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Introduction

Most law students think that they will find criminal law the most appealing of all the law subjects they have to study. A very large proportion of popular culture and entertainment concerns or touches upon crime and justice, and little on other fields related to law: how often have you seen a television drama about leases? Your own decision to study law may have been taken as a result of coverage of criminal cases in newspapers or on television, or interest generated by fictional portrayals of criminal proceedings. If so, what has attracted you is the criminal justice system, of which criminal law is only one element. As traditionally studied in law schools and treated in this book, criminal law means the substantive criminal law, concerning itself largely with the issue of criminal liability. We examine the extent to which there are any general principles governing criminal liability as a whole, e.g., are there any defences such as mental disorder applicable to offences generally? What are the rules on attempted crime or people who only assist in the commission of a crime? In addition, we choose some of the more important and well-known specific offences, such as murder, manslaughter, non-fatal offences of violence and offences against property, such as theft and criminal damage, and explore their detailed requirements as to liability. There are literally thousands of criminal offences in our law (and the previous Government has added to them at a seemingly exponential rate!) and it is impossible for us to consider specifically in detail more than a few of the major ones. That is why the search for principles which can be applied generally is such a major focus of any criminal law course.

Generally speaking, we are not concerned with other aspects of the criminal justice system except in so far as they impinge on criminal liability, even though these, far more than the substantive law, are the stuff of the criminal law in practice. We do not deal with sentencing issues (the punishments available upon conviction and how the judges arrive at their sentencing decisions), which are an important part of criminology courses. Our consideration focuses on guilt or innocence. Criminal procedure is another matter largely outside our remit. The basic mechanics of the criminal process tend to form part of legal system courses, with a more critical review reserved for criminology courses and more practical detail in the Legal Practice Course. Similarly, the law of criminal evidence is taught normally as part of a separate subject. By and large, we are not concerned with methods of proving facts and the surrounding law, e.g., admissibility of evidence. We are concerned only whether, on given facts, D (the accused) is liable for any offence and, if so, which. You will probably appreciate that, in practice, most contested cases involve disputes about the facts, not about the law (D denies that he was the person who robbed the bank, that he turned right without signalling, or whatever). Thus, even though academic criminal law may not be quite what you expected, we hope and believe that you will find

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it interesting and enjoyable. You will certainly find it a challenge to understand its complexities and must be prepared to work hard to overcome its undoubted difficulties.

1.1 What is a crime?

Academics have long quested for the Holy Grail of a general definition of a 'crime' which identifies the quality of an act or omission which makes it an offence ('crime' and 'offence' are synonymous). However, crimes are so many and varied and embrace such widely differing kinds of conduct that all attempts to illuminate the essential characteristics of a crime, whether based on moral criteria or otherwise, have proved fruitless. Writers have been forced to abandon the search for the 'nature' of a crime and to fall back on rather lame definitions based on the type of legal proceedings which may follow from the act. In other words, an act is a crime if it 'is capable of being followed by criminal proceedings, having one of the types of outcome (punishment, etc.) known to follow these proceedings' (Professor Glanville Williams, *The Definition of Crime* (1955) Current Legal Problems 107, p. 123). Thus, although there are some crimes, such as murder and theft, which are instantly recognisable as crimes, if you wish to know definitively whether particular conduct is a crime, you must have recourse to statutes and case law to see whether criminal proceedings and punishment can follow such an act. As Dine and Gobert point out (*Cases and Materials on Criminal Law*, 3rd ed., 2000, Oxford University Press, p. 43), this definition 'puts the cart before the horse'. Furthermore, it is clear that the European Court of Human Rights is free to reject a domestic law classification as non-criminal if the nature of the proceedings is characteristic of criminal offence proceedings (general enforcement by a public authority with punitive elements based on fault) with a significant penalty attached (see *Benham* v *UK* (1996) 22 EHRR 293 (imprisonment for failure to pay the community charge)). There is no 'magic' definition.

It is a case of the State deciding that certain conduct ought to be criminal because it is too important to leave it to the private citizen wronged to bring civil proceedings. The State takes it upon itself to discourage such conduct. Of course, the wheels of change run slowly and it is inevitable that conduct that is no longer considered to be in this category remains criminal, whilst conduct which is now considered worthy of criminal sanctions may not yet be criminal.

1.2 The role of the substantive criminal law

The rules governing criminal liability define what is and what is not, criminal conduct. These rules should therefore be clear and certain so that people may ascertain in advance and with reasonable confidence whether any conduct will or will not involve criminal liability. The European Convention on Human Rights reinforces this requirement, which has long been a principle of the common law. Unfortunately, as we shall see, clarity, certainty and predictability are often lacking and this is one of the reasons for the growing pressure towards codification of the criminal law.

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More importantly, the substantive rules on criminal liability define the playing field upon which the apparatus of the criminal justice system can be brought to bear. The coercive powers of the police (search, arrest, etc.) and the courts (to convict and sentence) are based on conduct defined as 'criminal' by the substantive law. The social control mechanism which is the criminal justice system is founded upon the rules prescribing what is and what is not, a crime.

