

RESTRUCTURING DEBATE AND REFORM IN THE CRIMINAL LAW

ELEMENT ANALYSIS

By

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THESIS ABSTRACT

This thesis explores the structure of the criminal law and, in particular, the structural device of element analysis. Building upon the classical *actus reus/mens rea* distinction, element analysis further sub-divides both parts of an offence into acts, circumstances and results. In doing so, element analysis offers advantages within the criminal law, both as a structure for legal discussion and analysis, and as a structure for law reform. In relation to the latter, recent reform of inchoate assisting and encouraging (as well as a range of Law Commission recommendations) has made use of element analysis to structure the reform of the general inchoate offences, requiring different levels of fault in relation to different offence elements.

However, despite the increasingly important role played by element analysis, it remains a controversial device. Critics have exposed a lack of objectivity within the separation of elements, and an unacceptable level of complexity, particularly in relation to assisting and encouraging. Accepting much of their criticism, but rejecting the viability of the alternatives offered, this thesis therefore seeks to reinterpret and remodel element analysis in order to realise its potential.

This thesis is dedicated to my late Grandfather Alan John Child.

An intelligent, honourable man.

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CHAPTER 1

INTRODUCTION

In order to have a meaningful discussion about any legal area it is first necessary to identify and (to some extent) agree upon the structural building blocks of that subject.¹ Within the criminal law of England and Wales,² these building blocks can be identified as the central concepts of actus reus (the conduct element of an offence), and mens rea (the fault element of an offence).³ Although the distinction between actus reus and mens rea does not directly affect the substance of the law, it is almost universally adopted by those that work within the criminal law.⁴ This is because by distinguishing between parts of an offence, commentators have a straightforward method of focusing their discussion and analysis. For example, within criminal law text books and Law Commission material it is very common to see mens rea and actus reus discussed separately in different chapters. The technique of separating actus reus and mens rea is commonly referred to as ‘offence analysis’.⁵

Element analysis refers to a technique that has been developed in order to expand upon the basic actus reus/mens rea distinction (offence analysis). Essentially, element analysis claims

¹ See, Dworkin, *Law's Empire* (Harvard University Press, 1986) Chapter 1, where Dworkin contends that disagreement about the concept of law is often confused by (or even based upon) a disagreement about the definition of the terms used within the debate. A criticism he labels as the ‘semantic sting’.

² To avoid wearisome repetition, I will simply refer to ‘the English criminal law’.

³ Criminal defences may also be included as a separate element.

⁴ For a minority opinion contending that the distinction is not a useful one, see Robinson, ‘Should the criminal law abandon the actus reus – mens rea distinction?’ in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 187.

⁵ For example, see Robinson and Grall, ‘Element analysis in defining liability: The Model Penal Code and beyond’ (1983) 35 *Stanford Law Review*, 681, 683.

the ability to taxonomize the actus reus of an offence into three further elements: acts, circumstances and results.⁶

Take the following example:

D intentionally throws a stone at V's window. The stone breaks the window.

In this example D has committed the offence of criminal damage.⁷ According to the Law Commission's interpretation of element analysis,⁸ D's *act* is the throwing of a stone, the *result* is the broken window and the *circumstance* is the fact that the window does not belong to D.⁹ All three elements must be satisfied for D to have completed the actus reus of criminal damage.

In common with criminal damage, many other offences are made up of all three elements. However, this is not necessarily the case. For example, the actus reus of several strict liability offences do not include a result element.¹⁰

⁶ Although the focus of element analysis is the dissection of the actus reus of an offence, as we will see later, this will lead, inevitably, to a dissection of the mens rea corresponding to that actus reus as well.

⁷ Contrary to the Criminal Damage Act 1971, s1. We are assuming that D satisfies the mens rea of the offence and lacks a valid defence.

⁸ For a discussion of problems apparent in the Law Commission's definition of element analysis, see, Chapter 2, pp41-48.

⁹ This is an example that has been employed regularly by the Law Commission in their recent work on inchoate liability and complicity, see, for example, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.23].

¹⁰ For example, within the offence of driving over the prescribed alcohol limit: the act element is driving, the circumstance element is the alcohol level and there is no result element. The Road Traffic Act 1988, s5(1)(b) and the Road Traffic Act 1998, s4(1).

The potential utility of element analysis as a structure to aid legal discussion and criticism is relatively obvious. Just as the basic actus reus/mens rea distinction allows us to focus both analysis and thought, greater sub-division offers the opportunity to narrow that focus even further. Indeed, as a vehicle through which to analyse and evaluate the criminal law, element analysis is already popular among a minority of academics and law reformers and has been for many years.¹¹

Perhaps less obvious is the potential that element analysis has as a model for law reform. However, this potential is extremely important. Within the US Model Penal Code for example, the use of element analysis to define the offence of criminal attempt opens up policy options that would not have been possible under the simple offence analysis approach.

§5.01. Criminal Attempt.

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

¹¹ For one of the first commentators to discuss a variation of element analysis, see, Cook, 'Act, Intention and motive in the criminal law' (1916) 26 *Yale Law Journal*, 645.

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.¹²

As we can see from section 5.01(1), the basic mens rea requirements of criminal attempt are to be determined by reference to the substantive offence being attempted. However, within each of the three potential variations of attempt liability set out in the section, we are also told that specific fault requirements will apply to certain elements of the actus reus. For example, for an attempt under section 5.01(1)(a) D must act purposely in relation to his or her conduct (referring to the act element¹³) and must at least believe in the existence of the requisite circumstances. On this basis, element analysis becomes integral to the offence itself: in order to identify the mens rea required by D, one must first separate the actus reus of the substantive offence attempted into acts, circumstances and results.

In this manner, element analysis is able to facilitate novel methods of law reform that would not otherwise have been available using only offence analysis. Indeed, it is this, alongside its potential in the field of legal debate, which has led Robinson to hail the American codification of element analysis in the US MPC as 'the most significant and enduring achievement of the Code's authors'.¹⁴

However, outside of America, the rest of the common law world has taken a much more cautious approach to element analysis. Reflecting on the potential benefits outlined above,

¹² US Model Penal Code 1962 (hereafter US MPC).

¹³ US MPC §1.13(5). "'Conduct'" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions'.

¹⁴ Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review* 681, 691.

commentators often concede element analysis' 'intuitive attractions'¹⁵, but then rapidly proceed to the conclusion that it is unworkable. Although several reasons are provided for this conclusion, the central criticism of element analysis invariably focuses on its perceived inability to separate the elements of the actus reus of offences objectively. Rather, it is maintained that the process of separation relies on a series of potentially inconsistent value judgements. However, if it is to be used as a vehicle for discussion that refines the current actus reus/mens rea distinction, and especially if it is to be used as a tool for law reform, critics contend that such objectivity is essential.

THE FOCUS OF THIS THESIS

The aim of this thesis is to discover whether element analysis, in any of its subtly different guises, is capable of providing a positive addition to the English criminal law. This is not a new debate. Indeed, it is a question that has been exercising the minds of those within the criminal law for almost a century, a period that has included several notable attempts to incorporate element analysis both within specific offences¹⁶ and even as a basis for a criminal code.¹⁷ However, despite the failures of element analysis to take any meaningful hold within the English criminal law for so many years, recent Law Commission projects have again chosen to adopt it as a structure for reform. This re-emergence is particularly notable because, at least in relation to the reform of criminal incitement (now assisting and

¹⁵ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 14.

¹⁶ See, for example, Law Commission, *Inchoate offences: Conspiracy, Attempt and Incitement* (Working Paper No 50, 1973) where the Working Party proposes that each of the inchoate offences should be structured using element analysis.

¹⁷ Law Commission, *A Criminal Code for England and Wales* (2 vols) (Law Com No 177, 1989) where element analysis is not only used to structure specific offences, but also as a structure for defining each of the fault terms.

encouraging), the Law Commission's recommendations have been adopted into legislation.¹⁸

It is this unexpected development, combined with the Law Commission's decision not to engage with the critics of element analysis,¹⁹ which provides the basis for this research. In what follows, we will trace the emergence of element analysis as a technique both to aid legal discussion and to structure criminal offences. In Parts I and II, exploring both sides of the debate, we will examine the potential benefits of element analysis that have for so long appealed to those within the criminal law, as well as the criticisms that many believe undermine them. Reflecting upon this debate, we are then able to look critically upon the several different conceptions of element analysis in order to decide which of them, if any, is capable of forming part of the criminal law.

Having identified the best possible conception of element analysis, Parts III and IV of the thesis will examine its usefulness *in action*. Here we will focus on the use of element analysis in relation to the general inchoate offences, and to a lesser extent, to secondary liability.²⁰ This investigation will focus jointly on the usefulness of element analysis as a vehicle for academic discussion, as well as a structure for law reform. It will also provide an opportunity to contrast element analysis with some recent alternatives that, whilst not finding favour

¹⁸ The Serious Crime Act 2007, Part 2. It is important to note that the Law Commission's recommendations have not been adopted verbatim and this will be explored later. However, for present purposes, it is enough to note that the use of element analysis to structure the new offences of assisting and encouraging is reflected in the legislation.

¹⁹ In the report on assisting and encouraging crime for example, the Commission's only reference to the critics of element analysis is contained within a footnote that does no more than simply state that a criticism exists without attempting to answer it. Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.23] (fn 24).

²⁰ We will focus on these offences in particular because this is the area where element analysis is able to provide new policy options. See the discussion of criminal attempt and the US MPC above, pp3-5.

with the Law Commission, claim to provide equally appropriate results without the problems *seemingly* inherent within element analysis.²¹

A MEASURE FOR SUCCESS

At this point it is useful to highlight the measures that will be employed later in the thesis to gauge the success of any one version of element analysis. These measures will be revisited at various points within the thesis.

To a certain extent, we can identify the success indicators for element analysis in line with those used for offence analysis, the technique that element analysis claims to refine and improve upon. One of the essential characteristics of offence analysis as a structure for legal discussion is that it applies universally across the criminal law: whatever offence is being discussed, it is possible to analyse it in terms of its *actus reus* and *mens rea* requirements. Therefore, if element analysis is to provide a desirable replacement for (or refinement to) offence analysis, then it too should be able to apply universally across the criminal law. Beyond this, a further essential aspect of offence analysis is that the process of separating *actus reus* and *mens rea* elements is reasonably settled. Although there may still be legitimate debates about whether it is possible to completely (and objectively) separate the two sides,²² it is possible to have these debates from a relatively secure footing and it is not always necessary to have them at all: in the vast majority of cases it will be clear if an aspect of an offence represents an *actus reus* or a *mens rea* element. This is essential because

²¹ See Chapter 14.

²² See, for example, our discussion of the problems caused by ulterior fault in Part III.

without an agreed foundation, offence analysis could not function as a structure for debates about other areas of the criminal law; it would simply represent a further (and unnecessary) layer of disagreement. Likewise for element analysis, which also claims to provide a structure for discussion as opposed to providing any form of normative steer, a basic agreed foundation is equally important.

Beyond these basic requirements however, it is important to recognise that the essential measures for element analysis must also go *beyond* those for offence analysis. First, this is simply because of the increased potential for problems with a technique that further subdivides offences. Although we may be able to tolerate some disagreement in relation to the actus reus and mens rea distinction, this is because such disagreement rarely interferes with a general discussion of offences. However, not only is it widely contended that element analysis involves an even greater degree of uncertainty in the separation of elements,²³ but simply by virtue of there being more divisions to be made will increase the potential for debate: debate that risks encroaching into unwanted areas of discussion in a manner that offence analysis would not have done. Therefore, for element analysis to represent a desirable refinement to current offence analysis, it is clear that it must operate in a manner that minimises the potential for disagreement in the process of separating elements.

Decreasing and minimising the role of subjective judgements within the separation of elements is a difficult target for element analysis to meet. However, as we recognise the second area of concern for element analysis, it becomes clear that this measure for success must be elevated still further. This is because, as we have already introduced, element

²³ See generally Part I.

analysis has been employed beyond offence analysis as a structure for the definition of certain generally applicable offences. As the mens rea requirements of these offences will now be dependent upon how element analysis separates the elements of each principal offence, legal certainty in this area will require all blurring between elements to be removed. Applying universally across the criminal law (though these general offences), any lack of objectivity within the separation of elements has the potential to lead to inconsistency and, ultimately, to the potential for injustice.

The measures for success for element analysis are therefore set, to a large extent, in line with those for offence analysis: requiring universal applicability across the criminal law, and a settled means for separating elements. However, it is also clear that within these fields, element analysis sets the bar rather higher. Refining the second requirement without sacrificing the first, element analysis must provide a process for objectively separating offence elements that does not rely on individual value judgements and is universally applicable.

TERMINOLOGY

The terminology employed within a discussion of element analysis, much like the detail of the technique itself, is far from uniform amongst academics. It is therefore important to spend some time justifying the terminology that will be used within this thesis.

Although element analysis is a technique that is widely recognised, it has been labelled in several different ways. For example, the Law Commission has traditionally employed the term ‘external elements’.²⁴ The US MPC, by contrast, refers to the ‘material elements’²⁵ of an offence, and the Australians to the ‘physical elements’.²⁶ Although each of these terms are intended to mean broadly the same thing, it is questionable whether any of them accurately reflect the full range of elements that can be found within the criminal law. For example, certain offences require D to possess a fault element that does not relate to conduct that has already taken place. This includes general inchoate offences like assisting and encouraging and conspiracy where D must intend P to complete a future criminal act, as well as traditionally choate offences such as burglary that require D to complete an act with the intention to go on to complete a further act.²⁷ Building upon the basic structure of act, circumstance and result, this fourth element will be referred to as *ulterior fault* and it is one that is not external, material or physical.²⁸ In light of this, the more general term *element analysis*, which is used by Robinson in his commentary on this subject,²⁹ is preferred. Where necessary, reference will be made simply to the *elements* of an offence.

