This principle is now enshrined in Article 7 of the European Convention.

\(^{82}\) Such as the canons of statutory interpretation.

\(^{83}\) The classic expression of the principle is that of Holmes J. in \textit{McBoyle v US} (1930) 283 US 25. The ECHR has declared that binding a person over not to act \textit{contra bonos mores} is incompatible with the Convention since it leaves the applicant, here hunt saboteurs, unclear as to the limits of their responsibilities: \textit{Hashman v UK} [2000] Crim LR 185.

\(^{84}\) [1990] Crim LR 814.

\(^{85}\) It was born at a time before the nineteenth century when there were literally hundreds of capital crimes and construing a statute strictly was an obvious way of mitigating the effect.
Where do the rules of criminal law come from?

A defendant’s conduct is proscribed. A further application is sometimes advanced. Where it is clear that the relevant provision was not intended to criminalise the behaviour of the defendant, it will be construed accordingly even if his behaviour lies on the borderline of criminality and even if, on a literal interpretation, the behaviour is proscribed. With both these ideas in mind, judges are now expected to consult *Hansard* and Committee reports to discover what mischief the legislature intended to remedy so as to determine whether the defendant is within the intended coverage of the Act.  

By adverting to the purpose of an enactment, the scope of criminal liability may be both expanded and cut down. A classic illustration where the scope was expanded is that of *Smith v Hughes* where a prostitute was charged with ‘soliciting in a street for the purpose of prostitution’. It was held that the offence was committed even where the woman was not in a street but was soliciting from a balcony above the street. The provision was obviously interpreted neither literally nor strictly, but according to the purpose of the Act, namely to remove the nuisance and offence of solicitation. In *Bull*, using the same purpose approach for the same provision, the scope was cut down. *B*, a male prostitute, was charged under the Street Offences Act 1959 with loitering, as a common prostitute, in a street or public place for the purpose of prostitution, contrary to s 1(1). The Divisional Court interpreted ‘common prostitute’ to refer only to the activities of female prostitutes since the purpose behind the originating Act was limited to proscribing such activities.

### 4 Fair warning and social protection

The message emerging from the above discussion is that judicial development of the law does not necessarily mean that judges make the law up as they go along. Although there is flexibility in the system, judicial decision-making is controlled by canons of interpretation, most notably the purpose approach, which may either argue for or against the extension of liability. Today, more so than ever, judges must ensure that these canons are applied consistently in such a way as to ensure that social goals such as social protection do not override individual rights to fair treatment.

Williams has argued, with reference to the one very narrow field of inquiry presently under consideration, namely street offences, that the canons are susceptible to manipulation for purposes of social protection. He describes the tendency in the following terms: ‘... the looser the defendant’s conduct, the more loosely the judges construe the statute designed to control him ... nothing short of the most powerful reasoning based on the wording of the statute is likely to dissuade the judges from holding that the statute applies to him’.

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87 [1960] 2 All ER 859.

88 See most recently *Fellows and Arnold* [1997] 2 All ER 548.


90 It should be noted that the view taken of the purpose of the Act (nuisance of female solicitation) was slightly narrower than that taken in the earlier case (nuisance of solicitation).

91 See art 14 ECHR.

It is possible to take another view of the interpretive stance of judges in this area, namely that it is infected by double standards. When it is the immorality of women which is at issue it is easy to agree with Williams. When it is male immorality under the interpretive microscope things are not quite so simple. By way of illustration consider the cases Williams mentions together with some others he did not. As we have seen, in *Smith v Hughes* a prostitute was held to be soliciting in the street even though her activities were conducted from a first-floor bedroom. In another case solicitation was held to be taking place even though no form of communication occurred, by a woman displaying herself motionless in a window. In other cases women have been interpreted as engaging in prostitution whether they have intercourse or merely provide masturbatory relief or other acts of ‘lewdness’.