The Wolfenden Committee on Homosexual Offences and Prostitution ((1957) Cmnd 247) viewed the purpose of the criminal law (at para. 13) as:

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

The Committee concluded that the criminal law should not be used to impose society's current moral standards on non-conformist individuals (even assuming these standards are readily ascertainable). This probably represents the prevailing view of the judiciary now (but *cf.* ***Brown*** discussed under 4.3.3.1). The truth is that whilst there might be a large measure of agreement about the central core of any criminal law, the issue of whether conduct on the periphery should be criminal often involves balancing a number of competing considerations and interests, and is ultimately a matter of social, economic and political judgement.

QUESTION 1.1

Is there any conduct (a) which is not criminal which you would like to see made criminal and (b) which is criminal which you think should be de-criminalised?

We can at this point note one development which the Government seems increasingly keen to use which threatens to undercut the substantive criminal law and the procedural safeguards surrounding it. There is a trend towards legislation which lays down what might be called 'civil' offences which do not attract criminal sanctions as such but merely allow the courts to impose an order on D to refrain from doing something. However, they are then indirectly criminalised by providing that breach of the 'civil' order **is** a criminal offence which attracts penal sanctions. This kind of procedure enables avoidance of traditional criminal safeguards in respect of standards of proof and admissibility of evidence in the initial proceedings imposing the relevant order. You will have heard of ASBOs (Anti-Social Behaviour Orders—see s.1 of the Crime and Disorder Act 1998). Other examples include Foreign Travel Orders, Sexual Offence Prevention Orders and Risk of Sexual Harm Orders under the Sexual Offences Act 2003 and Football Banning Orders under the Football (Disorder) Act 2000. In *R (McCann)* v *Crown Court at Manchester* [2003] 1 AC 787, the House of Lords has held that ASBO proceedings are not subject to the protections conferred to 'criminal charges' by Arts. 6(2) and 6(3) of the European Convention on Human Rights (see 1.6). They are, however, subject to the protections given to 'civil rights and obligations' by Art. 6(1) of the Convention (the right to a fair and public hearing). ASBOs may also violate Art. 10 (freedom of expression) and Art. 11 (freedom of assembly), depending on their terms.

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In addition to this, the last Labour Government seemed wedded to a marked extension of the reach of criminal liability based on a populist agenda fuelled by the tabloid press. The quantity of criminal offences has certainly grown but, more importantly, the tentacles of the criminal law are expanding into arguably inappropriate areas. In short, there is an anti-libertarian overkill in important pieces of legislation pouring out of Westminster. Offences are over-inclusive and rely on vague relativist notions such as 'anti-social', 'offensive' and 'insulting'. Furthermore, it appears that over-expansive legislation aimed at particular mischiefs, notably the anti-terrorist laws, is being hijacked for unrelated and arguably inappropriate purposes such as the stifling of legitimate protest. We may instance offences proposed in new anti-terrorism legislation such as 'glorification' of acts of terrorism, the overbroad offences under the Sexual Offences Act 2003, and the criminalisation of possession of extreme pornography under s. 63 of the Criminal Justice and Immigration Act 2009; the latter has been described as a 'thought crime' (*Respect for Bad Thoughts* [2008] UCL Human Rights Review 118–33).

1.3 Classification of offences

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Offences are classified for procedural purposes as summary, indictable or triable either way. Summary offences are the less serious crimes which can only be tried in the magistrates' court without a jury. Examples include common assault and battery, assaulting a police officer in the execution of his duty, drink-driving offences, and taking a vehicle without the owner's consent. Indictable offences are more serious offences which can be tried in the Crown Court with a judge and jury. Some indictable offences such as murder and manslaughter can only be tried on indictment and this is the sense in which we use the term 'indictable'. One recent development is that serious fraud cases and those where there is evidence of a real danger of jury-tampering may be tried by a judge alone under the Criminal Justice Act 2003. The first juryless trial for an indictable offence, the Heathrow robbery case, reached a guilty verdict in March 2010. Strictly speaking, however, any offence which is capable of being tried on indictment is an indictable offence, which term therefore includes all offences which are triable either way.

The latter are offences where the seriousness varies enormously depending on the particular circumstances of the individual case. Thus, theft can range from petty pilfering to the Great Train Robbery (if you remember that—otherwise Google it!) and is triable either way—summarily before magistrates in the first case, but on indictment before the Crown Court in the second case. Other such offences include handling stolen goods and fraud. Where an offence is triable either way, the magistrates decide whether it should be tried summarily or on indictment, although the accused may elect to be tried on indictment before a jury where the magistrates rule in favour of summary trial.

To end this section, we shall note a couple of changes to the language of offences. Since the Serious Organised Crime and Police Act 2005 came into force on 1 January 2006, there is no need to classify offences by whether they are 'arrestable' or not since that

terminology no longer applies. The old distinction between felonies (serious offences) and misdemeanours (less serious offences) was abolished by the Criminal Justice Act 1967, but you will still occasionally come across those terms.

1.4 Appeals and the role of the trial judge

Figures 1.1 and 1.2 set out briefly the system of criminal appeals and the grounds of appeal respectively for summary trials and trials on indictment.