The decision to move away from the Law Commission’s preferred term external elements is also partly motivated by a level of inconsistency in its application. For example, in recent

²⁴ See, for example, Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on the Draft Criminal Code Bill* (Law Com No 177, 1989) Part 7.

²⁵ US MPC §2.02 (Proposed Official draft 1962).

²⁶ Australian Commonwealth Criminal Code, Ch 2.

²⁷ D commits the offence of burglary if he or she ‘enters any building ... as a trespasser and with intent to commit any such offence as is mentioned [in following provisions].’ The Theft Act 1968, s9.

²⁸ In part, the decision to include a fourth element reflects a policy choice that ulterior fault issues should be removed from the analysis of D’s fault in relation to his or her own conduct. By failing to achieve this separation, the current literature causes unnecessary complication and risks undermining the actus reus/mens rea distinction. For further discussion of this point, see Chapter 9 generally.

²⁹ See, for example, Robinson, *Structure and Function in Criminal Law* (Oxford University Press, Oxford 1997).

Law Commission papers the label external elements, although very rarely used,³⁰ has been employed in a similar manner to the way we will be using element analysis in this thesis.³¹ However, in a previous Law Commission paper we can see the term external elements being employed to refer to the act and result elements of an offence without including the circumstance element.³² Given the everyday meaning of the label external, this alternative is not an unreasonable interpretation. However, the inconsistency between the papers provides a further reason to prefer the new label element analysis.

When referring to each individual element there has also been an inconsistency of labelling within the literature. Each of these will be explored in turn.

The act element

Employing the term *act* to describe the part of the offence that focuses on D's physical activities is not without its critics. In the criminal damage example outlined above, in which D's act is the throwing of a stone, the label would appear to be relatively unproblematic. However, what if the offence that D commits does not involve any obvious physical movement?

³⁰ For example, in two of the most recent Law Commission Reports that have employed element analysis, the term 'external elements' is used just once. The Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.23] and The Law Commission, *Participating in Crime* (Law Com No 305, 2007) [1.6].

³¹ See, for example, The Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on the Draft Criminal Code Bill* (Law Com No 177, 1989) Part 7; The Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.23].

³² See, for example, The Law Commission, *Inchoate offences: Conspiracy, Attempt and Incitement* (Working Paper No 50, 1973) [50], [53], and [102].

Consider the following two examples:

D intentionally withholds food from her young child V. V dies as a result.

In this example, D has committed the common law offence of murder.³³ The act element of D's offence is constituted by her omission to provide food for her child.

D is apprehended by the police. They discover a class A drug in one of his pockets.

In this example, D has committed the offence of possession of a class A drug.³⁴ The act element of D's offence relates to D's on-going possession of the drug.

In both examples above, the term act does not seem to be entirely appropriate. Using act to describe an omission and an on-going state of possession certainly represents a broadening of its everyday meaning.³⁵ However, it is one that is unlikely to trouble the courts. It is already commonplace, for example, for a court to interpret certain statutory language broadly in order to allow for omissions liability.³⁶ It is further noted that the Law

³³ We are assuming that D does not have a legitimate defence.

³⁴ Contrary to the Misuse of Drugs Act 1971, s5. Again, we are assuming that D does not have a legitimate defence.

³⁵ For a discussion about the importance of using the natural meaning of terms like 'act', see Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 254-5.

³⁶ For example, the Criminal Attempts Act 1981, s1(1) where 'act' has been interpreted to include omissions (*Gibbons and Proctor* (1918) 13 Cr. App. R. 134). See also, the Accessories and Abettors Act 1861, s8 where the terms 'aid, abet, counsel or procure' have been interpreted to include omissions (*Tuck v Robinson* [1970] 1 W.L.R. 741).

Commission in their Draft Criminal Code Report also used the term act in this very broad sense, although they did include a clause to make it clear that they were doing so.³⁷

In their most recent publications however, the Law Commission have substituted the term act and replaced it with *conduct*.³⁸ Although they do not explicitly discuss this change at any stage, there are cogent reasons why the term conduct may be preferred. The most compelling of these reasons is the greater ease with which conduct, as arguably a more general term than act, is able to cater for cases like those in the examples above. However, for the following reasons, this thesis continues to employ the term act rather than follow the Law Commission.

The first reason for preferring the term act is the apparent inconsistency between the Law Commission's discussion and their recommended draft legislation. In their three recent reports in which element analysis has formed an integral part,³⁹ the Commission have employed the term conduct within all of their discussion, and yet the term act is still preferred within the appended draft Bills. Presumably this has resulted because of Parliamentary Counsel's preference for the latter term. But it is an observation that lends further support to act as the more appropriate label. It is also an observation that is likely to lead to considerable confusion for those reading Law Commission material. The offences that the Commission have sought to codify and reform in these reports are some of the

³⁷ Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on the Draft Criminal Code Bill* (Law Com No 177, 1989) [7.6]-[7.13].

³⁸ See, for example, Law Commission, *Participating in Crime* (Law Com No 305, 2007).

³⁹ These reports have focused on the inchoate offences of assisting and encouraging, attempt and conspiracy, as well as the offence of complicity.

most complex within the criminal law, and a change in terminology between the body of the report and its appended Bill represents an unnecessary complication.

The second reason for preferring act relates simply to an issue of presentation and discussion. When isolating the various elements of an offence for analysis, it is often necessary to refer with precision to, for example, the conduct or fault elements of the act element. If the act element is relabelled as the conduct element, there is the unfortunate consequence that it becomes necessary to refer to the conduct element of the conduct element. The Law Commission avoid this problem in their recent publications by simply referring in shorthand to the conduct element. However, this solution means that the context within which the term is used effectively replaces the term itself, and at times it is even difficult for the knowledgeable reader to identify which of their two meanings of conduct they are intending to employ. This is an unnecessary problem that not only has the potential to confuse the reader, but also to mislead them as to the intended policy. For example, the Law Commission's secondary liability policy is such that D need not intend P to complete the full conduct element (actus reus) of the principal offence because D need only have knowledge in relation to both the circumstance and the result elements. However, D must intend P to complete the conduct (act) element of the conduct element (actus reus). Thus, where the Commission simply refer to D needing to intend P to complete the conduct element of the principal offence, they are liable to mislead their reader.⁴⁰

⁴⁰ See Law Commission, *Participating in Crime* (Law Com No 305, 2007) [3.77].

The circumstance element

The circumstance element (or elements) of an offence relates to the facts that provide the context for D's act. Although it is the focus for much academic discussion, the label circumstance is comparatively unproblematic and is consistently employed by all the major contributors in this area.

However, certain commentators have suggested that the content of the circumstance element is too vast to be contained within a single element. For example, as part of Smith's⁴¹ discussion of criminal attempts, he has suggested that the circumstance element should be further subdivided into two separate classes of circumstance: 'pure circumstances' and 'consequential circumstances'. According to Smith, pure circumstances are those which are 'not essential to the occurrence of the consequence [result element]'⁴² but merely provide it with a context. For example, if we draw again upon the facts of the criminal damage example above, a pure circumstance of D's conduct is the fact that he or she does not own the property that has been damaged. By way of contrast, consequential circumstances are essential to the occurrence of the result element. Thus, in reference to the same example, these would include the fact that D had a stone in his or her hand and the fact that V's window was in the way of the stone when it was thrown.

⁴¹ Smith, 'Two problems in criminal attempts' (1956) 70 *Harvard Law Review*, 422.

⁴² *Ibid*, 424.

Smith presents this separation in order to discuss whether each of the two different types of circumstance should have a different fault element attached to it. However, in doing so, it soon becomes clear that an objective separation of the two species of circumstance would be very difficult to achieve for every offence. It would be unacceptable for two identical cases to lead to different results simply because the court in one case interpreted a fact as a pure circumstance (leading to the application of a certain fault requirement), whereas a court in the other case interpreted it as a consequential circumstance (leading to the application of a different fault requirement). Even more importantly, it is also unclear how even an objective separation of this kind could provide any substantive or theoretical benefits to the criminal law. Indeed, there is every indication from Smith's later work that he too came to the conclusion that a singularly defined circumstance element is preferable to his dual conception.⁴³ A conclusion accepted within this thesis.

The result element

The result element of an offence relates to an event or a state of affairs that is caused by D's act. An obvious example would be the requirement for the common law offence of murder that D's act causes V to die.

Although there is no discernable difference in meaning, there is a split in the literature between the use of the term *result* and the use of the term *consequence*. In order to maintain consistency within this thesis, the term result will be employed throughout. In

⁴³ In Smith's two follow-up publications, 'Two problems in criminal attempts re-examined – I' (1962) *Criminal Law Review*, 135, and 'Two problems in criminal attempts re-examined – II' (1962) *Criminal Law Review*, 212, Smith does not revisit this part of his previous argument.

support of this preference, it is noted that the New Zealand Crimes Consultative Committee (one of the very few bodies to have explicitly discussed this issue) also prefer the term ‘result element’.⁴⁴

OVERVIEW OF THE THESIS

Part I: In this Part, chapters 2 and 3 will trace the history of element analysis. We will explore the problems with the current law that have led to the call for element analysis, the criticisms of element analysis that have (at least) delayed its adoption, and finally, how different jurisdictions have responded to those criticisms.

Part II: In this Part, chapters 4 to 7 will focus on the first area of criticism: whether element analysis can separate the actus reus elements of an offence objectively. Critically, this will involve the act element being identified and isolated within simple bodily movement.

Part III: In this Part, chapters 8 to 13 will focus on the second area of criticism: whether (even if objective) element analysis can operate successfully within a criminal law system that values clarity and simplicity. A separate area of the criminal law will be explored within each chapter.

Part IV: Finally, within chapters 14 and 15, having constructed our preferred method of element analysis, we will be in a position to compare it to the various alternative approaches to the reform of general inchoate liability. From here, we may then draw general conclusions.

⁴⁴ Crimes Consultative Committee, *Report on 1989 Crimes Bill* (New Zealand, 1991), 13.

PART I

ELEMENT ANALYSIS: AN EVOLVING DEBATE

The purpose of Part I is to explore three interrelated questions:

1. What are the benefits of element analysis/problems with the current law that have led to calls for its adoption into the English criminal law?
2. What are the criticisms of element analysis that have prevented (or at least delayed) its adoption into the English criminal law? and
3. How, and to what extent, have the proponents of element analysis in England and other jurisdictions attempted to adapt their conception of element analysis in order to answer these criticisms?

The answers to these questions will lead us up to the current stage of the debate. Beyond this, they will also provide the necessary foundation upon which to assess the various conceptions of element analysis that currently exist. Within Parts II and III, we will then attempt to construct a *best practice* conception of element analysis.

CHAPTER 2

THE ATTRACTIONS AND CRITICISMS OF ELEMENT ANALYSIS

In order to understand the potential role of element analysis in the future of criminal law discussion and reform, it is first important to understand its attractions and perceived weaknesses.

THE ATTRACTIONS OF ELEMENT ANALYSIS

1) Element analysis as a structure for legal discussion and presentation

The earliest and in many ways the least controversial attraction of element analysis lies in its use as a structuring technique for legal discussion and analysis.⁴⁵ By refining the more basic actus reus/mens rea distinction (offence analysis), element analysis provides an opportunity for greater precision when referring to different parts of an offence.

Element analysis operates by subdividing the actus reus of offences into a maximum⁴⁶ of three separate parts (elements):

- **Act element:** The physical conduct (or omission) necessary for the offence.

⁴⁵ Whether the use of element analysis in this area *should* be considered less controversial than its use as a structure for law reform is discussed below at p41.

⁴⁶ Certain offences may not contain all three elements (see discussion in Chapter 1, p2, and Chapter 6 generally).

- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.⁴⁷

Progressing from the basic actus reus/mens rea distinction, offences may now be divided into six separate elements: the act, circumstance and result elements that make up the actus reus, and the fault elements that attach to each one.⁴⁸

	Act Element	Circumstance Element	Result Element
Actus Reus	1	2	3
Mens Rea	4	5	6

Analysing the current law

One of the primary advantages of greater granularity is evident where element analysis has been employed to discuss complex criminal offences. As early as 1917, Professor Walter Cook⁴⁹ contended that in order to undertake an investigation of the offence of criminal attempt and provide ‘analysis somewhat more careful than that usually given’, the investigator must first trace the subdivision of actus reus and mens rea into ‘(1) the act (or acts); (2) the concomitant circumstances; (3) the [results]; (4) the actors state of mind’.⁵⁰ Employing this technique (that we might now label as element analysis), Cook accused his contemporaries of confusing the very general term *actus reus* and employing it

⁴⁷ These definitions reflect those employed by the Law Commission. See, Law Commission, *Conspiracy and Attempts: A Consultation Paper* (Consultation No 183, 2008) [4.6]-[4.15].

⁴⁸ As we will examine in Chapter 9, certain offences such as inchoate offences and offences of specific intent may require us to include an additional element. We have labelled this as the ‘ulterior fault element’.

⁴⁹ Based, at this time, in Yale University.