In *McFarlane* the view taken of the purpose behind an enactment was a notably loose one. Here the provision to be interpreted was ‘living on the earnings of prostitution’. A woman offered sexual services to would-be clients, received payment in advance and then absconded without ever providing any such services. The question for the court was whether the woman’s partner would commit this offence if part of the benefit of the scam found its way to him. The Court of Appeal held that he would, even though the woman had done nothing in the slightest measure sexually immoral. It should be noted that this was not a case where, as in *Darroch*, the wording of the statute was vague or where the intended scope of the statute was unclear. Although the purpose of the particular provision was to protect women from exploitation by pimps, the more general purpose relied upon was found in a different Act entirely, namely the Street Offences Act 1959. The purpose of this Act was to remove the nuisance of street solicitation and it was in support of this extra-legislative aim that the provision’s penal effect was extended retrospectively to cover living off the earnings of fraud.

These examples illustrate that as long as the general (social protection) purposes of the relevant Act are advanced by criminalising the relevant behaviour, it is no obstacle that the behaviour fell outside the explicit scope of the proscription. Indeed it may be enough that the purpose of some other Act is thereby advanced. This is not necessarily unfair. Both vagueness of statutory provision and laxity of construction may sometimes be necessary to combat determined efforts to avoid the penal consequences of behaviour known to be at the margins of criminality.

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93 Section 1 Street Offences Act 1959 has now been amended. It is replaced by a non-gender specific offence of loitering or soliciting for purposes of prostitution. It also defines what is meant by street or public place. By section 1(2) “street” includes any bridge, road, lane, footway, subway, square, court, alley or passage, whether a thoroughfare or not, which is for the time being open to the public; and the doorways and entrances of premises abutting on a street (as hereinbefore defined), and any ground adjoining and open to a street, shall be treated as forming part of the street.”

94 *de Munck* [1918] 1 QB 635.

95 [1994] 2 All ER 283.


97 And perhaps more generally to weaken the economic infrastructure of prostitution.

98 ‘Extra’ that is to the enactment being interpreted.

99 See discussion of *McFarlane* above.

100 ‘Overly precise statutes invite the criminally inclined to frustrate the intent of legislation by skirting the inflexibly precise language. As a result fairness only requires that a statute put law-abiding non-lawyers on reasonable notice that their intended conduct runs a reasonable risk of violating the statute.’ J. Dressler, *Understanding Criminal Law*, New York: Matthew Bender (1987) (hereafter Dressler), 28.
Those who skate at the margins of legality cannot complain if they are not given precise warning as to when they are about to fall in.

If, as Williams suggests, a preference for social protection over fair warning apparently holds good in the general field of street offences, how, then, do we explain Bull and Darroch? In a number of other cases the preference has also been reversed. In Crook v Edmondson, a male kerb-crawler was found not to be ‘soliciting for sex’, an offence interpreted, by reference to the purpose of the originators of the Act, to cover only the mischief offered by prostitutes and their pimps trawling the streets for custom. Again, in R v Morris-Lowe, it was held that a man who attempted to dupe would-be masseuses into masturbating him was not guilty of the offence of attempting to procure a woman to become a common prostitute, since his action was intended to be a ‘one-off’ and not therefore intended to propel a woman into a career as a prostitute.

The significant picture emerging is that implementing the same canons of statutory interpretation seems to operate inconsistently against different classes of defendant. Unlike the simple picture painted by Williams, judicial moralism does not always cut both ways. The defendants in Crook, Bull, Darroch, and Morris-Lowe were protected by the principle of fair warning but in Smith, McFarlane, and de Munck they were compromised by thin ice and in each case the purpose of the Act was relied upon. It might be assumed that this assertion must now be read in the light of Article 7 ECHR which protects against retrospective legislation. However, the European Court have affirmed the right of domestic courts to adapt criminal offences to ensure their ingredients reflect existing social conditions. The thin ice principle may be expected, therefore, to continue to play a role in the construction of criminal identities. Whether by accident or design (systemic or individual), the benefit of legislative ambiguity in street offences, at least, has until now tended to favour men before women. The implicit message is that the social defence purpose underpinning the various provisions is the control of female sexuality rather than, say, the protection of vulnerable women from manipulative (immoral) men.