Apart from legislative provision, the rules of substantive law are largely set by appeal cases and much of this text will be devoted to analysing such cases. In the majority of decisions relevant to us, the appeal is at least partly on the ground that the trial judge has got the law wrong in his direction to the jury. If a conviction follows, D is likely to appeal. If D is acquitted at the initial trial, it is now possible for the Attorney-General to 'refer' the case to the Court of Appeal for a ruling on the point of law decided by the Crown Court against the prosecution (Criminal Justice Act 1972, s. 36). Whatever the Court of Appeal's view on the point of law, D's acquittal cannot be overturned under this procedure. You will come across several of these 'Attorney-General's References' which have established important legal principles.

The House of Lords in *Wang* [2005] UKHL 9 helpfully summarised the respective functions of the judge and jury in a criminal trial:

> The judge directs, or instructs, the jury on the law relevant to the counts in the indictment [i.e., the charges laid against D], and makes it clear that the jury must accept and follow his legal rulings. But he also directs the jury that the decision of all factual questions, including the application of the law as expounded to the facts as they find them to be, is a matter for them alone. And he makes it plain that, whatever views he may express or be thought to express, it is for them and not for him to decide whether, on each count in the indictment, the defendant is guilty or not guilty. [8]
>
> ... if a judge is satisfied that there is no evidence which could justify the jury in convicting the defendant and that it would be perverse for them to do so, it is the judge's duty to direct them to acquit (*DPP* v *Stonehouse* [1978] AC 55 at 70, 79–80 and 94) ... a judge should withdraw a defence from the consideration of the jury if there is no evidence whatever to support it, and he need not direct the jury on an issue not raised by any evidence ... in a case where, on applying the law as expounded by the judge to facts which have been agreed or not disputed at trial, the only reasonable course is to convict, the judge may comment in stronger terms than would otherwise be permissible. But even in such a case ... the judge may not direct the jury to convict. [3]

Wang marks a welcome affirmation that the jury is ultimately the sole arbiter of guilt and that a trial judge cannot under any circumstances direct them to find a defendant guilty.

QUESTION 1.2

If D appeals on a point of law, is it a case of the Court of Appeal simply deciding whether it would have convicted D of the offence? If not, what is its role?

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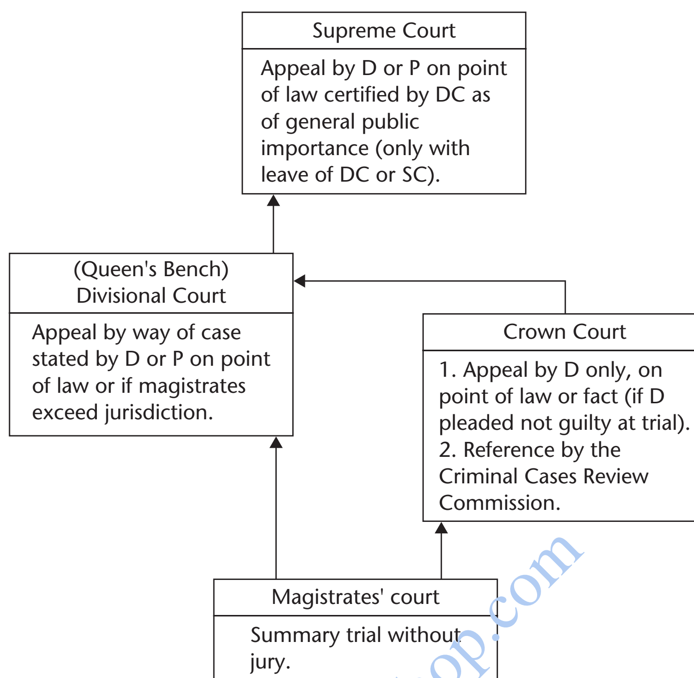

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Figure 1.1 Appeals from summary trials

When D appeals on a point of law, the Court of Appeal must decide whether the trial judge's explanation of the law to the jury was correct. It is exceptionally important to understand that it is not the appeal court's function to retry the case and substitute its verdict for that of the jury. As we have seen, the jury is the arbiter of guilt or innocence in trials on indictment, but if D may have been prejudiced by an error of the trial judge in explaining the law to the jury, the Court of Appeal must give D the benefit of any doubt and if the jury might have returned a different verdict, the court must quash the conviction. The Criminal Appeal Act 1995 reformed the grounds of appeal to the Court of Appeal by amending s. 2 of the Criminal Appeal Act 1968. There is now only one ground of appeal—that the conviction is 'unsafe'. This will include cases where the trial judge misdirects the jury on the law, though now the leave of the Court of Appeal or the trial judge to appeal is a pre-requisite (Criminal Appeal Act 1995, s. 1).

There are two points we need to make about this. First, students often focus on the outcome of the appeal when what matters far more is the reasoning employed by the appeal court in affirming or quashing the conviction. This incorrect focus leads to bewilderment that an 'obviously guilty' villain goes free. Unfortunately, it is a fact of life that misdirections in law sometimes occur because the trial judge is straining too hard to ensure the conviction of an 'obviously guilty villain'. It is the appeal court's job to ensure that the jury has considered its verdict on the correct basis and that if there is even a small possibility of a different verdict had the jury been told correctly what constituted the ingredients of the crime or, maybe, the defence in issue, the conviction should be quashed as being 'unsafe'.