⁵⁰ Cook, ‘Act, Intention and motive in the criminal law’ (1916) 26 *Yale Law Journal*, 645, 646-647.

inconsistently as a result. He believed that through element analysis, he would be able to avoid similar inconsistency because of the relatively confined investigation within each element.⁵¹

Returning to the present day, the usefulness of element analysis as a tool for discussing complex offences remains clearly evident. In the Law Commission's recent report on complicity, for example, element analysis is not only used to construct a new and reformed offence, it is also used to explore the current law as it stood at the time of publication. Within this, the Commission pay particular attention to the current mens rea of secondary liability, describing it as 'complex and difficult',⁵² with 'no single case set[ting] out a general test and the cases from which a general test may be inferred [being] inconsistent.'⁵³ The Commission explains that the reason for this complexity is that 'D's state of mind is relevant to his or her conduct, to P's conduct and to P's state of mind'.⁵⁴ With so many different facets to D's mens rea, a single answer to the question *what is the mens rea requirement of secondary liability?*, demanded by offence analysis, would be impossible: there is no one mens rea requirement. Therefore, the Commission separated the elements of the actus reus of complicity using element analysis and then explored the fault that attached to each element in turn.⁵⁵ In this way, the Commission is able to lead its reader through a very complex offence one section at a time. At the end, it is the accumulation of these individual

⁵¹ Cook, 'Act, Intention and motive in the criminal law' (1916) 26 *Yale Law Journal*, 645, 646. Cook makes the point that where '[o]ne writer or judge will use [terms such as act] in one sense, another in a different sense; indeed, the same writer will not always be consistent in his usage.'

⁵² Law Commission, *Participating in Crime* (Law Com No 305, 2007) [B.67].

⁵³ *Ibid.* [B.68].

⁵⁴ *Ibid.* [B.68].

⁵⁵ *Ibid.* Appendix B. It is a technique that is particularly evident in what are arguably the most complex parts of the analysis. For example, the Commission's discussion of D's state of mind in relation to the actus reus of the principal offence committed by P [B.79-B.100].

discussions that is able to provide the Commission's answer to the question *what is the mens rea requirement of secondary liability?*

Evaluating and codifying the current law

Through the separation of complex offences into manageable sections, the systematic approach required by element analysis also offers the potential for greater clarity and comprehensiveness within one's evaluation of the law. The argument here is that although the simplistic language of offence analysis can allow problems within the law to remain hidden, analysing the elements of an offence individually can have the effect of shining a light into a dark corner.⁵⁶ Commenting on codification generally (for which he believes element analysis forms an integral part), Robinson comments that:

The rambling paragraphs of case opinions and scholarly literature ... provide a permanent haven for the murky rule. Leaving the law's rules to the shadows of case law and scholarly literature, where there is never a clear target, means less likelihood of seeing and correcting law's flaws.⁵⁷

As the quotation suggests, it should not be forgotten that the important corollary of exposing problems in the law is the opportunity for their correction. Here too, law

⁵⁶ For examples of this, see the discussion of general inchoate offences in Chapter 10. Exploring each element of each offence, this discussion exposes gaps and inconsistencies in both the current law and within the relevant Law Commission recommendations.

⁵⁷ Robinson, 'In defence of the Model Penal Code: A reply to Professor Fletcher' (1998) 2 *Buffalo Criminal Law Review*, 25, 42.

reformers may be aided by a technique that allows them to focus on the precise elements of offences rather than having to tackle them as a whole.⁵⁸

Beyond the greater clarity discussed above, it has been claimed that reform structured by element analysis will also promote greater democratic control and improved consistency in application: each of which form integral parts of the ‘principle of legitimacy’ that underpins the normative basis of the criminal law.⁵⁹

The democratic claim is premised upon the contention that many offences currently on the statute book (which have not been created with element analysis in mind) are either incomplete or too open-textured. Where this is so, there is effectively a delegation of legislative responsibility from Parliament to the courts to fill in the gaps in order to resolve the cases before them. An example of this, which will be fully explored later in this chapter, can be found in the law of criminal attempt. Section 1(1) of the Criminal Attempts Act 1981 states that to be guilty of criminal attempt D must *intend* to ‘commit an offence.’ Based upon the Law Commission’s report that preceded the Act, this statement was intended to apply *generally* to the actus reus of the principal offence (every element of it).⁶⁰ However, in the case of *Khan*,⁶¹ the Court of Appeal interpreted the Act to require intention as to the act and result elements, but to allow the fault attached to the circumstance element to mirror that of the principal offence.

⁵⁸ Although, of course, maintaining an overview of the offence is also essential.

⁵⁹ Moore, *Act and Crime: The philosophy of action and its implications for criminal law* (Oxford University Press, Oxford 1993) 240.

⁶⁰ Law Commission, *Criminal law: Attempt and impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.14-18].

⁶¹ [1990] 1 WLR 813.

Whether or not one agrees with the result in this particular case, it must lead us to question the ability of offence analysis to secure the will of Parliament. Proponents of element analysis claim that its use would enable the 'legislature to reclaim from the courts the authority to define the grounds of criminal liability.'⁶² The argument here is that, had the offence been codified using element analysis, clearly stating that intention was required for every element of the principal offence, the court's interpretation in *Khan* would not have been possible.⁶³ This democratic claim, of course, requires some qualification. For example, many offences are likely to continue to be drafted in an intentionally open-textured way in order (partly) to allow the courts some manner of discretion. However, the greater potential of element analysis to confine courts discretion in those areas deemed necessary by Parliament, remains a significant benefit of the technique.

The contention that element analysis would also facilitate greater consistency in the way statutes are applied, follows a very similar line. First, if element analysis results in there being fewer gaps in the law because such gaps are clearly visible on the face of a statute, judges will not be forced to make decisions on how they should be filled in order to decide cases. As a result, it is arguably less likely that inconsistent lines of authority will develop in the courts as different judges peruse dissimilar approaches. An example of this is the

⁶² Leader-Elliott, 'Benthamite reflections on codification of the general principles of criminal liability: Towards the panopticon' (2005) 9 *Buffalo Criminal Law Review*, 391, 391.

⁶³ See, The Law Commission, *Codification of the Criminal Law: A Report to the Law Commission* (Law Com No 143, 1985) [14.30], where it is proposed that the Criminal Attempts Act should be redrafted to state that intention is required for every element of the principal offence. Support for the point can also be gained from a comparison with the offence of conspiracy. Unlike the Criminal Attempts Act 1981, section 1(2) of the Criminal Law Act 1977 specifically rules out the possibility of any fault element lower than intention or knowledge being sufficient for the circumstance element of conspiracy. As a result, in the case of *Saik* [2006] UKHL 18, [2007] 1 AC 18, the House of Lords felt bound to apply the law as set out in the statute despite the 'unattractive outcome' (Lord Nicholls [33]). However, *Saik* may be contrasted with *Sakavickas* [2004] EWCA Crim 2686 where the court held that s1(2) of the Criminal Law Act could be satisfied by D that 'knew' that his or her state of mind was 'suspicion'.

current law of complicity, where although the actus reus of the offence is set out (in the barest terms) in section 8 of the Accessories and Abettors Act 1861, the mens rea is left entirely undefined by the statute. In an attempt to fill this void, the courts have developed several approaches which now stand inconsistently with one another.⁶⁴

Secondly, in relation to cases like *Khan*, if judges are confined by very precise drafting, then this too may improve consistency.⁶⁵ Gainer contends that, by narrowing the choices judges are left with through the use of element analysis, we are able to 'reduce the opportunities for, and probably the instances of, different conclusions being reached on the basis of reaction rather than reason.'⁶⁶ This is not to advocate the complete removal of the judicial role, and there remains some scope within the structure of element analysis for judicial discretion.⁶⁷ However, with this discretion confined within each individual element of the offence, the use of element analysis can be seen as a refinement in favour of consistency.

Preventing the enactment of thought crime

Within his book *Structure and Function in Criminal Law*, Robinson makes the further claim that employing element analysis as a structure for the law would have the effect of 'barring punishment for unexternalised thoughts': as every offence must contain an act element.⁶⁸

However, as Simester has observed, the act requirement is neither adequate nor desirable

⁶⁴ For discussion of this, see, Law Commission, *Participating in Crime* (Law Com No 305, 2007) Appendix B.

⁶⁵ For example, the question whether the authority in *Khan* can be extended to allow a fault element less than intention to apply in attempts to the result element of a principal offence remains, to some extent, an open debate. See the contrasting cases of *Millard and Vernon* [1987] Crim. L.R. 393 and *AG Reference (No3 of 1992)* [1994] 1 W.L.R. 409.

⁶⁶ Gainer, 'The culpability provisions of the MPC' (1987) 19 *Rutgers Law Journal*, 575, 583.

⁶⁷ See the discussion in Part III generally.

⁶⁸ Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 32.

as a lone defence against the enactment of 'thought crimes'.⁶⁹ It is not adequate because a statute could simply require D to have performed any act, however remote from the eventual harm. For example, as Simester states, 'moving one's arm whilst contemplating the death of the King would not violate Robinson's act requirement.'⁷⁰ It is not desirable as a lone defence because the aversion to thought crime shared by Robinson and Simester is not structural but normative, relating to the values of free speech and autonomy.⁷¹

Robinson may well reply to this criticism, with some justification, that his comments concerning the act element (as a defence against the creation of thought crime) have been taken out of context. After all, the examples provided by Robinson clearly demonstrate that he had in mind only those acts which either cause the eventual harm or are a clear indication of D's criminal intent.⁷² However, such a response is to concede that element analysis is *not* able to prevent the enactment of thought crime. The use of element analysis may provide greater clarity when exposing what may be seen as *normatively inadequate* act elements. However, element analysis, like offence analysis, does not prescribe any particular policy. Rather, it provides a structure around which various policies can be constructed: including policies that require act elements to be proximate to harm and/or a manifestation of intention.

The rejection of this particular *potential* advantage as unsustainable does no damage to the other potential benefits of element analysis outlined in this chapter. Indeed, the

⁶⁹ Simester, 'Robinson, *Structure and Function in Criminal Law*' (Book Review, 1998) *Cambridge Law Journal*, 616.

⁷⁰ *Ibid*, 617.

⁷¹ *Ibid*, 617; Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 31 and 32.

⁷² Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 31 and 32.

acceptability of element analysis (or any other device) cannot hang on its ability to solve *all* of the problems within the criminal law. However, its inclusion (and rejection) comes as useful reiteration of the limits of element analysis. To a certain extent, there must be links between the structure of the criminal law and its normative content. Indeed, in our discussion below, we highlight that one of the principal benefits of element analysis is that it is able to facilitate certain policy options within the law of attempt that would not be possible using only offence analysis. However, if the technique is to remain flexible to the needs of a changing society, it is also a benefit that it is normatively neutral as to the content of the law. Element analysis provides the basis for an expanded variety of policy options, but contrary to Robinson, it does not (and is not equipped to) go beyond that.

Analysis and codification of the fault terms

Arguably the most visible use of element analysis across the common law world relates to the exploration of fault terminology. Whether or not it is judged to be an acceptable structure for the analysis of offences or even as a structure for law reform, it seems that element analysis (in this area at least) has emerged as the preferred option to offence analysis.⁷³

The main reason for the use of element analysis in this area seems to relate to the greater flexibility that it provides: flexibility required both to reflect the common law (which often distinguishes between the elements of an offence when discussing fault) and to conform to

⁷³ See, for example, the discussion of fault terms in Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) Ch 5.2 and Simester and Sullivan, *Criminal law: Theory and Doctrine* (3rd Ed, Hart Publishing, Oxford 2007) Ch 5.

the requirements of the law reformer. Whereas, using offence analysis, the definition of a fault term would have to be capable of applying to any part (element) of an offence, element analysis allows each fault term to be tailored depending on the element it is applied to. For example, section 18 of the 1989 Draft Criminal Code⁷⁴ sets out the fault terms in the following manner:

18. For the purposes of this Act... a person acts—

(a) ‘knowingly’ with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist;

(b) ‘intentionally’ with respect to—

(i) a circumstance when he hopes or knows that it exists or will exist;

(ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events;

(c) ‘recklessly’ with respect to—

(i) a circumstance when he is aware of a risk that it exists or will exist;

(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk;

Several important aspects of this section would not have been possible if the Law Commission had not chosen to structure it using element analysis (separating the elements). For example, we can see considerable differences in the way the single terms *intentionally* and *recklessly* apply as between circumstances and results. Beyond this, element analysis also allows the fault terms to overlap with one another in limited areas without losing the

⁷⁴ The Law Commission, *A Criminal Code for England and Wales: Volume 1 Report and Draft Criminal Code Bill* (Law Com No 177, 1989) 51.

distinction between them completely. Examples of this include the definitions of *knowingly* and *intentionally* which overlap when applied to the circumstance element of an offence, but not the result element.

In certain instances, the use of element analysis to define fault terminology can be placed within a wider acceptance of element analysis as a structure for drafting all criminal offences.⁷⁵ However, in those jurisdictions that have not fully incorporated element analysis, its use in this particular field has had a relatively unusual history. This is because even those academics that have criticised element analysis generally as being unworkable, have still tended to employ it in this limited capacity. For example, the 1980 Law Commission report on preparatory offences is notable for its total rejection of element analysis as a structure for the reform of inchoate offences:

Since the new statutory offence of attempt in place of common law will ... apply to all existing offences, it seems to us that the terminology of 'circumstances' and [results] will not be appropriate.⁷⁶

However, an integral part of the reform recommended within the report is based upon the assumption that *intention* includes *knowledge* in relation to the circumstance element of an offence, but not the result element.⁷⁷ Whether it is logically sustainable to reject element

⁷⁵ This is certainly the case within the US MPC where commentators commonly discuss the use of element analysis and the definition of fault terms to be part of the same closely related project. See, for example, Gainer, 'The culpability provisions of the MPC' (1987) 19 *Rutgers Law Journal*, 575.

⁷⁶ The Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12].

⁷⁷ The Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.15].

analysis generally, and yet still employ it in this limited way, will be explored below at chapter 11.

Conclusion

It is clear from the preceding discussion that there are several potential advantages for those within the criminal law to employ element analysis as a structure for legal discussion and presentation. Element analysis provides a ‘building-block technique’ which supporters claim is capable of simplifying the law, whilst simultaneously increasing its level of sophistication.⁷⁸ Therefore, although each of these advantages will require further examination before they are fully accepted, a task that is taken up in later chapters, there appears to be a relatively strong *prima facie* case for the technique.