C European Union law

Apart from any residuary powers retained by the Courts, Parliament is historically sovereign on the question of what conduct can and what cannot be made the subject of a criminal offence. That sovereignty was reduced when the UK joined the European Union. The UK now accepts that domestic law must defer to EC law in cases of conflict and the process of legislation must ensure that all new criminal legislation and procedure must be EU compatible. This means that a defendant has the right to challenge the validity of an item of domestic criminal law if it is in conflict with EU law.

In recent years the potential power of the EU over the criminal law has been manifested in increased activity. In 2005 the European Commission outlined a number of offences which member states were required to implement. These included counterfeiting, credit

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103 [1985] 1 All ER 400.
104 The position governing solicitation is now addressed by s 51A Sexual Offences Act 2003.
card fraud, money laundering, people-trafficking, computer hacking and virus attacks, corruption and environmental protection. Although such legislation was already largely on the domestic statute book, Europe’s influence as a source of criminal law seems set to increase substantially.

D The European Convention on Human Rights

The European Convention on Human Rights allows individual citizens of a member state to make complaint before the European Court of Human Rights that their Convention rights have been infringed. Infringements may take the form of positive state violations of such rights. For example, in Dudgeon v UK, the Court held that a legislative provision criminalising homosexual activity between consenting adults in private in Northern Ireland was a breach of Article 8. They may also take the form of state failures to provide protection of Convention rights due to, say, an ineffective system of criminal sanctions. In A v UK the Court ruled that a common law defence of reasonable chastisement which had led to the acquittal of a man who had beaten his step-child with a garden cane did not provide adequate protection for the latter’s Article 3 rights. In both cases Parliament acted quickly to eradicate the inconsistency.

1 The Human Rights Act 1998

With the coming into force of the Human Rights Act 1998 Convention rights have an even greater impact than hitherto. They now form part of the domestic system’s own basic resources for ensuring the delivery of criminal justice, substantive, procedural and evidential. In theory, therefore, the occasions will be reduced when citizens will need to petition the European Court for infringement of rights. These will be taken into account in the interpretation of existing law and the development of new law.

The manner in which Convention rights impinge on domestic law should be noted. Convention rights do not supplant domestic legislation, in the manner of European criminal law, such that the courts can strike down Convention-incompatible provisions. Rather, the courts must, so far as possible, interpret legislation, whenever enacted, ‘in a way which is compatible with Convention rights’. Where such a compatibilist interpretation is not possible a declaration of incompatibility may be made which sets in motion a legislative fast-track procedure for the amending statute.

105 Article 25.
106 See also Sutherland v UK (1998) 24 EHRLR 117.
108 Namely the right to be protected from inhuman or degrading treatment. See, however, R v H [2002] Cr App R 59.
109 As they can with incompatible community law.
111 Section 4.
In developing and ensuring compatibility Government ministers are expected to respond to declarations of incompatibility from the courts, and to make a declaration of compatibility with respect to all new Bills brought before Parliament, thus generating a rights-sensitive process. It has been argued that the operation of this process may be more form than substance since it has not had any discernible effect on the passage of legislation bearing significant implications for human rights. Likewise judges, without being bound by the jurisprudence of the Court and the European Commission on Human Rights, are bound by section 2 to take their decisions into account.

The Human Rights Act contains no specific procedure for dealing with incompatible common law offences and defences. Sir Richard Buxton has argued that judicial power in this respect cannot exceed that available in cases of legislative incompatibility. On this view, it would not be proper, for example, for a Crown Court judge to amend the common law defence of parental chastisement in anticipation of amending legislation. Given that the common law rules are creatures of the judiciary, this view seems unduly restrictive. A plausible via media is that such changes should be effected only by an appellate court with the appropriate constitutional jurisdiction, and only then when such a change would be consistent with other Convention rights.

When considering the scope for doctrinal development post-enactment of the 1998 Act the major Convention rights likely to form the basis of legal challenges to domestic substantive law, or otherwise influence legal development, are as follows and include examples of how they have been or may be used. Article 2, which protects the right to life, has been referred to in a case assessing the legality of an operation to separate conjoined twins and another case involving the legality of mercy killing. In Menon, a case involving a racially motivated attack in London, the European Court of Human Rights indicated that this may require States to enact special legislation to provide for vulnerable groups to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. This may well lead to legislation similar to that governing racially and religiously aggravated offences for the benefit of other victimised groups. It is also likely to have a future impact on the rules governing mistake and reasonable force in self-defence, effecting arrest and the prevention of crime, since domestic law affords a rather broader justification (reasonableness) for the use of deadly force than that envisaged by Article 2 (absolutely necessary and strictly proportionate).