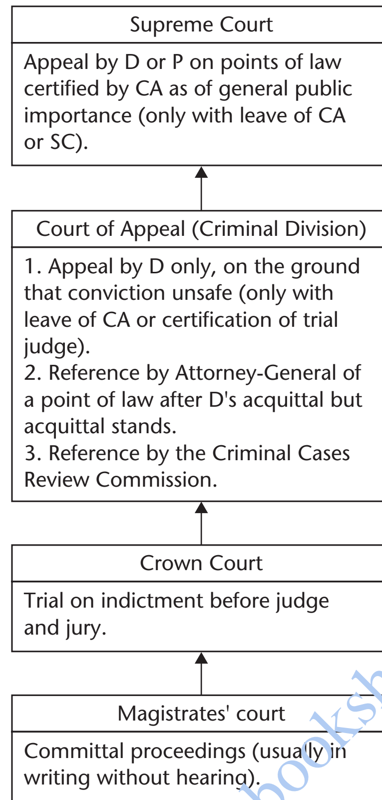

Figure 1.2 Appeals from trials on indictment

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Paradoxically, the second point is the converse of the first. Sometimes the appeal court's overwhelming desire to ensure that an 'obviously guilty villain' is not acquitted because of an unfortunate error by the trial judge, leads it to distort the applicable principle of law to enable it to hold that there has been no misdirection on the law. The court loses sight of its wider role of ensuring consistency and clarity in the law.

One other change made by the Criminal Appeal Act 1995 was to provide for the establishment of the Criminal Cases Review Commission. This body took over from the Home Secretary the role of investigating and referring to the Court of Appeal or, in the case of summary convictions, the Crown Court, convictions involving alleged miscarriages of justice, normally where standard appeals procedures have been exhausted and fresh evidence and/or arguments have come to light since. The Commission is constitutionally independent of the Government though appointment of its members is by the Queen on the recommendation of the Prime Minister. Its Annual Report for 2011–12 disclosed that, since its establishment, it has referred to the courts only an average of 3.64% of the 1,000 or so cases reviewed by it each year (seemingly a testimony to the general competence of the criminal courts). The Commission's referrals 'success rate' in terms of convictions quashed is around two-thirds and attests to the competence of its judgments.

1.5 Burden of proof

It is a fundamental principle of English law reinforced by Art. 6(2) of the European Convention on Human Rights, that a person is innocent until proved guilty (although inroads on the 'right of silence' by ss. 32–37 of the Criminal Justice and Public Order Act 1994 may be seen as a serious derogation from the principle). This means that the legal burden of proving that D committed the alleged offence is placed squarely on the prosecution. It must prove 'beyond reasonable doubt' that D committed the crime charged (*Woolmington* v *DPP* [1935] All ER Rep 1, HL; *Mancini* v *DPP* [1941] 3 All ER 272, HL). In *Woolmington* D had shot dead his estranged wife. He claimed that the gun had gone off accidentally when he was showing it to her. The trial judge had directed the jury that it was up to D to satisfy them that the killing was not murder, i.e., an accident. The House of Lords held this to be a misdirection, Viscount Sankey LC stating: 'Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt . . . the principle . . . is part of the common law of England and no attempt to whittle it down can be entertained.' Thus, the prosecution had to establish that D killed with the requisite intention to kill or cause serious injury in order to secure a conviction for murder.

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QUESTION 1.3

How would the prosecution be able to prove what was going on in D's head when the gun went off?

At the trial, the prosecution will first present its case calling witnesses to the incident, scientific evidence (e.g., fingerprints or bloodstains), evidence as to D's motive and circumstantial evidence (e.g., linking D with the scene of the crime) and any statements he has made under police interrogation. Assuming the prosecution has made out a *prima facie* case, the defence presents its case calling its own witnesses (including, if it wishes, the accused himself) and evidence (e.g., alibi evidence supporting a claim to be miles from the scene of the crime). At the close of evidence, each side in turn makes a closing address to the court. The trial judge then has to sum up for the jury. He must review the evidence for them, summarising each side's case, pointing out discrepancies and weak points and focusing the jury on the crucial issues to be determined on the facts. He must also direct them on any relevant law. Thus, in a murder trial, he must explain the legal ingredients of murder and what the jury must be satisfied about before they can convict. If D is claiming a defence, e.g., that he acted in self-defence, the judge would have to explain the legal requirements of such a defence.

In serious crimes, one of the standard requirements for the prosecution is to prove that D had a particular state of mind at the time of performing the prohibited conduct. This is the *mens rea* for the crime and the definition of each crime will prescribe precisely what the requisite state of mind is. Usually it will be either an intention to do something (e.g., kill, injure) or a realisation that the conduct involves a risk of doing something (e.g., killing, injuring). This brings us to Question 1.3: how can it be proved beyond reasonable doubt what D was thinking at the time of the act? After all, we cannot look inside D's head

and if he says he did not intend to fire the gun, have we not got to give him the benefit of the doubt and take his word for it? The first point is that it is clearly open to the jury to disbelieve D's evidence in the same way as that of any other witness. For example, that evidence may be contradicted by D's earlier confession to the police. Witnesses may have seen the incident or overheard D threatening P and their evidence may be inconsistent with D's version.