However, standing alone, the potential benefits of element analysis outlined above may be of a limited appeal. This is because, like the more general project of codification, the use of any common structures within the law requires a level of political consensus in its support. Thus, although the benefits of *general* codification are well known,⁷⁹ without the necessary consensus, the project has now been abandoned.⁸⁰ Equally, although individual academics and law reformers may find benefit in the use of element analysis, its full potential will not be realised unless it becomes a common structure.⁸¹

⁷⁸ Gainer, ‘The culpability provisions of the MPC’ (1987) 19 *Rutgers Law Journal*, 575, 588.

⁷⁹ See, Law Commission, *A Criminal Code for England and Wales – Volume 1 – Report and Draft Criminal Code Bill* (Law Com No 177, 1989) Part 2.

⁸⁰ Law Commission, *Tenth Program of Law Reform* (Law Com No 311, 2008) [1.2-1.6].

⁸¹ For discussion of this point, see Part IV generally.

For proponents like Robinson, building a consensus in favour of element analysis has focused on highlighting the top-down benefits that it can bring to the study and operation of the criminal law (outlined above).⁸² However, unlike the case for codification more generally, element analysis can also be advocated using a bottom-up approach: that it is necessary in order to create individual offences that operate fairly. It is to this potential benefit that we now turn. Although each benefit is often discussed separately, and they are in no way mutually dependant, they may be mutually reinforcing.⁸³

2) Element analysis as a structure for the reform of *general* offences

Arguably the most important, but certainly the most contentious, attraction of element analysis concerns the creation of new policy options in the reform of inchoate offences and complicity.⁸⁴ Each of these offences and the potential role played by element analysis will be explored in detail in chapters 10 and 12. However, for present purposes, we will briefly discuss why and then how element analysis has been used in the reform of the offence most commonly associated with it in this jurisdiction, that of criminal attempt.

Consider the following example:

⁸² See generally, Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997).

⁸³ This is discussed further below. See Part IV generally.

⁸⁴ It should be noted (again) that the benefit of element analysis in this regard is that it facilitates a wider variety of reform options. Not that it contains a normative preference for any one option.

D picks up a stone. Just as he motions to throw the stone, X, realising that it might hit and damage V's window, prevents D from doing so.

In this example, the issue is whether D should be liable for having attempted to cause criminal damage to V's property.⁸⁵ D's act in trying to throw the stone would come comfortably within most people's conceptions of the actus reus of attempt.⁸⁶ However, before D can be found liable for an attempt, we must also consider what mens rea should be required by D in relation to the substantive offence. It is whilst dealing with this second *normative* issue of mens rea that *structural* benefits offered by element analysis have proven to be particularly attractive.

In order to appreciate why law reformers (and the courts) have looked to element analysis for assistance in this area, it is first important to understand the alternative approaches available in its absence. Without employing element analysis, law reformers have traditionally⁸⁷ been confined to two possible options.

Option 1: Mirror the substantive offence

⁸⁵ Contrary to the Criminal Damage Act 1971, s1.

⁸⁶ It would certainly be sufficient to come within the conduct element of attempt set out in the Criminal Attempts Act 1981, s1.

⁸⁷ The word 'traditionally' is used because a number of alternative approaches have arisen in recent years as direct challenges to the use of element analysis. These alternatives will be discussed fully in chapter 14.

The first option, a technique never garnering much support,⁸⁸ would require D to have the same mens rea as he or she would be required to have for the principal offence. Therefore, having identified the mens rea required for the principal offence (in this case criminal damage), we then require for attempts liability that D should possess this same mens rea at the time of his or her attempt. A potential advantage of this approach is that it recognises the moral equivalence of D that completes the offence and D that, though no choice of his or her own, is prevented from completing the offence. If the conduct of each defendant is morally equivalent, then surely the mens rea requirements should be the same.

However, although this policy might seem attractive if we imagine D in our example as an enemy of V intent on damaging his property, it becomes much less attractive if we discover that D is a friend of V and is simply trying to get his attention from outside the house. Here, if D foresees the possibility that the stone *might* damage V's property, even if he does not want it to and even if (as in the example) he is prevented from throwing the stone, he will still be guilty of attempted criminal damage.⁸⁹

Similarly unsatisfactory conclusions would appear in other areas of the law as well. The offence of murder, for example, does not require D to intend or even foresee the result element of the actus reus (death) in order to be convicted.⁹⁰ However, if D is arrested just

⁸⁸ For a rare exception, see Loftis, 'Criminal law: Requiring the same intent for prosecution of criminal attempt and the consummated crime' (1984) 36 *University of Florida Law Review*, 545.

⁸⁹ This is because the mens rea of the substantive offence of criminal damage only requires D to be reckless in relation to the damage being caused: Criminal Damage Act 1971, s1(1).

⁹⁰ D need only intend to cause V serious harm (see, *Vickers* [1957] 2 QB 664).

before attacking V, it is surely wrong to convict him or her of attempted murder unless he or she intended to kill V.⁹¹

There would also be problems with several strict liability offences. Consider the following example:

D and P go out to a pub together to celebrate D's birthday. D is intending to drive home and so he does not drink any alcohol. However, unaware that D is intending to drive, and anxious that D should enjoy himself, P mixes alcohol into D's drinks. Just as D gets into his car to drive home P spots him and tells him what he did. D does not drive home.

If D had driven the car and been in excess of the prescribed alcohol limit then he would have committed an offence regardless of his lack of fault.⁹² D's conviction (on these terms) is justified on the basis that, whether or not he intended to commit the offence, drink driving poses a considerable danger to other road users. However, in a case such as that in the example, where D does not actually go on to create the danger, it is surely inappropriate to convict him of attempt unless he at least foresaw the risk that he might be over the alcohol limit.

⁹¹ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 29-32.

⁹² Contrary to The Road Traffic Act 1988, s5.

Option 2: Intending every element of the substantive offence

This option was preferred by both the Law Commission and by Parliament leading to the enactment of the Criminal Attempts Act 1981.⁹³ Setting aside the mens rea requirements of the principal offence, this approach to criminal attempts simply requires D to intend every element. Unlike option one, this option is predicated upon the contention that D (who fails to bring about a specific harm) is equally deserving of punishment as P (who actually brings about the harm) only if D *intended* to bring that harm about. Preventing the net of criminality being cast too widely, this approach ensures that ‘as the form of criminal liability moves further away from the infliction of harm, so the grounds of liability ... become more narrow.’⁹⁴

In this manner, option two is able to deal much more satisfactorily with the examples outlined above that proved problematic for option one. It would convict, in the criminal damage example, D1 that intended to break V’s window, but acquit D2 that simply intended to get V’s attention whilst foreseeing the possibility of damage. It would also require D to intend to kill V before he or she could be convicted of attempted murder. And likewise, in the drink driving example, it would be necessary for D to know that he was in excess of the alcohol limit before he could be convicted of attempting to drive in excess of the alcohol limit.

⁹³ The Criminal Attempts Act 1981, s1.

⁹⁴ Ashworth, *Principles of Criminal Law* (4th Ed, Oxford University Press, Oxford 2003) 425.

However, as with option one, this policy also encounters problems when it is applied to certain offences. Consider the following example involving the offence of rape:

D and P go out to find a woman (V) with whom to have sex with. Without caring whether V consents or not, but recognising the likelihood that she will not, both D and P attempt penetration. Only P is successful.

In this example,⁹⁵ P has committed the offence of rape.⁹⁶ P commits rape because he does not reasonably believe, at the time of penetration, that V is consenting. However, if attempts liability were to require intention as to every element of the offence, D's recklessness as to V's lack of consent would not be sufficient to ground his liability in attempt. Therefore, D would not be liable for attempted rape. In fact, to be liable for the attempt, it would appear necessary for D to either intend V to lack consent, or at best to have full knowledge of V's lack of consent. It is little wonder therefore that this approach has been widely and almost universally criticised for being unduly restrictive in its application.⁹⁷

Element analysis

As we have already highlighted, element analysis (like offence analysis) does not provide an alternative policy as to the normative content of the law. Indeed, although the two options

⁹⁵ Loosely based on an example from Ashworth, *Principles of Criminal Law* (5th Ed, Oxford University Press, Oxford 2006) 448-9.

⁹⁶ Contrary to the Sexual Offences Act 2003, s1. We are assuming that V does not consent to sexual intercourse and that P does not have a valid defence.

⁹⁷ See, for example, Ashworth, *Principles of Criminal Law* (4th Ed, Oxford University Press, Oxford 2003) 425.

above are noted because they do not require the use of element analysis to function, either one could also be expressed using an element analysis structure. However, having rejected the two options above as either over or under-inclusive, it is the use of element analysis that provides the structure for further (mid-way) options. It is the normative appeal of these further options, only available through the use of element analysis, which has made element analysis so attractive.⁹⁸ Thus, when setting out the fault element of attempt, instead of mirroring the substantive offence or requiring a single level of fault for the whole offence, it becomes possible for different levels of fault to apply to different elements of the *actus reus*.

Element analysis has been used to structure the criminal attempts policy in this way for many years within the US MPC,⁹⁹ but has, for some time, only attracted limited support in England.¹⁰⁰ That is, until the case of *Pigg*.¹⁰¹ *Pigg* was heard after the enactment of the Criminal Attempts Act 1981 (which codified option two), but as the facts of the case preceded the Act,¹⁰² it was decided under the old common law. In *Pigg*, D attempted to have sexual intercourse with V who did not consent. D foresaw the possibility of V's non-consent but did not perceive the risk as a serious one. The Court of Appeal upheld D's conviction for attempted rape.

⁹⁸ Although certain options are *only* available through the use of element analysis, a number of new (mid-way) options have emerged that do not require the technique in order to function. These will be explored in Chapter 14.

⁹⁹ US MPC §5.01. See also, discussion in Chapter 1, pp3-4.

¹⁰⁰ Its main advocate was the Law Commission's Working Group. See, Law Commission, *Inchoate offences: Conspiracy, Attempt and Incitement* (Working Paper No 50, 1973). However, it also attracted some academic support. See, for example, Smith, 'Two problems in criminal attempts re-examined – I' (1962) *Criminal Law Review*, 135.

¹⁰¹ *Pigg* [1982] 1 W.L.R. 762.

¹⁰² The Criminal Attempts Act 1981 came into force on August 27, 1981.

The decision in *Pigg* was based upon option one rather than element analysis. However, being heard so soon after the enactment of the Criminal Attempts Act, *Pigg* demonstrated the inadequacy of the approach just codified: under option two, D in *Pigg* would not have been convicted of attempted rape because he did not intend or know that V was not consenting.¹⁰³ As a result, commentators began to look for ways to interpret the language of the Act¹⁰⁴ in order to allow for a conviction if a case like *Pigg* was to come before the courts again.

Chiefly, this search led to element analysis.¹⁰⁵ By employing element analysis to structure the law, it would become possible to require intention as to the act and result elements, but to allow the circumstance element to reflect the fault required by the principal offence (often to a minimum floor of recklessness).¹⁰⁶ In this way, element analysis facilitates the creation of an approach that plots a midway course between options one and two. It aims to avoid over-inclusiveness. It does so in cases like attempted murder, for example, by requiring that D intend to kill V (result) as a condition of liability. Further, in the attempted drink driving example, D will not be liable for attempting to drive in excess of the prescribed alcohol limit unless he is at least reckless as to the fact that he is over the prescribed limit (circumstance). The approach also aims to avoid being under-inclusive. In the attempted rape example, D will be liable for attempted rape because he was reckless as to the

¹⁰³ Smith, 'Rape – R v Pigg' (1982) *Criminal Law Review*, 446, 449.

¹⁰⁴ Although the Act required D to 'intend' to commit the principal offence, it did not state that this intention was required for every element of it.

¹⁰⁵ Alternative (mid-way) approaches that have been designed to avoid the use of element analysis will be discussed in Chapter 14.

¹⁰⁶ For early support of variations of this approach, see Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 372 and 373; Smith and Hogan, *Criminal law* (5th Ed, Butterworths, London 1983) 257.

circumstance of whether V was consenting, a level of fault that would be sufficient for the principal offence.

Convinced by their Scrutiny Group on preliminary offences that the law of attempts should allow for recklessness as to circumstance,¹⁰⁷ the Law Commission in 1989 also decided that reform should be based on element analysis (abandoning option 2).¹⁰⁸ However, despite the Law Commission's recognition of element analysis' potential benefits, following the failure of the Criminal Code Bill, the issue was again left to the courts. It was the case of *Khan*,¹⁰⁹ mirroring the facts of our attempted rape example above, which confirmed that the Criminal Attempts Act 1981 should be interpreted to require intention as to acts and results, but only recklessness as to the circumstance element. This approach can only function through the use of element analysis.

Post-*Khan*, this nuanced approach provided for and facilitated by element analysis, represents the current law of attempts.¹¹⁰ Beyond this, recognising the considerable overlap between the inchoate offences, the Law Commission are now perusing a similar approach within the codification of the inchoate offences of incitement, attempt and conspiracy, as well as the choate offence of complicity.¹¹¹ The old common law offence of incitement, for

¹⁰⁷ Unless a higher degree of fault was prescribed within the principal offence, in which case the fault required for the attempt will reflect that required for the circumstance element of the principal offence.

¹⁰⁸ The Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on the Draft Criminal Code Bill* (Law Com No 177, 1989) [13.44-13.45].

¹⁰⁹ *Khan* [1990] 1 W.L.R. 813.

¹¹⁰ However, with a definite tension between the wording of the Criminal Attempts Act 1981 (which was intended to codify option 2) and the interpretation given to it by the court in *Khan*, reform of the Act remains highly desirable. See, Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 383, where Ormerod states that the fault element of criminal attempts remains 'far from easy to specify'.