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112 Section 19 HRA 1998. The Law Commission will also ensure that all law reform proposals are Convention compatible. See Arden, ‘Criminal Law at the Crossroads’ at 451–3.
117 Notably Article 7, prohibiting retrospective criminalisation.
118 Re A (conjoined twins) [2000] 4 All ER 961; R (on the application of Pretty) v DPP [2002] 1 All ER 1 HL.
119 Menon and others v United Kingdom (App. 47916/99) Decision of Court (Second Section) as to admissibility, 6 May 2003.
Article 3, which protects the right not to be subjected to torture or to inhuman or degrading treatment or punishment, was the basis for changes to the rules governing parental chastisement effected by the Children Act 2004. Article 3 also formed a major plank in the case brought by Dianne Pretty who argued that the criminal law should permit her husband to help her take her life when she was in the final throes of motor neurone disease, to vindicate her right not to suffer unnecessarily.\(^\text{122}\)

Article 5, which protects the right to liberty and security of the person, has ramifications for the criminal law’s definition of insanity, in particular the internal/external mental abnormality test of insanity.\(^\text{123}\)

Article 6, which guarantees a right to a fair and public hearing, was the basis for a challenge to the definition of ‘drunkenness’ for being unduly vague for the purpose of the offence of being drunk on an aircraft.\(^\text{124}\) The joint enterprise rules in relation to convicting accessories for murder have been (unsuccessfully) challenged.\(^\text{125}\) A number of cases have involved challenges to the use of strict liability and reverse burdens of proof.

Article 7 guarantees a right not to be convicted under retrospective laws. This is particularly relevant in cases where a jury decision is necessary to ensure whether the relevant criminal standard has been breached or not. Cheating and other offences of dishonesty pose potential problems of legality,\(^\text{126}\) as do offences of public nuisance,\(^\text{127}\) public mischief, corrupting public morals and outraging public decency, and binding over.\(^\text{128}\)

Article 8, which protects the right to respect for private and family life, has clear application in relation to the defence of consent in sexual offences.\(^\text{129}\) It was used, again unsuccessfully, in Pretty on the basis that mercy killing of a consenting adult is a matter of conscience, not State concern.\(^\text{130}\) In Purdy, on facts comparable with those of Pretty, it was the basis for a successful challenge before the House of Lords in that Art 8(2) requires consideration of whether Section 2 of the Suicide Act is sufficiently clear to enable a spouse to know what he could and could not do without committing the offence of assisting suicide.

Article 10 (right to freedom of expression) is important for challenges to laws based on obscenity, official secrets, binding over, racially or religiously aggravated offences and incitement. Article 11 sets out the right to free assembly and association. In Steel v UK

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\(^{122}\) See previous note.


\(^{125}\) In R v Concannon the Court of Appeal, refusing leave to appeal against conviction, rejected the defendant’s argument that the mismatch between the mens rea necessary to convict the principal and that necessary to convict an accessory was a breach of Article 6 ECHR.

\(^{126}\) In R v Pattni, Dhunna, Soni and Poopalarajah [2001] Crim LR 570 counts of ‘cheating the revenue’ were unsuccessfully attacked for failing to meet the test of reasonable certainty required by Article 7 ECHR. The problem posed by ‘dishonesty’ is even more acute following enactment of the Fraud Act and recent case decisions on theft which require no manifest wrongdoing. Similarly the notion of ‘gross’ in gross negligence manslaughter was unsuccessfully challenged in Misra [2005] 1 Cr App R 21 as being in contravention of Article 7.

\(^{127}\) The problem posed by public nuisance has now been resolved. See Rimmington and Goldstein [2006] 1 AC 459: here the House of Lords defined public nuisance restrictively to impart certainty. As Lord Bingham remarked, ‘the offence of public nuisance lacked the clarity and precision which both the law and the Convention require’ at 466.