What the jury must do if they wish to convict in cases where D denies he had the requisite intention or foresight (realisation) is to infer that intention or foresight from proof of what actually happened, what D did and the surrounding circumstances. This rule of common sense is enshrined in s. 8 of the Criminal Justice Act 1967 which contains instructions for how D's intention or foresight of a harmful consequence (e.g., death) must be proved if and when the definition of the offence charged requires it to be proved. It reads:

A court or jury, in determining whether a person has committed an offence—

(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
(b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

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Thus, the prosecution has the legal burden of proving beyond reasonable doubt the presence of all the ingredients of the crime and that D was the person who committed it. That is the position where, for example, D simply denies that he was the person who did it. However, the position is more complicated if he admits to performing the acts but claims they do not amount to the crime because he has a defence, e.g., he acted in self-defence or under duress or he was insane. It would be ridiculously onerous for the prosecution if, in every trial, it had to deal with and eliminate every possible defence which D might have raised and the law does not require it to do so. An evidential burden (termed by some 'the burden of going forward') is placed on D to put forward some credible evidence to support his claimed defence. Only if he does this will the prosecution then have the legal burden of disproving this defence. For example, in *Woolmington*, D claimed that the shooting of his wife was an accident and that, despite appearances, he did not intend to kill or injure. For this to become an issue in the trial compelling the prosecution to disprove it, D would have to provide some evidence to support it, e.g., by his own testimony at the trial, testimony from friends as to a good relationship with his ex-wife, or that he had no reason to kill.

1.5.1 **Reverse burdens of proof**

There are some defences where D's burden is even higher. He bears the 'burden of persuasion'—persuading the court that, more probably than not, he satisfies the conditions for the claimed defence. There is only one instance at common law—the defence of insanity. Since the law presumes everyone sane unless the contrary is proved, if D claims to have been insane when acting, he must prove it on the balance of probabilities (accepted by the European Commission on Human Rights as not contrary to Art. 6(2) of the ECHR in *H* v *United Kingdom* Appn No. 15023/89, 4 April 1990 (unreported)). This is the only

exception to the rule developed by the common law, but it is always possible for the legislature to make exceptions to it expressly or impliedly by statute (*Hunt* [1987] 1 All ER 10, HL). This has been done on numerous occasions and is quite a favoured modern drafting technique (for a recent example see s. 63 of the Gambling Act 2005). It usually happens in the limited context of a specific statutory offence where the legislature defines the basic ingredients of the offence but then expressly excuses D from liability if he can 'prove' certain specified facts. For example, s. 2 of the Homicide Act 1957 enacted the statutory defence to murder of diminished responsibility (a form of mental disorder) and expressly imposes not just an evidential burden but the legal burden of proof on D. This will remain the case after the reforms to that defence introduced by the Coroners and Justice Act 2009. The Court of Appeal in the consolidated appeals of *Lambert; Ali; Jordan* [2001] 1 All ER 1014 refused to hold that reversing the burden of proof contravened the presumption of innocence enshrined in Art. 6(2) of the ECHR. That would not necessarily prevent imposing a burden of proof on D especially where the substance of what he had to prove was not 'an essential element' or 'ingredient' of the offence, but rather 'a special defence or exception' as in the case of diminished responsibility under s. 2.

The case of *Lambert*, though neither of the other consolidated appeals, was appealed to the House of Lords. The decision ([2001] UKHL 37) necessitates a fundamental reassessment of provisions which place a burden of proof on D whether couched in terms of a constituent element of the offence definition itself or a special defence or exception. The House's view was that placing a burden of proof on D was *prima facie* a contravention of the presumption of innocence guaranteed by Art. 6(2) of the ECHR. Although some inroads were permissible, they had to be confined within 'reasonable limits', be 'objectively justified' and comply with the 'principle of proportionality' (Lord Steyn). The majority's view was that a provision that made someone in possession of a controlled drug guilty unless he could 'prove' on the balance of probabilities that he did not know, suspect or have reason to suspect that the bag he possessed contained a controlled drug, did contravene Art. 6(2). The remarkable solution adopted by their Lordships (Lord Hutton dissenting) was to invoke s. 3(1) of the Human Rights Act 1998 to 'read down' the statutory provision so that when it said 'prove', it did not mean 'prove on the balance of probabilities' but only 'giving sufficient evidence'. Thus, an apparently clear imposition of a burden of proof on D was interpreted as a mere evidential burden so as to make the legislative provision comply with Art. 6(2). It seemed to follow that the numerous statutory provisions couched in terms of burden of proof might no longer mean what they say!