¹¹¹ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006); Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009); Law Commission, *Participating in Crime* (Law Com No 305, 2007).

example, has already been replaced with a new offence (assisting and encouraging crime) which is structured using element analysis.¹¹²

Conclusion

If element analysis is employed by Parliament to reform *general* offences like the inchoate offences and complicity, then, theoretically,¹¹³ the courts could be called upon to separate the elements of any offence within the English criminal law. In this manner, the bottom-up attraction of element analysis explored in this section has the potential to provide the *common* usage required to realise the top-down attractions explored in the previous section. Unlike the general case for codification, a common language of element analysis will be effectively forced upon the criminal law, making it much more likely that it will begin to shape both discussion and presentation in a more general way.

THE CRITICISMS OF ELEMENT ANALYSIS

In this section we explore the major criticisms of element analysis that have prevented (or at least substantially delayed) its adoption into the English criminal law.

¹¹² The Serious Crime Act 2007, Part 2 ss44-67. It is noted that section 47(5)(b)(i), departing from the Law Commission's recommendations, also allows for recklessness as to the result element of the principal offence assisted or encouraged. Although different from the approach discussed above, this policy also relies on element analysis and is further demonstration that element analysis provides a structure for law reform rather than the substance of it.

¹¹³ In reality, there is a core of substantive offences that are most commonly associated with these forms of liability, for example, rape and obtaining property by deception. See, The Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on Draft Criminal Code Bill* (Law Com No 177, 1989) [13.45].

1) The problem of objective separation of elements

The separation of offence elements might (at first glance) seem quite straightforward:

- **Act element:** The physical conduct (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

However, critics have pointed out that the process of separating elements inevitably requires subjective judgements to be made. This simple point is the single most damaging criticism of element analysis. Focused upon the use of element analysis as a structure for the reform of inchoate offences, which in turn must apply to offences across the criminal law, objectivity is essential. For example, the approach explored above in relation to criminal attempts is that D must intend the act and result elements of the principal offence, but may be reckless as to the circumstance element. The mens rea of attempts does not simply reflect the principal offence (option 1) and it is not based on a single level of fault (option 2). Rather, the fault required is directly related to the manner in which the principal offence's actus reus is separated into elements. Therefore, if the process of separation is subjective to each court, it will be impossible to predict the result of individual cases in advance and very difficult to ensure consistency.

An offence often used to illustrate this point is the 'abduction of an unmarried girl under the age sixteen from her parent or guardian'.¹¹⁴ Attempting to place this example within an element analysis structure, critics have claimed that the task of separating offence elements becomes 'virtually a matter of taste'¹¹⁵ in which different parts of the offence can be defensibly placed in almost any of the elements.¹¹⁶ For example, although one commentator might describe D's act element as 'taking' with all other aspects of the offence considered circumstances. Another might legitimately claim that D's act element is the 'taking of a girl' or even the 'taking of an unmarried girl under the age of sixteen from her parent or guardian'. Further, as one looks to isolate the result element, the same problems arise.

The issue of objectivity within the separation of elements is not aided by the language used within the criminal law. Without element analysis in mind, offences are discussed and codified using terms that combine elements and defy separation. For example, instead of stating that a particular act must be shown to have caused a particular result, the use of terms like 'kills',¹¹⁷ and 'wounding',¹¹⁸ combine both act and result elements. Other terms like 'abduction', discussed in the previous paragraph, could even be interpreted to include all

¹¹⁴ The Sexual Offences Act 1956, s20 (repealed by the Sexual Offences Act 2003, s42 sch7 para1). Although the offence was abolished in 2004, its provisions are mirrored to a large extent by sections 1-3 of the Child Abduction Act 1984.

¹¹⁵ Buxton, 'The Working Paper on inchoate offences: (1) Incitement and Attempt' (1973) *Criminal Law Review*, 656, 663.

¹¹⁶ For discussion and support of this argument, see Buxton, 'The Working Paper on inchoate offences: (1) Incitement and Attempt' (1973) *Criminal Law Review*, 656; Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25; Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120; Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 12-14; White, 'Three points on Pigg' (1989) *Criminal Law Review*, 539, 544-5.

¹¹⁷ Homicide Act 1957, s 1(1).

¹¹⁸ Offences Against the Person Act 1861, s20. The difficulty of distinguishing the elements within this term was specifically referred to by the Law Commission as an example justifying their rejection of element analysis. Law Commission, *Report on Conspiracy and Criminal Law Reform* (Law Com No 76, 1976) [1.42].

three elements: the act involved in taking, the result of being taken and the circumstance that it is done without legal authority.¹¹⁹

All of this leaves the court with a rather unenviable task. In order to apply a general offence that relies upon element analysis they must separate the elements of (potentially) any principal offence. However, without being provided with the means to do this objectively, and various options seeming to be equally compelling, subjective considerations about individual case fairness will be both inevitable and correct. However, to the extent that such value judgements may lead to inconsistencies between courts and the analysis of offences, they have the potential to undermine any policy based on element analysis that has claims of legal certainty. This is because, although a circumstance element may allow for recklessness for example, if the same term is also an act and/or a result element, then it would be equally possible for a court to require intention.

Element analysis as a structure for discussion and presentation

As previously mentioned, the criticism of element analysis' inability to separate the elements of individual offences objectively is usually aimed at its role in the reform of inchoate offences. However, it is important to note that the criticism applies with equal force to the use of element analysis as a structure for discussion and presentation. As element analysis does not provide answers to substantive policy questions, the only

¹¹⁹ See, Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 709; Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 25; Leader-Elliott, 'Benthamite reflections on codification of the general principles of criminal liability: Towards the panopticon' (2005) 9 *Buffalo Criminal Law Review*, 391, 422.

advantage it can offer in this area is the provision of a common structure to focus the debate of academics and the choices of law reformers. However, if this structure is not objectively discoverable, then it is unlikely to be common between all academics. Far from being useful as a framework, element analysis is therefore liable to provoke simply a further and unnecessary layer of complication.¹²⁰

2) The problem of complexity

Unlike the previous criticism, the criticism that element analysis and the processes of separating offence elements are overly complex does not seek to undermine element analysis' theoretical foundation. However, particularly in relation to the use of element analysis to reform inchoate offences, the criticism is potentially very damaging. It is usually presented in one of the two ways: as part of a general criticism or as a sole concern. Each will be discussed in turn.

Complexity as part of a general criticism

The first way in which the criticism is presented is part of a general critique of the use of element analysis to reform the inchoate offences. This form of the criticism is most closely associated with Richard Buxton.¹²¹ Despite the growing support for element analysis

¹²⁰ It would be undesirable if, for example, every academic continued to believe (as Cook did in 1917) that before employing element analysis within their discussion they must first publish a preliminary article to define the various terms. Cook, 'Act, Intention and motive in the criminal law' (1916) 26 *Yale Law Journal*, 645.

¹²¹ Now the Rt Hon Lord Justice Buxton.

following its rejection by the Law Commission in 1981,¹²² Buxton maintained that such an approach would have required too much of the court. Without the aid of clear definitions and a method of identifying the elements of an offence, he noted that ‘a formidable programme [of interpretation and analysis] would have awaited the judge, let alone the jury.’¹²³ Part of this criticism reflects the problem of objective separation of elements already discussed. However, beyond this, the policy achieved through element analysis is unquestionably more complicated than the *intention for all* approach first envisaged by the Criminal Attempts Act 1981. The judge not only has to separate the elements of the principal offence, he or she must also lead the jury through the process so that they can understand it sufficiently to decide whether D has the requisite fault for each element.

It is partly this added complexity that also led Professor Ormerod to label the new offence of assisting and encouraging crime (structured using element analysis) as ‘torturously complex.’¹²⁴

Complexity as a sole concern

The second group of critics agree (at least in general terms) that a policy structured on element analysis is desirable, but lament the complex product of its codification. Calling for simple and concise drafting is, of course, uncontroversial. The danger, however, is that the desire to create a simple statute may end up undermining the policy itself. For example, the

¹²² See Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12].

¹²³ Buxton, ‘Circumstances, consequences and attempted rape’ (1984) *Criminal Law Review*, 25, 27.

¹²⁴ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 447.

reform of complicity recommended by the Law Commission in their 2007 report *Participating in Crime* is structured using element analysis.¹²⁵ The crime of complicity and the reform of it recommended by the Law Commission are very complex. The choice for the Commission was between recommending a draft Bill that fully set out the detail of the offence, and one that was more simply worded (leaving the detail to be read in by the courts). Following a consultation exercise that revealed a clear preference for the simpler draft Bill, the Commission chose that course.¹²⁶

Where, as with the draft Complicity Bill, the details omitted from the legislation are essential to its operation,¹²⁷ it seems that the course chosen by the Commission may be regrettable. First, it is regrettable because if enacted, the legislation will not provide citizens with a clear and complete description of the law.¹²⁸

Secondly, there is the danger that open textured legislation will be interpreted in a way that is not intended by its authors. Indeed, we have already discussed above, in relation to the interpretation in *Khan* of the Criminal Attempts Act 1981, how a lack of element analysis within the presentation of the law can leave it particularly vulnerable in this way. Professor Sullivan for example, who fundamentally disagrees with the Law Commission about how complicity should be reformed, has already highlighted the open texture of the draft Bill as

¹²⁵ Law Commission, *Participating in Crime* (Law Com No 305, 2007).

¹²⁶ *Ibid*, [A.14-A.16].

¹²⁷ The Law Commission state the courts will have to be 'guided by [their] report feeding into Judicial Studies Board specimen directions to juries'. Law Commission, *Participating in Crime* (Law Com No 305, 2007) [A.15].

¹²⁸ It must be remembered, in this vein, that complicity applies across all criminal offences (including murder).

an opportunity for the courts to avoid the parts of the Law Commission's policy that he disagrees with.¹²⁹

Lastly, the Law Commission's response is regrettable because it does not remove the offence's complexity, it simply disguises it. Despite what appears in the draft Bill, the Commission does not concede the substance of the reforms that it is recommending: the underlying policy remains the same. Therefore, the complexity of the recommended policy will simply be left as a matter for the courts. The advantages of this, besides the stated desire to 'set out the law in a simple and intelligible manner',¹³⁰ are not discussed by the Commission. However, with the Commission repeatedly criticising the current law for the failure of the courts to adopt and maintain a consistent approach in this area,¹³¹ the potential dangers are relatively obvious.

In this manner, it is clear how even this second *milder* variation of the complexity criticism has the potential to do serious damage.

¹²⁹ Sullivan, 'Participating in crime: Law Com No. 305 – joint criminal ventures' (2008) *Criminal Law Review*, 19, 26-27.

¹³⁰ Law Commission, *Participating in Crime* (Law Com No 305, 2007) [3.126]. To what extent clause 2 in particular constitutes an 'intelligible' statement of the law (with no mention of mens rea, and only the barest hint as to actus reus) is highly debatable.

¹³¹ *Ibid*, Part 2 and Appendix B.

CONCLUSION

Element analysis has an 'intuitive attraction'¹³² both as a structure for discussion and presentation (top-down) and as a structure for the reform of inchoate offences (bottom-up). However, if they hold, it appears that the criticisms outlined above are sufficient to undermine its viability in both areas.¹³³ In order for the attractions of element analysis to be realised, it must be possible to separate the elements of every criminal offence objectively and it must be done in a manner that can be replicated in the courts. Indeed, it is this challenge that will define our search for a workable model of element analysis. However, as Thornton has rather wistfully stated, such an objective can begin to look like the struggle for a 'magic formula.'¹³⁴

¹³² Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 14.

¹³³ *Ibid*, 14.

¹³⁴ Thornton, 'Attempting the impossible (again)' (1982) 25 *Criminal Law Quarterly*, 294, 299.

CHAPTER 3

FINDING A RESPONSE TO THE CRITICISMS

In line with the conclusions from chapter 2, for element analysis to function in an acceptable manner, it is essential for the identified criticisms to be overcome. This will be the principal task of Parts II and III. However, the first of these criticisms requires some preliminary work. This is the potentially very serious criticism that element analysis does not provide a method for the *objective* separation of offence elements. In this chapter, we survey the efforts that have already been made by various academics and law reformers to answer this criticism.

The definition of element analysis identified within chapter 2, and set out below, will remain our point of reference:

- **Act element:** The physical conduct (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

The obvious solution

Arguably the most straight forward solution, at least on first reflection, would be to create a list of all criminal offences already divided into their various elements using element analysis. With this to hand, the complexity of the court's task would be much reduced and

the required standards of objectivity and consistency would be assured. Indeed, there is precedent for such an approach in international criminal law. Supplementing the Rome Statute,¹³⁵ for example, 'The Elements of Crimes'¹³⁶ provides a list of criminal offences and their separation into elements. Aiding the interpretation and use of Articles 6, 7 and 8 of the Rome Statute, 'The Elements of Crimes' have been generally welcomed as a useful addition.¹³⁷

Despite the undoubted merits of such an approach, however, it is very unlikely to be replicated within the English domestic criminal law. First, this is because of the sheer size of the project. It is one thing to trace the separation of the elements of the offences within Articles 6 to 8 of the Rome Statute, but quite another to do so with the many thousands of criminal offences within the English criminal law.¹³⁸ Secondly, even if reformers were to focus upon a core body of offences,¹³⁹ it is still unlikely that the project would be successful. With the 1989 Draft Criminal Code now almost forgotten as a going concern, and the Law Commission formally conceding its grand project of codification for the foreseeable future,¹⁴⁰ it is very unlikely that a similar codification project designed to aid element analysis would gain the necessary political support.

¹³⁵ The Rome Statute of the International Criminal Court 1998, Art 9 (implemented into English law through the International Criminal Court Act 2001).