\(^{129}\) See Laskey v UK (1997) 24 EHRR 39.

\(^{130}\) Other Convention rights include Article 9 (right to freedom of thought, conscience and religion). It has obvious implications for the future of the offence of blasphemy.
[1998] Crim LR 893, it was held that taking part in a demonstration was a protected right under Article 11 and, without more, conviction and punishment for breach of the peace was a disproportionate response.

1.6 Logic and rationality in the criminal law

A system is rational if it is organised by rules and principles which require judges to defer to preexisting law rather than legislate for ‘what seems to them an ideally just society’. If, on the other hand, a system has built into it politically satisfactory justifications for avoiding the implementation of binding rules, it has no claim to be designated a rational system or even a semi-rational system.

The reader will no doubt appreciate, from his treatment of street offences, that Williams has no illusions that the criminal law is entirely rational. He clearly accepts that judges can and do decide cases on political rather than strictly legal grounds. Indeed, he explains the cases simply as an example of judges allowing their morals to get the better of them. This is not the same, of course, as conceding that the system as a whole is irrational. The fault, in his view, lies with a bunch of incompetent and/or biased judges. If the benches were populated with Williams’ clones, everything might run smoothly and rationally.

Some theorists reject this latter possibility in its entirety, concluding that the idea that the criminal law is more or less rational is untenable. Among the more subtle of such accounts Norrie, while recognising that rationality has a part to play in legal decision-making, sides with critical theorists in denying criminal law the scope to rid itself entirely of systemic irrationality.

His general conclusion is that it is inevitable that the criminal law will reflect, in contradictory doctrine, the social contradictions besetting society at large. Most, but not all, of these reduce to the contradictory ambitions of different classes, sub-classes and groupings, the political compromises which these give rise to, and the patterns of power which these compromises reflect and sustain. This point is perhaps best understood, once again, from the point of view of street offences. The criminal law is located in a society which, as a whole, is organised on the assumption that males visiting prostitutes is a natural, if unfortunate, expression of their sexuality. On the other hand, women acting as prostitutes is assumed not to be natural. Indeed, it is viewed as a dangerously subversive form of sexual behaviour, which society needs to control if ideal patterns of womanhood are to be sustained and men are not to be hostages to their own weaknesses. The contradiction, then, is society’s urgent need to control the sexual autonomy of women, while being committed, in principle, to sexual autonomy for all.

On this view, it is not coincidental that following the same rule of interpretation has a differential effect on males and females, since the phenomenon of street offences is itself

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132 That is, which allows judges to get away with it.
135 Norrie, ibid., particularly Chapter 1.
contradictory. Rules designed to control female (without male) sexual autonomy, if neutrally interpreted, will reinforce this contradictory effect. The only alternative would be for judges to ignore the rules of precedent and interpretation and advance social justice (sexual autonomy for all) instead. But if they did so, this would require the law’s inner logic (rule-following) to be ignored. One way or another the law has no built-in mechanism for reconciling public and private interests. It requires political choices to be made, not simply legal determinations.\(^{137}\)

Norrie’s account cannot be lightly dismissed. Reconciling public and private interests in a way which offers no systematic challenge to the rule of law is a challenge indeed. Nevertheless as an explanation of what is going on and as a predictor of what judges will do, it is perhaps a less persuasive model of law-making than those which treat rationality and legality as an achievement, that is something to be aimed for, and thus an evaluative yardstick,\(^{138}\) rather than, as Norrie would have it, a dubious form of window dressing disguising the true nature of (criminal) legal doctrine.\(^{139}\) Decisions of domestic courts involving issues of human rights indicate that judges are increasingly anxious to address explicitly the fairness of individuals shouldering the penal burden of community interests.\(^{140}\) This is not to deny that criminal law allows social needs to ‘trump’ individual rights and that it may do so in a discriminatory way. Cases such as \textit{C v DPP} and \textit{A-G’s Reference (No. 1 of 1988)} which seek to control the exercise of judicial discretion do little to inhibit the emergence and development of unfair and discriminatory rules. However, as \textit{R v R} indicates and the Human Rights Act requires, ethical principles already at work in criminal law have the capacity to ‘trump’ unfair rules and to do so in a way which sustains rather than undermines the rule of law.\(^{141}\) The main threat to rule of law values is posed by doctrinal vagueness and ambiguity. Here too the Human Rights Act has an important role to play.\(^{142}\) However, the enactment of a comprehensive criminal code is also widely considered to be a major functional priority in ensuring criminal doctrine is an apt vehicle for the delivery of criminal justice.