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However, in *Johnstone* [2003] UKHL 28, the House of Lords, showing a much greater readiness to uphold reverse burdens of proof, seriously softened the *Lambert* approach where the starting point was a strong assumption that there was a contravention of Art. 6(2). D was convicted of possessing pirated recordings which infringed recording companies' trade marks contrary to s. 92 of the Trade Marks Act 1994. Section 92(5) gave D a defence if he could 'show' that he reasonably believed he was not infringing the trade mark. Their Lordships found the necessary 'compelling reasons' for upholding the provision's imposition of the reverse burden of proof. Emphasis was placed on the need to respect the will of Parliament and not to be too astute to find that the reverse burden was a disproportionate response to the mischief Parliament was trying to correct. Even before *Johnstone*, the lower courts had been quite ready to sidestep *Lambert* (whilst paying lip

service to it, of course!). In *L* v *DPP* [2002] Crim LR 320 DC, D had in his possession a lock knife in a public place. This was an offence under s. 139 of the Criminal Justice Act 1988 unless D could 'prove that he had good reason or lawful authority for having' it with him. The court distinguished *Lambert* holding that placing the onus of proving something that was essentially within his own knowledge was 'a proportionate measure, weighed by Parliament and well within reasonable limits'. A similar line was taken in *Drummond* [2002] Crim LR 666, CA in relation to drink-driving legislation. Section 15 of the Road Traffic Offenders Act 1988 allows a driver who tests positive a defence if he 'proves (a) that he consumed alcohol before he provided the specimen and . . . after the time of the alleged offence . . . and (b) that had he not done so the proportion of alcohol . . . would not have exceeded the prescribed limit . . .'. Again this was held to impose a persuasive burden of proof and not just an evidential burden. The imposition of a reverse burden was a justifiable response to the evils of drink/driving and the problems posed by post-offence drinking (formerly called 'the hip-flask defence') and it was proportionate as it related to a matter peculiarly within D's own knowledge. Thus, it became far from inevitable that the word 'prove' would be read down in accordance with *Lambert* but there was an unfortunate air of unpredictability as to whether or not the word would be held to mean what it said.

In *Attorney-General's Reference (No. 1 of 2004)* [2004] EWCA Crim 1025, the Court of Appeal recognised the divergence of approach between *Lambert* and *Johnstone* and plumped for *Johnstone* with an instruction to trial judges and magistrates to ignore *Lambert*! The stage was set therefore for a final resolution by the House of Lords. Unfortunately the anticipated clarification did not materialise in the consolidated appeals of *Attorney-General's Reference (No. 4 of 2002); Sheldrake* v *DPP* [2004] UKHL 43 and we are still left a legacy of uncertainty and unpredictability. Certainly their Lordships disapproved of the Court of Appeal's sidelining of *Lambert* which 'should not be treated as superseded or implicitly overruled [by *Johnstone*]'. In assessing whether the provision 'unjustifiably infringes the presumption of innocence', the courts must not be unduly influenced by the fact that Parliament has thought it necessary to enact the provision, otherwise there is a danger of giving too little weight to the presumption of innocence ([31]).

> The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end . . . [any provision] must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption . . . The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case [21].

In other words, play it by ear!

Essentially, in assessing whether the reverse burden is a proportionate response, the court has to balance the legitimacy and importance of countering the social (and economic) mischief against the accused's right to a fair trial. Key factors will be the seriousness of the offence in terms of both penalty and stigma, the potential for a person 'who

is innocent of any blameworthy or properly criminal conduct' to be convicted and the respective difficulty for either party in proving the matter(s) subjected to the reverse burden [51]. The preponderance of cases have upheld the imposition of a reverse burden, as the House did in respect of drink-driving legislation in the *Sheldrake* part of the appeal. However, on the other appeal concerning the offence of being or professing to be a member of a proscribed organisation contrary to s. 11 of the Terrorism Act 2000, the House read down a reverse burden of proof provision making it a defence for D to 'prove' *inter alia* that the organisation was not proscribed when he joined it and he has not taken part in its activities since it became proscribed. The importance of countering terrorism did not justify the use of this legislative means because of its potential to undermine the fairness of D's trial and to convict him unfairly of a very serious offence (up to 10 years' imprisonment). In *Keogh* [2007] EWCA Crim 528 the court found that if ss. 2(3) and 3(4) of the Official Secrets Act 1989 were interpreted as imposing a legal burden of proof on the defendant, this would be disproportionate and unjustifiable and hence would violate Art. 6(2) of the ECHR; the reverse burden was not necessary for the effective operation of the Act. Thus the relevant section of the Act was interpreted so as to impose only an evidential burden on the defendant.

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1.5.2 Standard of proof

QUESTION 1.4

Taking D's claim in *Woolmington* that the shooting was an accident, would it be true to say that if he produced some evidence to support his claim, but the jury ultimately disbelieved his claim, the jury would be entitled to convict him?

We need to conclude this section with a little more about the standard of proof required. You will have noticed that, in those exceptional instances where the legal burden of proof is placed on D, it is of a lower standard than applies when the burden is on the prosecution. D need only establish his defence 'on the balance of probabilities'—his claim is more likely to be true than not (the same standard borne by the claimant in civil cases). Where D has only an evidential burden, the standard is even lower than this. D need only point to material which might cause the jury to have a reasonable doubt about his guilt (*Lee Chun-Chuen* v *R* [1963] 1 All ER 73, PC).