¹³⁶ International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

¹³⁷ See Clark, 'Drafting the General Part to a Penal Code: Some thoughts inspired by the negotiations on the Rome Statute of the International Criminal Court and the court's first substantive law discussion in the *Lubanga Dyilo* confirmation proceedings' (2008) *Criminal Law Forum*, 519. For criticism of the system of element analysis adopted within the Rome Statute, see Elewa Badar, 'The mental element in the Rome Statute of the International Criminal Court: A commentary from a comparative criminal law perspective' (2008) *Criminal Law Forum*, 474. It is contended that the problems identified in this article, relating to 'quasi-elements', are a product of the statute's requirement of intention or knowledge for every element. As a result, they have little bearing on our current discussion.

¹³⁸ Estimated at over 8000 offences in total (not including by-laws): Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 9.

¹³⁹ For example, those most commonly at issue in relation to the inchoate offences.

¹⁴⁰ Law Commission, *Tenth Program of Law Reform* (Law Com No 311, 2008) [1.2-1.6].

However, this approach should not be abandoned entirely. Just as the Law Commission have revised their codification project to focus on specific areas of the criminal law rather than a full criminal code,¹⁴¹ we can revise our ambitions here in a similar way. *If we are able to identify an objective method of element separation to be employed by the courts*, then over time, although the courts will have no direct equivalent to ‘The Elements of Crimes’, they will have the precedents of previous decisions to aid them. Further, if element analysis is accepted, then the drafting of new or reformed offences are likely to reflect that acceptance: clearly separating elements or at least avoiding the terms that combine them.¹⁴²

The discussion leaves us with some hope that the use of element analysis and the process of element separation will become easier over time. However, the search for a *magic formula* that is able to separate the elements of offences objectively remains a necessary one.

England and Wales

The subject of element analysis has provoked a ‘spirited debate’¹⁴³ in England and Wales ever since it was adopted into the US MPC. It has also proven to be a rather curious debate. With many commentators clearly torn between the attractions of element analysis on one

¹⁴¹ Law Commission, *Tenth Program of Law Reform* (Law Com No 311, 2008) [1.2-1.6].

¹⁴² See, Robinson and Grall, ‘Element analysis in defining liability: The Model Penal Code and beyond’ (1983) 35 *Stanford Law Review*, 681, 691-4. The definition of fault terms employing element analysis is also likely to improve this process.

¹⁴³ Ashworth, ‘Criminal attempts and the role of resulting harm under the code, and in the common law’ (1987) 19 *Rutgers Law Journal*, 725, 755.

hand, and the criticisms that threaten to undermine them on the other, we have seen some of the most notable writers on the criminal law switching from one side to another. In the case of the Law Commission, a periodic change of personnel is probably a sufficient explanation. But the phenomenon is also true of individuals. For example, both Glanville Williams¹⁴⁴ and J C Smith¹⁴⁵ have been considered as central proponents of element analysis and its use for the reform of inchoate offences. However, at different times, both concluded that objective separation of elements (and element analysis as a result) is unworkable.¹⁴⁶ Williams outlines the dilemma in these terms:

The conclusion [of a policy structured using element analysis] is wholly satisfactory, which tends to cloud the critical faculty. I confess to having changed my mind on the subject twice, but my present opinion is that the reasoning behind the argument (though not the conclusion) is very shaky indeed.¹⁴⁷

It is notable too, that Richard Buxton, probably the leading critic of element analysis,¹⁴⁸ was the Criminal Law Commissioner in 1989 when element analysis was employed as a structure

¹⁴⁴ See, Williams, *Criminal Law: The General Part* (2nd Ed, Stevens and Sons, London 1961) 199; Williams, 'The Government's proposals on criminal attempts – III' (1981) *New Law Journal*, 128; Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365.

¹⁴⁵ See, Smith, 'Two problems in criminal attempts' (1956) 70 *Harvard Law Review*, 422; Smith and Hogan, *Criminal law* (5th Ed, Butterworths, London 1983) and (6th Ed, Butterworths, London 1988). See also Smith's paper 'Draft Criminal Code Bill, Clauses 51-55' submitted to the Law Commission's Preparatory Offences Group in the run up to the 1989 draft Criminal Code.

¹⁴⁶ See, Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120; Smith, 'Intention in criminal law' (1974) *Current Legal Problems*, 93; Smith, 'Rape – R v Pigg' (1982) *Criminal Law Review*, 446. See also, The Law Commission, *Codification of the Criminal Law: A Report to the Law Commission* (Law Com No 143, 1985) where J C Smith chaired a panel of expert academics in their production of a draft Criminal Code. The Code rejected the use of element analysis, referencing Smith's 1974 article as it did so ([8.8] of the Report).

¹⁴⁷ Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120, 120.

¹⁴⁸ See, Buxton, 'The Working Paper on inchoate offences: (1) Incitement and Attempt' (1973) *Criminal Law Review*, 656; Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25.

for the Law Commission's draft Criminal Code.¹⁴⁹ As we move on to trace how the element analysis debate has progressed, we can see a similar struggle in the writings of many of those involved.

The origins of the debate

Following the adoption of element analysis within the US MPC in 1962, it is clear from the early Law Commission (Working Party) material that it believed that England would soon adopt a similar model.¹⁵⁰ Still fostering this belief as late as 1973, the Working Party's Consultation Paper on the reform of inchoate offences expressly employed a form of element analysis to structure their proposals: the fault of each offence relying on the separation of elements.¹⁵¹ There is no indication in the paper that the Working Party recognised a problem with the objectivity of that separation. Interestingly, there is also no indication in the introduction to the paper, written by the Law Commission, that it recognised any problems in this area either.¹⁵²

¹⁴⁹ The Law Commission, *A Criminal Code for England and Wales: Volume 1 Report and Draft Criminal Code Bill* (Law Com No 177, 1989); *A Criminal Code for England and Wales: Volume 2 Commentary on Draft Criminal Code Bill* (Law Com No 177, 1989).

¹⁵⁰ See, Law Commission, *Codification of the Criminal Law General Principles – Working Party's preliminary Working Paper – The field of inquiry* (Consultation No 17, 1968) 11, discussing the general part of a future criminal code; Law Commission, *Codification of the Criminal Law – General Principles – The Mental Element in Crime* (Consultation No 31, 1970) discussing the definition of fault terms using element analysis; Law Commission, *Codification of the Criminal Law – General Principles – Parties Complicity and Liability for Acts of Another* (Consultation No 43, 1972) 11, using the language of element analysis within its discussion of complicity.

¹⁵¹ Law Commission, *Codification of the Criminal Law – General Principles – Inchoate Offences: Conspiracy, Attempt and Incitement* (Consultation No 50, 1973).

¹⁵² Williams claims that the Law Commission had been in agreement at this stage. See, Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 367.

However, by the time its report was published in 1980, the Law Commission had fully rejected the use of element analysis.¹⁵³ Part of the reason for this rejection, that should not be neglected, was policy based. The Law Commission were recommending that the defence of impossibility should be removed and were concerned about the breadth of the criminal law if it were to convict those that recklessly attempt, incite or conspire to commit an impossible offence.¹⁵⁴

The other reason was that the Law Commission, convinced by Richard Buxton, now believed that element analysis could not provide for the objective separation of offence elements and was overly complex. Referring to the work of Buxton,¹⁵⁵ the Commission stated that:

We agree with this criticism. The separation of elements of an offence into circumstances and [results] may in some instances be a useful means of analysing them. But to ask in the case of every offence what is a circumstance and what is a [result] is in our view a difficult and artificial process which may sometimes lead to confusion. Since a new statutory offence of attempt in place of the common law will (subject to express exceptions) apply to all existing offences, it seems to us that the terminology of 'circumstances' and ['results'] will not be appropriate.¹⁵⁶

¹⁵³ Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.11-2.13], reiterating their position from the two previous reports. See, *Law Commission, Criminal Law – Report on Conspiracy and Criminal Law Reform* (Law Com No 76, 1976) [1.41-1.42]; *Criminal Law – Report on the Mental Element of Crime* (Law Com No 89, 1978) 61.

¹⁵⁴ For example, the policy proposed by the Working Party would convict D of attempting to obtain property by deception even if he or she did not intend to make a false statement (though was reckless) and the statement turned out to be true. See, Williams, 'The Government's proposals on criminal attempts – III' (1981) *New Law Journal*, 128, 129. See also, Enker, 'Mens Rea and Criminal Attempt' (1977) *American Bar Foundation Research Journal*, 845, 866-871.

¹⁵⁵ Buxton, 'The Working Paper on inchoate offences: (1) Incitement and Attempt' (1973) *Criminal Law Review*, 656.

¹⁵⁶ Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12]. The term 'results' has been substituted for the Commission's (at this time) preferred term 'consequences'.

Following the recommendations in the Law Commission's report, Parliament enacted the Criminal Attempts Act 1981. Employing offence analysis, the mens rea requirement set out in the Act simply states that D must intend to 'commit an offence' (option 2).¹⁵⁷

The first defence: Denial

Reacting with surprise, the first line of defence offered by advocates of element analysis was to deny the criticism. For Williams, the Law Commission's rejection of element analysis was 'demonstrably a mistake.'¹⁵⁸ Analysing the offence of 'abduction of an unmarried girl under the age sixteen from her parent or guardian', Williams claimed that Buxton and the Commission had been misled by Smith and Hogan.¹⁵⁹ Although Smith and Hogan had separated the elements of the offence to include a result element (leading to the confusion between circumstances and results), Williams believed that it was a conduct crime and thus had no result element. Therefore, with the mistake put right, the 'alleged difficulty' is 'not proved by the example.'¹⁶⁰

However, the defence offered by Williams can be exposed as inadequate for two reasons. The first reason relates to the method of element separation set out by Williams in his article. With his sole concern being to distinguish between circumstances and results,

¹⁵⁷ Criminal Attempts Act, s 1(1).

¹⁵⁸ Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 367.

¹⁵⁹ *Ibid*, 368, referring to Smith and Hogan, *Criminal Law* (4th Ed, Butterworths, London 1978).

¹⁶⁰ Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 368.

Williams concedes a ‘haziness’¹⁶¹ in relation to the definition of the act element and uses it interchangeably with the circumstance element.¹⁶² This may have been adequate in order to implement the 1973 Working Party’s proposals on Attempt (which did not discuss fault in relation to the act element),¹⁶³ but it would not be adequate to implement modern proposals that require a different level of fault to apply to acts and circumstances.

When discussing the offence of ‘assaulting a constable in the execution of his duty’, Williams’ method of element separation ran into further problems.¹⁶⁴ He noted that a rioter attacking a policeman could be described as:

wounding a policeman (in which case the fact that the victim is a policeman is part of the act, or a circumstance of the act), or we may say that his act is throwing a stone, and the [result] of the act is the wounding of the policeman (in which case the fact that the victim is a policeman is part of the [result]).¹⁶⁵

In order to resolve this problem, Williams introduced a ‘subsidiary rule’ stating that:

... when a particular consequence of a bodily movement is *customarily* regarded as part of the act, it is nevertheless to be regarded as a [result] (and not a circumstance) of the act for the purpose of the distinction.¹⁶⁶ (emphasis added)

¹⁶¹ Williams, ‘The Problem of Reckless Attempts’ (1983) *Criminal Law Review* 365, 369.

¹⁶² See, *Ibid*, 368, where Williams talks of the girl’s possessory status as being a ‘circumstance of the act (or, if you will, part of the act).’

¹⁶³ Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [88-91].

¹⁶⁴ Williams, ‘The Problem of Reckless Attempts’ (1983) *Criminal Law Review* 365, 369.

¹⁶⁵ *Ibid*, 369. The term ‘result’ is substituting the author’s use of ‘consequence’.

¹⁶⁶ *Ibid*, 369. The term ‘result’ is substituting the author’s use of ‘consequence’.

On this basis, Williams concluded that he 'could not see any possibility' of the distinction between circumstances and results 'involving difficulty in its application.'¹⁶⁷ We may respectfully disagree. In the search for an objective method of separating the elements of offences, it is not sufficient to rely on there being a common 'customary use' of action descriptions. For example, Williams talks of 'wounding a policeman' being a customary description of an act, but why not 'wounding an on-duty policeman'? If the latter was accepted as being customary, presumably the policeman's on-duty status would also become part of the result element (and therefore have to be intended).¹⁶⁸

The second way in which Williams' defence is exposed as inadequate relates to the reply given to it by Smith and Hogan. Although they recognised Williams' criticism of their separation of offence elements, they did not accept that they had made a mistake. Rather, they continued to believe that the example (abduction offence) includes a result element.¹⁶⁹ A very real inconsistency is therefore exposed between the leading advocates of element analysis; an inconsistency that not only makes it very easy to label the process of element separation as subjective,¹⁷⁰ but also one that makes the *denial* defence untenable.

¹⁶⁷ Williams, 'The Problem of Reckless Attempts' (1983) *Criminal Law Review* 365, 369.

¹⁶⁸ See, Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25, 31-32.

¹⁶⁹ Smith and Hogan, *Criminal law* (5th Ed, Butterworths, London 1983) 35, fn 15.

¹⁷⁰ See, Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25.

The second defence: Concede and tolerate the problem

Despite the failure of the proponents of element analysis to construct an objective method to separate the elements of offences, following the case of *Pigg*,¹⁷¹ there was a second wave of support for the technique. For example, in the run up to the Law Commission's 1989 draft Criminal Code, the Commission's Preparatory Offences Group¹⁷² recommended to them that the new code should again adopt element analysis. A paper by J C Smith that forms part of the group's recommendations¹⁷³ clearly sets out the injustice done by a policy in attempts that requires D to intend every element, and the benefit of one (structured on element analysis) that allows for recklessness as to circumstances.¹⁷⁴ Recognising the criticism concerning objective separation of elements, the paper simply states that:

I suspect that the difficulties are more theoretical than practical. The test seems easy enough to apply in relation to offences like rape and obtaining by deception which specify recklessness as a sufficient mens rea for circumstance.¹⁷⁵

Expressly referring to both *Pigg* and the scrutiny group's recommendations, the Law Commission accepted that its previous position (option 2)¹⁷⁶ had to be changed. The Commission agreed that the reform of attempts should allow for recklessness as to circumstance and that this should be achieved by structuring the inchoate offences using

¹⁷¹ *Pigg* [1982] 1 W.L.R. 762. See discussion in Chapter 2, pp38-41.