### 1.7 Codification

The German theorist Max Weber loosely characterised legal systems according to the degree of systemic rationality they enjoy.\(^{143}\) At one extreme, case decisions are arrived at as a result of a consideration of the contingent merits of the individual case. At the other, case

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\(^{137}\) Driven by an increasing problem of sexual trafficking, such initiatives have recently been explored by Government, in particular the possibility of adopting the Swedish model of criminalising pay for sexual services. See \textit{A Coordinated Prostitution Strategy}, Home Office 2006.


\(^{140}\) See for example \textit{R v K} [2001] Crim LR 133.

\(^{141}\) An obvious example is the principle of neutrality which appears to have informed the decision in \textit{R v R}. This principle holds that the penal effect of any rule should be visited neutrally on all persons irrespective of status in the absence of specific Parliamentary provision.

\(^{142}\) See for example \textit{R v Pattni, Dhumna, Soni and Poopalarajah} [2001] Crim LR 570 in which counts of ‘cheating the revenue’ were unsuccessfully attacked for failing to meet the test of reasonable certainty required by Article 7 ECHR. See also A.J. Ashworth \citeyear{Ashworth2001} at 863.

\(^{143}\) M. Weber, ibid., 62 ff.
decisions are compelled by the formal determination of a ‘gapless’ system of rules in the manner of a codified system. Somewhere between the two extremes lies the common law system, where the gaps between rules may be filled by decisions dictated by ethical principles informing analogous cases or matters entirely extrinsic to the system such as social morality or public policy. It is commonly supposed that codification represents an advance on the common law system since it combines both rationality and justice. It is rational because case outcomes are the result of a legal rather than a political or moral determination. It is just in the sphere of criminal law because people do not suffer the evil of punishment except for breach of a preexisting penal norm, the existence and content of which the individual is given fair warning.

It may be appreciated that the principle of legality (fair warning) is breached, in theory, every time an offence of vague meaning or indeterminate scope is enacted, or an offence of determinate scope is extended beyond that scope, or a moribund statutory rule is disinterred for reasons of penal convenience, and every time a new common law offence is created or defence cut down. Codification promises to reduce the occasions when this will occur. Accordingly, in many other jurisdictions the criminal law is to be found in a single criminal code.

Apart from efficiency of promulgation, the major formal purpose of codification remains that of clarification and simplification. In this respect its object is to replace an unwieldy, unstructured mess of statutory and common law provisions with a comprehensive, clear, and internally consistent code, including a well drafted set of crimes, defences and general rules of criminal responsibility. The codifying aim of clarity and simplicity is not simply a matter of linguistic aesthetics. It is a functional priority in a system in which the vast majority of criminal cases are dealt with by lay magistrates dependent upon non-specialist court clerks for advice on the law. It also guarantees the moral hygiene of any system of rules, the importance of which cannot be understated. In Okosi, O, a minicab driver, drove off with H, a passenger, hanging onto the car following an altercation. H was injured. O was charged under s 35, Offences Against the Person Act 1861 (OAPA) with causing bodily injury through wanton or furious driving. This was an antiquated offence first created in 1820 to deal with the contemporary mischief of stagecoach drivers who were making a dangerous nuisance of themselves on public roads. It was superseded by the Road Traffic Acts and is largely redundant, albeit still in force. Charging this offence was unnecessary given that O could have been charged under these Acts, or, if it were thought necessary, with an offence against the person such as unlawful wounding. It was also arguably unfair since the probative burden on the prosecution was slightly eased over what they would have had to prove to establish the latter offence. Perhaps the strongest argument against the deployment of the rule, however, is that criminal justice demanded that O be punished for the same crime as everybody else who injures another while driving dangerously. What did he do wrong to get lumbered with this old-fashioned thing? Under a