When the legal burden of proof is laid on the prosecution it is the more onerous one of proof 'beyond reasonable doubt' (*Woolmington*). This means that, even if on balance the jury thinks that D did commit the offence charged, it must acquit if it entertains any reasonable doubt that he may not have committed the offence. Therefore, in Question 1.4, the jury should not convict if it thinks D's claim might reasonably be true, even though, on balance, it thinks it is probably not true. The benefit of any reasonable doubt has to be given to D.

1.6 Reform of the criminal law

It will quickly become evident that the English criminal law is in many areas in something of a chaotic state. It is often incoherent, illogical and lacking in clarity. Even its most

basic concepts are uncertain. There is therefore a good deal of pressure for reform in legal circles and there are signs that this is beginning to bear fruit in the political arena. Whilst technical reform of the criminal law has not been seen as a high priority in the allocation of scarce Parliamentary time (see, e.g., Brooke (then Chairman of the Law Commission) [1995] Crim LR 911, 917–19), the Government in 2002 professed its intention to codify the general principles of criminal law (see later in the chapter).

The Law Commission is at the forefront of the push for reform and its output of material on criminal law in recent years has been phenomenal. We will be referring to the Law Commission's proposals in its consultation papers and reports throughout this book, and so it is appropriate at this point to explain in general terms something about the work of the Commission.

At the heart of the Law Commission's endeavours is a proposal for a comprehensive criminal code to replace much of the existing law. This draft Criminal Code, as it is now generally known, was published by the Law Commission as *The Report and Draft Criminal Code Bill for England and Wales* in 1989 (Law Com. No. 177). It was based on the work of a small team of distinguished academic lawyers comprising the late Professor Sir John Smith, the late Professor Griew and Professor Dennis. Volume I includes the Commission's recommendations, a draft Criminal Code Bill and Appendices. Part I of the Bill covers the general principles of liability and Part II deals with specific offences. Appendix B to the report gives illustrations of how the Code might operate in particular fact situations. Volume II offers a commentary on some of the Code's provisions.

Although the Commission's long-term aim is that such a Code should be enacted, in deference to political realities and the amount of Parliamentary time which would be needed for an enactment of that magnitude, it produced a less ambitious scheme in 1993. The Report, *Legislating the Criminal Code: Offences Against the Person and General Principles* has abstracted what the Commission sees as key areas desperate for reform and a Criminal Law Bill has been drawn up which builds on the relevant provisions in the original draft Criminal Code Bill (Law Com. No. 218).

In addition to these more generalised reports, the Commission has produced a number of reports and consultation papers on more specific and discrete topics, such as the defence of intoxication (1995), involuntary manslaughter (1996), fraud (2002), partial defences to murder (2004), and further proposals for reform of homicide (2005 and 2006). (More examples are given in the ensuing pages.) The procedure is that the Commission in the first instance issues a consultation paper discussing the existing law, indicating its preliminary views on changes and inviting comments from readers. Following consideration of these comments, it issues a report containing its final recommendations, which can differ quite dramatically from the initial consultation paper (e.g., see the report on intoxication in **Chapter 8**). These reports and papers often contain most lucid expositions of the current law and its anomalies and it is extremely instructive to read these sections of them. A new protocol was issued on 29 March 2010 detailing how the Law Commission, Lord Chancellor and Government should work together before, during and after a report from the Law Commission. It is to be hoped that this will lead to a greater proportion of the latter's proposals making their way into legislation, but recent experience is not promising—as we shall see, the Government has decided not to enact various Law Commission proposals.

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Some of the Commission's Reports have stirred the Home Office into action to the extent of formulating proposals for consultation in respect of offences of non-fatal violence (see **Chapter 4**), involuntary manslaughter (see **Chapter 6** and the **online chapter** on vicarious and corporate liability), fraud (see **Chapter 11**) and sex offences (see **Chapter 5**). However, only a few have resulted in legislation—examples are the Sexual Offences Act 2003, the Fraud Act 2006, the Serious Crime Act 2007, and the Coroners and Justice Act 2009. In some of those instances, only part of the Commission's proposals were enacted. In terms of codification in general, the White Paper, *Criminal Justice: The Way Ahead*, 2002, committed the Government to 'a key idea . . . of reform and codification of criminal law providing a consolidated, modernised core criminal code to improve public confidence and make for shorter, simpler trials'. It is alleged that the Home Office is 'urgently working on what a programme of codification might consist of and how it might be managed'. (See Editorial at [2003] Crim LR 431.) We will not be holding our breath but, as part of this programme, the Law Commission agreed to update its previous work and produce a series of consultation papers on the following topics:

- External elements of offences, in particular causation (i.e., *actus reus*—see **Chapter 2**)
- Fault (see **Chapter 3**)
- Parties to offences (see **Chapter 14**)
- Incapacity and mental disorder (see **Chapters 7, 8 and 9**)
- Intoxication (see **Chapter 8**)
- Defences (see **Chapters 7, 8 and 9**)
- Preliminary Offences (see **Chapter 15**)
- Proof (see **Chapter 1**).