¹⁷² Chaired by His Honour Judge Rolf Hammerton, this group were charged by the Commission with investigating clauses 51-55 of the 1985 draft Criminal Code.

¹⁷³ Smith, 'Draft Criminal Code Bill, clauses 51-55'. Preparatory Offences Scrutiny Group material (Pre-1989 Draft Code).

¹⁷⁴ See discussion in Chapter 2, pp32-41.

¹⁷⁵ Smith, 'Draft Criminal Code Bill, clauses 51-55'. Preparatory Offences Scrutiny Group material (Pre-1989 Draft Code).

¹⁷⁶ Codified in the Criminal Attempts Act 1981.

element analysis.¹⁷⁷ The perceived inability of element analysis to distinguish the elements of an offence objectively, the criticism that had led the Law Commission to reject element analysis nine years earlier, was referred to as merely a 'minor complication'.¹⁷⁸ The Commission's response, mirroring that of Smith, was:

We are prepared to tolerate the difficulty because in the mainstream cases where the rule is likely to operate, namely, rape and obtaining property by deception, the rule appears to work well. The distinction between act (sexual intercourse) and circumstance (non-consent) or between result (obtaining) and circumstance (the falsity of the representation) is plain on the face of the definitions of the offences.¹⁷⁹

In this manner, the Law Commission were clearly convinced by the attractions of element analysis (especially the ability to deal with cases like *Pigg*). However, it may well be that the Commission had not taken the objectivity criticism sufficiently seriously.

First, the Law Commission's approach can be criticised on the same terms that it used to reject element analysis in 1980. Although the Commission claim that the separation of elements of a few specific offences is a straightforward process, the inchoate offences that are being reformed will have to 'apply to all existing offences'.¹⁸⁰ Therefore, the Commission are conceding that in many cases the use of element analysis will *not work well*: leading to

¹⁷⁷ The Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on Draft Criminal Code Bill* (Law Com No 177, 1989) [13.44]-[13.45]. The Commission also accepted a similar policy in relation to conspiracy [13.26] and incitement [13.9], although the relevant fault in relation to incitement was 'belief' as opposed to 'recklessness'.

¹⁷⁸ *Ibid*, [13.45].

¹⁷⁹ *Ibid*, [13.45].

¹⁸⁰ See, Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12]; Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [A.12].

unpredictability, inconsistency and complexity.¹⁸¹ For the courts and the parties involved in these cases, the fact that element analysis works well in other areas will be of scant comfort.

Secondly, one may even question the claim that element analysis works well in relation to its paradigm examples like rape. According to the Law Commission,¹⁸² the actus reus of the offence of rape should have its elements separated in the following manner:

- **Act element:** Penal penetration of the vagina, anus or mouth (sexual intercourse);
- **Circumstance element:** Lack of consent; and
- **Result element:** None.

Separating the elements of rape in this way is very useful for the Commission. When it comes to attempted rape for example, their policy (requiring intent as to the act and result elements and recklessness as to the circumstance element) would achieve a conviction in a case like *Pigg* without being over-inclusive.

However, critics claim that the conclusion of this separation of elements has not been reached as a result of an objective process, but rather it is the desired conclusion that has defined that process: the Commission want to allow recklessness for non-consent so it defines non-consent as a circumstance element.¹⁸³ If this is the case, even the offence of rape will remain open to re-interpretation by a body that disagrees with the Commission's

¹⁸¹ See the discussion on the criticisms of element analysis in Chapter 2, pp41-49.

¹⁸² The Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on Draft Criminal Code Bill* (Law Com No 177, 1989) [13.45].

¹⁸³ Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 108.

policy. For example, a court in Australia has recently separated the elements of the offence of rape to include non-consent within the act element (i.e. non-consensual sexual intercourse).¹⁸⁴ As a result, in this case, intention is also required in relation to the fact of V's non-consent. Beyond this, similar confusions surround whether the act element of rape includes the status of V as a woman or even as a person (i.e. intercourse with a female human) or whether such facts are circumstances.¹⁸⁵ It is the inability of the Law Commission's approach to element analysis to show that the Australian court was demonstrably incorrect, and the fact that other areas of uncertainty still persist, which clearly shows the inadequacy of their position.

The third defence: Re-defining the elements

Proponents of element analysis have at various points attempted to re-define the elements themselves in order to facilitate a greater level of objectivity and consistency. For example, several commentators (following the US MPC¹⁸⁶) have chosen to define the act element in terms of simple bodily movement.¹⁸⁷

- **Act element:** The bodily movement (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

¹⁸⁴ *DPP v WJI* (2004) 219 C.L.R. 43 (Aus).

¹⁸⁵ See, Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25, 30; White, 'Three points on Pigg' (1989) *Criminal Law Review*, 539, 545.

¹⁸⁶ See discussion below, pp79-82.

¹⁸⁷ See, for example, Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, Smith, 'Two problems in criminal attempts' (1956) 70 *Harvard Law Review*, 422, and Cook, 'Act, Intention and motive in the criminal law' (1916) 26 *Yale Law Journal*, 645.

By *stripping down* the act element in this way, the hope is that it will be much easier to distinguish it from the circumstance and result elements. For example, if the act element of an offence simply relates to body movement, then the fact of non-consent in rape is clearly not part of the act element.

Despite the attraction of this approach, it has been subjected to several criticisms and has remained on the fringes of the debate. Critics claim, for example, that to describe an offence like rape as the *moving of the pelvis* or abduction offences as the *moving of muscles* does not adequately reflect what the offences are about.¹⁸⁸ In support of this, they also demonstrate how the proponents of this method are often inconsistent with their examples and go beyond simple bodily movement. For example, Duff has pointed out that:

Enker ... describes the 'act' in possessing stolen goods as 'possession of stolen goods' and in smuggling as 'bringing goods into the country without paying a duty' ... [and] Dressler ... describes 'acts' such as 'positioning ... dynamite around V's house and ... activating ... the detonator.'¹⁸⁹

Examples like this make it very easy for critics of the approach to claim a consensus for their belief that the act element must contain certain circumstances to be understood. And thus, that element analysis does not achieve objectivity.

¹⁸⁸ See, for example, Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25, 30; Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 250-263; Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 105.

¹⁸⁹ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 250. Referring to Enker 'Impossibility in Criminal Attempts: Legality and the Legal Process' *Minnesota Law Review* (1969) 665, 665-666; Dressler, *Understanding Criminal Law* (New York, 1987) 65-66.

Duff, in his article 'The Circumstances of an Attempt',¹⁹⁰ has offered an alternative method for separating the elements of offences for the purposes of attempt (again assuming the Law Commission's policy). For him, the priority should not be the *stripping down* of the act element, it should be to reflect the intention required for the principal offence. Thus:

- **Act element:** Whatever part of the principal offence requires intention.
- **Circumstance element:** The facts at the time of the act that do not require intention.
- **Result element:** Those things caused by the act necessary for the offence (whatever fault is required).

Duff avoids having to reduce the act element to bodily movement, but his approach is still very problematic. First, the method is designed purely for the use of element analysis as a tool for the reform of inchoate offences and not as a structure for discussion and presentation. This is because the *process* of separating offence elements is heavily dependent on the offence being separated. Referring to, for example, the act element of the offence will not pinpoint a certain area of that offence, it will merely require the reader to investigate the offence to see where intent is required. It will also make the comparison of act elements of different offences (when discussing thought crime for example) irrelevant, because the act elements of different offences will bear little or no relation to one another.

¹⁹⁰ Duff, 'The Circumstances of an Attempt' (1991) 50(1) *Cambridge Law Journal*, 100.

Secondly, although Duff spends some time distinguishing between acts and circumstances, he spends relatively little time distinguishing between circumstances and results. If there is a blurring between the two, as Duff claims there is when criticising similar approaches by other academics,¹⁹¹ then there is still the potential that intention will be required in relation to a fact that Duff would rather class as a circumstance.¹⁹²

Finally, there is the problem of complexity: the method of element separation that Duff sets out is not straightforward and it will differ significantly for every offence.¹⁹³ In fact, it is the increased complexity of this approach that leads Duff to reject it himself before moving on to introduce his alternative to element analysis.¹⁹⁴

The current defence: Re-defining the problem

Over the last few years the Law Commission has again turned its attention to the reform of inchoate offences and has again opted to employ the structure of element analysis in order to do so.¹⁹⁵ Indeed, even beyond the general inchoate offences, the Commission has also relied upon element analysis to structure their recommendations in relation to the offence

¹⁹¹ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 57-60.

¹⁹² For example, if the result element of criminal damage is defined as 'damage to someone else's property', then the ownership of the property (usually thought of as a circumstance element) will become part of the result element.

¹⁹³ Often, for example, it will not be clear which parts of an offence require intention and therefore unclear if they are part of the act or circumstance elements.

¹⁹⁴ Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 111. For discussion of this (and other) alternatives to element analysis, see Chapter 14.

¹⁹⁵ For reform of incitement, see, Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006); for conspiracy see, Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) Parts 2-7; for attempts see, Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) Part 8.

of complicity and the rules regarding intoxication.¹⁹⁶ Notably, the recommendations of the Commission for the reform of incitement have already formed the basis of legislation that explicitly relies upon a form of element analysis.¹⁹⁷

However, despite the Commission's extended use of element analysis, they have not attempted to follow the third defence by seeking to objectify the process of separating offence elements. Rather, in a recent attempt to re-cast the debate, the Commission has contended that a certain degree of subjectivity within element analysis is actually an advantage of the technique rather than a problem.¹⁹⁸ Maintaining their line from the second defence, the Commission still believes that in the majority of core cases the process of separation will be simple and uncontroversial.¹⁹⁹ However, going beyond the previous defence, they have contended that certain offences require discretion on the part of those separating the elements. This is because, for these offences, the manner in which they are separated may change depending upon the factual background of the case before the court, and even the manner in which the prosecution presents that case. Therefore, if a rigid and objective system of element analysis were to be developed, it would actually hinder the operation of those offences.²⁰⁰

¹⁹⁶ See, Law Commission, *Participating in Crime* (Law Com No 305, 2007); Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009). For a discussion of the latter, see, Child, 'Drink, drugs and law reform: A review of Law Commission Report No.314' 7 (2009) *Criminal Law Review* 488.

¹⁹⁷ The Serious Crime Act 2007, Part 2.

¹⁹⁸ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.14-2.29].

¹⁹⁹ For incitement, see, Law Commission, 'Inchoate Liability for Assisting and Encouraging Crime' (Law Com No 300, 2006) [5.23] and fn 24; for conspiracy see, 'Conspiracy and Attempts' (Law Com Consultation No 183, 2008) [4.11]; for attempts see, 'Conspiracy and Attempts' (Law Com Consultation No 183, 2008) [16.81]-[16.82]; for complicity see, 'Participating in Crime' (Law Com No 305, 2007) [1.6] and fn 7.

²⁰⁰ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.28].

In order to demonstrate the benefits of this discretion, the Commission provide two examples. The first relates to the offence of sexual assault,²⁰¹ and the second, to the offence of dangerous driving.²⁰² In each case, they discuss the offences in the context of a conspiracy charge. We will explore each example in turn.

To be liable for the offence of sexual assault, D must intentionally touch V without consent in a manner that a reasonable person would perceive as sexual.²⁰³ Under the Act, the touching can either be judged as sexual ‘because of its nature’ or, if its sexual nature is uncertain, ‘because of its circumstances’ or because of D’s sexual ‘purpose’.²⁰⁴ In this manner, even if D’s actions were not obviously sexual to the reasonable person, he or she will not escape liability if those actions contained a sexual dimension.²⁰⁵ According to the Law Commission, the variety of ways in which D’s touching can be viewed as sexual represents a legislative requirement for movement between elements. This is because, if D assaults V by forcing her to strip naked against her will for example, D’s conduct is *by its nature sexual* and thus part of the *act element*, whereas, if D assaults V by robbing her in a female changing room, then the potential sexual dimension depends on the *circumstance* of whether V is naked or partially clad.²⁰⁶ Accordingly, if D is charged (under the Commission’s recommendations) with a conspiracy to commit sexual assault in the lead up to either of these assaults, it would have to be demonstrated that D intended the sexual dimension in

²⁰¹ Contrary to the Sexual Offences Act 2003, s3.

²⁰² Contrary to the Road Traffic Act 1988, s2.

²⁰³ Sexual Offences Act 2003, s3. Also, D must not reasonably believe that V consented to the touching.

²⁰⁴ Sexual Offences Act 2003, s78. It is interesting to note that, although the Commission discusses the first two ways in which D’s conduct can be viewed as sexual, they do not discuss the intention based route. See discussion in Chapter 9, pp218-220.

²⁰⁵ See, for example, the case of *Court* [1988] 3 ALL E.R. 221, in which D’s sexual motives in spanking a young child were sufficient to ground liability.

²⁰⁶ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.22-2.24].

the former (because it forms part of the act element), but only that D was reckless as to the sexual dimension in the latter (because it forms part of the circumstance element).

Although the Commission have employed this example in order to demonstrate the benefits of flexibility, it nevertheless gives rise to a number of difficulties. First, the distinction between what is sexual by its nature and sexual due to circumstances will not always be a clear one. For example, if D slaps a stranger (V) on the bottom in the middle of a busy street, we may conclude that this is sexual by its nature due to the intimate area being touched. However, because the slapping of a bottom will not always be sexual,²⁰⁷ it is possible to disagree with this categorisation, and claim that the assault is only sexual in this example because of the circumstances that V is a stranger and in a public street. It should be remembered that as nothing hangs on this distinction within the principal offence, D could be convicted of sexual assault without the requirement of categorising the sexual dimension beyond the conclusion that it fits within at least one of the areas. However, as the Commission's policy for conspiracy would make this distinction essential in order to ascertain D's required mens rea, a court would have to decide on the categorisation in every case. As the example demonstrates, this will not be straightforward.