144 Largely for this reason the common law offence of effecting a public mischief was removed by the House of Lords in DPP v Withers [1975] AC 842.
147 The principle of justice relied upon is commonly known as the principle of fair labelling.
codified system, any offence ‘swallowed up’, as this was, by another offence or offences would simply be removed.\(^\text{148}\)

## 1.8 The Draft Criminal Code

The legal system of England and Wales has not followed the line of codification. Historically this was due in large part to the hostility of nineteenth-century judges to the codes proposed in 1878–80 towards what would constitute a ‘diminution in their status and authority’.\(^\text{149}\) In recent years attempts have been renewed to produce a codified criminal law. A draft Criminal Code was published by the Law Commission in 1989. The groundwork was that of a team of senior academics invited by the Law Commission to undertake the task. In general the Code seeks to restate the common law, including the elimination of inconsistencies, rather than reform it.\(^\text{150}\) By creating such systemic clarity and coherence, codification promises to render the criminal justice system more efficient and limit the reach of the criminal penalty to those occasions explicitly provided for by the elected legislature. Judges would retain significant legislative power, however, through the interpretive function to develop existing common law doctrine not abrogated by the code, of particular significance in the field of criminal defences.\(^\text{151}\) The substantive merit of the Code’s provisions will be considered in due course. However, students desirous of an accurate, clear and concise statement of much of the law examined and discussed in the pages of this book are recommended to obtain a copy of the Report and the attached draft code.\(^\text{152}\)

This time, the codification project has foundered on the rocks of Parliamentary indifference rather than judicial hostility. Parliament has taken little notice of the Draft Code, which stretches to 220 sections. Lest it be thought that this attitude has been prompted by pressure of Parliamentary time, no more notice has been taken of shorter efforts in the form of individual draft bills on areas of particular pressing concern.\(^\text{153}\) Far more notice was taken in the United States of a similar initiative by the American Law Institute. Since its publication in 1962 the American Model Penal Code has been the model for the enactment of completely new criminal codes by a large majority of states in the union.\(^\text{154}\) Other common law jurisdictions have adopted criminal codes, including Australia, New Zealand and Canada. Ireland is in the early stages of codifying its criminal law.\(^\text{155}\)

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\(^{148}\) Its abolition was recommended by the CLRC, 14th Report Cmd 7844 (1980) at 65.


\(^{150}\) There are, in fact, many reform proposals within it, encompassing reform proposals of official bodies previously set up to scrutinise the law with a view to reform, notably the Criminal Law Revision Committee and the Butler Committee on Mentally Abnormal Offenders.

\(^{151}\) Draft Code, para. 3.37.

\(^{152}\) Clauses 55, 70, 71, 72 on offences against the person and 33–40 on mental disorder are reform proposals and so do not represent a restatement of the current law.


Social commentators usually explain the general lack of political will to legislate a code as an example of the peculiarly English talent for recognising the political advantages accruing from a system with ambiguity and discretion built into it.\(^{156}\) Though we may doubt whether such considerations still rank high with the modern legislator, Parliament, it seems, still desires something more of its law reform programme than the clarification, simplification and efficient promulgation of the rules governing criminal liability.\(^{157}\) The enactment of the Human Rights Act 1998 should have given fresh impetus to the Code project but nothing came of it. Given the complexity and ambiguity of much of domestic law, challenges under the Convention are increasingly launched on grounds of certainty and retroactivity as well as more basic infringements of Convention Rights. While courts may find the clarification they seek in the European Convention and the various reports or consultation papers produced by the Law Commission, this is but a poor half-way house to a Code designed specifically with clarity, certainty, accessibility and substantive human rights in mind.\(^{158}\) In 2008 the Law Commission finally conceded defeat, removing codification from its programme of reform.\(^{159}\) The main explanation given was the inability of the project to keep pace with the speed and complexity of legislative change and its interpenetration with European law. True no doubt, but more likely a sad acknowledgement that hope had at last run out.

**Further reading**


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