'Simplification of criminal law' and 'unfitness to plead and the insanity defence' are ongoing Commission projects. Reports have recently been published on conspiracy and attempts (2009) and intoxication (also 2009).

Finally, we must note one other development whose effect on the criminal law is unpredictable but likely to be of great significance. The Human Rights Act 1998, which came into force on 2 October 2000, in effect incorporates the provisions of the European Convention on Human Rights into domestic law, thus paving the way for accused persons to argue that current interpretations of penal laws contravene rights enshrined in the Convention. When such arguments are accepted, the courts will have either to reinterpret existing principles and statutory provisions so as to accord with Convention rights or, in the case of statutory provisions, to precipitate legislative amendment by declaring them incompatible with the Convention.

The formulation of legislation has to take account of the Convention's provisions. Whilst the greatest impact will be (and has already been) felt in the area of procedure and evidence, it seems inevitable that lawyers have also used Convention rights to argue for particular interpretations of the definitions of substantive offences. To date, however, the courts have almost always rejected such arguments, often on the basis that the applicable Article (usually it has been Art. 6) is designed to ensure a fair trial **procedure** and does not extend to requiring a fair **substantive** law (see, e.g., *Barnfather* v *Islington Education Authority* [2003] 1 WLR 2318 DC at 13.3).

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It should also be noted that European Community Law enshrines certain general rights such as freedom of movement which automatically take precedence over domestic law and which could be used to overturn or circumscribe particular criminal offences.

Though this has been the case since the United Kingdom joined the Community, the impact so far has been very limited and, in practice, the Human Rights Act will be much more significant.

Further Reading

Ashworth: *Is Criminal Law a Lost Cause?* [2000] 116 LQR 225: argues for a 'principled core of criminal law', based on four interrelated principles.

Ashworth: *The Human Rights Act and the Substantive Criminal Law: A Non-Minimalist View* [2000] Crim LR 564: responds to, and argues against, Buxton's article (see subsequent reference).

Ashworth: *Social Control and Anti-Social Behaviour: The Subversion of Human Rights?* (2004) 120 LQR 263: looks at strategies for dealing with anti-social behaviour, and at the human rights issues which such strategies may trigger.

Buxton: *The Human Rights Act and the Substantive Criminal Law* [2000] Crim LR 311: the former Law Commissioner doubts that the HRA 1998 will have a major effect on substantive criminal law.

Dennis: *Reverse Onus and the Presumption of Innocence: In search of principle* [2005] Crim LR 901: considers the approach of UK courts to whether a reverse burden should be interpreted as legal or evidential.

Devlin: *The Enforcement of Morals* (1968, Oxford University Press): this famous monograph discusses whether and how morality should be protected by the law.

Duff: *Theorising Criminal Law* [2005] 25 OJLS 253: looks at how the theory of criminal law has developed over the past 25 years.

Hart: *Law, Liberty and Morality* (1963, Oxford University Press): disagrees with Devlin, sparking much lively debate.

Lamond: *What is a Crime?* [2007] 27 OJLS 353: examines fault-based crimes and strict liability as different models of criminal liability.

Williams: *The Definition of Crime* (1955) Current Legal Problems 107: searches for a method of distinguishing crimes from civil wrongs.

Summary

Criminal law is the study of the substantive law of criminal liability looking at general principles of liability and some specific offences. It is not a study of procedure, evidence or sentencing. There is no standard definition of a 'crime'—it is simply conduct allowing criminal proceedings and punishment. Substantive criminal law defines the parameters of the criminal justice system by defining what is and what is not criminal conduct.

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- *Classification of offences by mode of trial*—summary only (by magistrates), indictable only (most serious) (by jury in Crown Court) or triable either way (magistrates' or Crown Court depending on circumstances).
- *Appeals*—see diagrams. Often concerns whether trial judge has explained the law correctly to the jury.
- *Burden of proof*—prosecution has legal burden of proving D's guilt beyond reasonable doubt (*Woolmington*). Applies to most defences although D would have an (evidential) burden of adducing credible evidence to put the defence 'in play'. Exceptionally, D may have legal burden of proving 'on balance of probabilities', e.g., insanity, or where statute expressly or impliedly puts burden on D, e.g., diminished responsibility though called into question by the presumption of innocence in ECHR Art. 6(2) (see *Lambert; Sheldrake* v *DPP, Keogh*). Proof of D's state of mind often required—in absence of D's admission state of mind must be inferred from circumstances (*cf.* s. 8 of the Criminal Justice Act 1967).
- *Reform*—Law Commission's consultation papers and reports on specific topics. Draft Criminal Law Bill 1993 covers non-fatal offences against the person and many general principles of liability. Draft Criminal Code Bill 1989 is similar but much more comprehensive and wide-ranging. Government now showing interest: (i) draft Offences Against the Person Bill; (ii) Sexual Offences Act 2003; (iii) Home Office Review of murder; (iv) Fresh review of General Principles via Law Commission; (v) Human Rights Act incorporating European Convention on Human Rights into domestic law.

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