Secondly, although the Commission attempt to explain the manner in which this example employs movement between elements, they do not tell us why.²⁰⁸ As we observed above,

²⁰⁷ See discussion in *Court* [1988] 3 ALL E.R. 221. There are also a number of examples where bottom slapping is accepted between adults, though not necessarily consented to, for example in sporting activities.

²⁰⁸ The Commission suggest that the movement between elements is mandated by the legislation. However, as the legislation pre-dates the use of element analysis within any of the inchoate offences, it does not explicitly employ the language of element analysis (in a manner that prevents a contrary interpretation), and it leads to serious problems in the operation of conspiracy, this explanation must be insufficient. Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.21].

for the principal offence of sexual assault, there is no distinction made between D1 who's assault is sexual by its nature and D2 who's assault is sexual due to the circumstances in which it is carried out. It is simply two ways of committing the same offence. Therefore, it is difficult to understand why a distinction should be brought in at the conspiracy stage. For example, if D1 conspires to assault V, reckless as to whether D2 will carry this out when V is changing, D1's recklessness will be sufficient for the charge of conspiracy to commit sexual assault (whether V is changing is part of the circumstance element). However, if D1 conspires to assault V, reckless as to whether D2 will carry this out by forcing V to strip, D1's recklessness is now insufficient (being forced to strip is part of the act element). The introduction of any distinction that is not recognised by the principal offence would appear to be contrary to principle.²⁰⁹ But one that makes it more difficult to convict D for conspiracy to commit sexual assault where the agreement relates to conduct that is by its nature sexual, and easier where it is sexual due to surrounding circumstances, certainly requires further justification than that provided by the Commission.

Finally, although this example is employed partly to demonstrate the problems with a rigid interpretation of element analysis (defining the act element narrowly as bodily movement²¹⁰), it is remarkable how much more effectively the rejected method of element analysis would cater for it. This is because, if the act element of sexual assault were to be isolated to the bodily movements of D, then the sexual dimension would never form part of that act element. Whether D's conduct is sexual due to its sexual nature, or whether it is sexual due to surrounding circumstances, the sexual dimension would form part of the

²⁰⁹ If there is a valid distinction, why is it not reflected in the mens rea of the principal offence?

²¹⁰ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.18-2.24].

circumstance element (social perception of D's actions in their full context).²¹¹ Therefore, just as no distinction is made between conduct that is sexual by its nature or sexual due to certain circumstances within the principal offence, so no distinction will be drawn between the two within the inchoate charge. For both, as circumstance elements, D must be at least reckless as to whether a reasonable person would perceive his or her conduct as sexual.

The second example offered by the Commission, focusing on the offence of dangerous driving,²¹² is equally problematic. The Commission present the example in the following terms:

In considering a conspiracy charge for dangerous driving the element of dangerousness may lie in the very nature of the driving [the act element] agreed on, as where D1 and D2 agree to race each other along a motorway. Alternatively, the danger may lie in an inherent risk, such as an agreement to drive even though D1 and D2 know that their car tires are bald. In such a case, we would expect a court to say that whether the element of dangerousness is an [act] element (as in the first example), or a circumstance element (as in the second example), depends on the factual foundation on which the prosecution seeks to rely.²¹³

The first problem, again, is that we have very few indications about how to differentiate the act and circumstance elements, essential in order to ascertain D's mens rea. For example, although the Commission classify an agreement to race as dangerous by its very nature, if that agreement also involved an established racetrack and speeds not exceeding 20mph,

²¹¹ For a discussion in relation to the preferred method of element analysis, see Chapter 9, pp214-216.

²¹² Contrary to the Road Traffic Act 1988, s2.

²¹³ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.25].

then it is very unlikely to be dangerous. Rather, one might legitimately claim, it is not the act of racing that is dangerous, but rather the circumstances that it is taking place on a public motorway and at high speeds. Equally, although the Commission classify an agreement to drive a car with bald tyres as dangerous due to circumstances, others might claim that 'driving a car with bald tyres' should be taken as a full expression of D's action, and thus the dangerous dimension would come within that act element. To imply, as the Commission does,²¹⁴ that prosecutors and defence lawyers will find an easy common ground to the classification of offence elements, despite the mens rea requirements of D relying on them, and despite the subjectivity of the judgements involved, seems highly optimistic. Rather, it seems considerably more likely that the 'common sense analysis'²¹⁵ anticipated by the Commission will be a common sense that reflects the conflicting interests of the two sides, leading to dispute and inconsistency.

Beyond this, the central problem is the lack of reasons given by the Commission as to why this approach is preferable to the rigid application of an objective method of element analysis. Again, there is no distinction made between dangerous acts and dangerous circumstances within the principal offence, and therefore no need for such a distinction within the inchoate charges. Rather, there is every reason to define the act element narrowly to include only bodily movements, allowing the entire issue of dangerousness to be consistently analysed as part of the circumstance element.²¹⁶

²¹⁴ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.29].

²¹⁵ *Ibid*, [2.28].

²¹⁶ For a discussion of the similarly constructed offence of 'causing death by dangerous driving' and the preferred method of element analysis, see Chapter 8, pp208-210.

In this manner, although the Commission's approach represents an interesting and ingenious attempt to turn the objectivity debate on its head, it is not a successful one. The examples that they provide to show the benefits of subjectivity do not demand a subjective approach and are better analysed using the objective method of element analysis explicitly rejected by the Commission.²¹⁷ With no obvious advantages forthcoming, the Commission is therefore left with the same problems with subjectivity analysed above in relation to the second defence. And again, as with the second defence, we are forced to conclude that unless an objective method can be discovered, the advantages of element analysis cannot be realised.

Other Common Law jurisdictions (not including the US)

The experience of other common law jurisdictions is generally very similar to that of England and Wales. With several of them considering the reform of inchoate offences, the attractions of element analysis certainly warrant consideration. The question is whether they are also willing to tackle its critics.

No mention of criticism

The jurisdictions that fall within this category include Hong Kong and Canada. Although these jurisdictions do not advance our search for the *magic formula* enabling objective separation of offence elements, they do demonstrate the wide appeal of element analysis.

²¹⁷ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.19].

The work of the Law Reform Commission of Hong Kong is particularly interesting because its review of the inchoate offences took place in 1994.²¹⁸ Therefore, as much of the report is spent canvassing the English law, one would imagine that the Hong Kong Commission gained a clear understanding of both the attractions *and the criticisms* of element analysis. However, in their report, only the positive aspects of element analysis are discussed: notably its ability to facilitate the policy of recklessness as to circumstance.²¹⁹ Although this omission could be interpreted as the Hong Kong Commission's rejection of the critics, it is noted that despite their recommendations, the legislation that followed their report is not structured using element analysis.²²⁰ Rather, it is based upon the current English legislation²²¹ (originally intended to codify the rejection of the technique).²²²

A similar review of inchoate offences (and complicity) was undertaken by the Law Reform Commission of Canada in the late 1980's.²²³ Here, too, element analysis was employed and recommended.²²⁴ However, the layers of complexity that disguise its use are, arguably, a sign that the Canadian Commission were not whole hearted in their endorsement. For example, the recommended clauses dealing with attempt²²⁵ and conspiracy²²⁶ do not

²¹⁸ The Law Reform Commission of Hong Kong, *Report on Codification: The preliminary offences of Incitement, Conspiracy and Attempt* (Topic 26 of 1994).

²¹⁹ *Ibid*, [4.56], which recommends the policy of recklessness as to circumstance for both attempts and conspiracy (structured using element analysis).

²²⁰ Crimes (Amendment) Ordinance (No 49 of 1996).

²²¹ The Criminal Attempts Act 1981 (for attempts); The Criminal Law Act 1977 (for conspiracy).

²²² However, as with the current English law, there is still the potential that the courts in Hong Kong could interpret the law in line with *Khan*: allowing for recklessness as to circumstance for attempts. See, Jackson, *Criminal Law in Hong Kong* (Hong Kong University Press, 2002) 470-479.

²²³ See, Law Reform Commission of Canada, *Secondary Liability: Participating in Crime and Inchoate Offences* (Working Paper 45, 1985); Law Reform Commission of Canada, *Re-Codifying Criminal Law* (Report 30, 1987).

²²⁴ See, Law Reform Commission of Canada, *Re-Codifying Criminal Law* (Report 30, 1987) cl 4(3) and 4(5) in conjunction with cl 2(4).

²²⁵ *Ibid*, cl 4(3).

²²⁶ *Ibid*, cl 4(5).

mention mens rea, and so we must rely on a residual rule that tells us to assume a requirement of *purpose*.²²⁷ It is within the definition of purpose that element analysis is employed.²²⁸ The clause distinguishes three scenarios:

1. Where the offence requires purpose: purpose will be required for the act and result elements, but recklessness will suffice for circumstances.²²⁹
2. Where essential circumstances are not mentioned in the definition of the offence (for example, that the gun is loaded): these circumstances will require knowledge.²³⁰
3. Where the offence requires only recklessness: purpose will be required for the act element, but recklessness will suffice for circumstances and results.²³¹

It is perhaps unsurprising that the complicated policy recommended by the Canadian Commission, contained within the definition of purpose, has not yet been taken forward into legislation.²³²

²²⁷ Law Reform Commission of Canada, *Re-Codifying Criminal Law* (Report 30, 1987) cl 2(4)(d).

²²⁸ *Ibid.* cl 2(4)(a).

²²⁹ *Ibid.* cl 2(4)(a)(i).

²³⁰ *Ibid.* cl 2(4)(a)(i).

²³¹ *Ibid.* cl 2(4)(a)(ii).

²³² The current law of Canada appears to require D to intend every element of an offence attempted or conspired. See, The Canadian Criminal Code 1980, s24; *Williams* (2003) S.C.C. 41 where the Canadian Supreme Court assumes the requirement of intent for attempts. However, again, there is some academic doubt. For example, Roach states that 'the intent required for attempts ... is not clear'. Roach, *Criminal Law* (3rd Ed, 2004) 115.

Recognising the criticisms

The jurisdictions that fall within this category include Australia, New Zealand and the Republic of Ireland. However, although each has confronted the criticisms of element analysis, their solutions have proved to be largely inadequate.

In Australia, the debate about element analysis is relevant to both the Model Criminal Code (MCC) and the common law. The MCC²³³ does not rely upon element analysis to structure the inchoate offences.²³⁴ However, it is used to define the fault terms²³⁵ and it is also relied upon for the presumption of fault set out in Division 5.6 of the Code:

(1) If the law creating the offence does not specify a fault element for a ... element of an offence that consists only of [an act], intention is the fault element for that ... element.

(2) If the law creating the offence does not specify a fault element for a ... element of an offence that consists of a circumstance or a result, recklessness is the fault element for that ... element.

In order to apply Division 5.6 it is therefore essential to be able to distinguish acts (which must be intended) from circumstances and results (which require recklessness).

²³³ Australian Model Criminal Code 1992. The Code has been adopted (to some extent) with four Australian territories: The Northern Territory, Queensland, Western Australia and Tasmania.

²³⁴ For each of the inchoate offences, D is required to have intention or knowledge in relation to the principal offence (See, Div 11). It is notable that Division 11.1 explicitly states that attempts require intention or knowledge for 'each ... element of the offence attempted'.

²³⁵ Australian Model Criminal Code, Div 5.

As a result of Division 5.6, the definition of the act element becomes very important. However, due to a strange trail of logic, the authors of the MCC chose that it should remain undefined (beyond the clarification that it includes omissions and a state of affairs).²³⁶ The authors of the Code recognised that if the act element were defined to include anything more than simple body movements then ‘the distinction between ‘act’ and ‘circumstance’ [essential for Division 5.6] seems to collapse.’²³⁷ However, they also believed that such a description would be too narrow,²³⁸ and they go on to cite with approval a line of case law that defines acts to include *where necessary* certain circumstances and results.²³⁹ The conclusion of the Code’s authors, to leave the definition of the act element to the courts,²⁴⁰ is therefore (covertly) to concede the objectivity of element analysis and of Division 5.6.

Within Australia’s common law jurisdictions,²⁴¹ element analysis has been employed by the courts as a structure for the law of attempts. In the case of *Evans*,²⁴² for example, element analysis was employed in order to convict D of attempted rape (requiring intent for the act element, but allowing for recklessness as to the circumstance of non-consent). A unanimous decision from the Supreme Court of South Australia, the judges appear to see the separation of the elements of rape as uncontroversial.²⁴³

²³⁶ The act element is referred to in the Australian Model Criminal Code as ‘conduct’. See, Australian Model Criminal Code, s 202.

²³⁷ Australian Model Penal Code (commentary) s 202.

²³⁸ See discussion above, p59.

²³⁹ The leading case cited is *Falconer* (1990) 171 C.L.R. 30.

²⁴⁰ Australian Model Criminal Code (commentary) s 202.

²⁴¹ New South Wales, South Australia and Victoria.

²⁴² *Evans* [1987] 48 SASR 35: interpreting the South Australian Criminal Law Consolidation Act 1935, s270A (silent in relation to mens rea). For a similar judgement in the Tasmanian courts, see *Bell* [1972] Tas. S.R. 127.

²⁴³ See, *Evans* [1987] 48 S.A.S.R. 35, 41, and the judgement of King CJ.

Despite academic support for *Evans*,²⁴⁴ however, the precedent only lasted five years. In the case of *Knight*,²⁴⁵ it was held by the High Court of Australia that attempts liability requires D to intend every element of the principal offence. As *Evans* is not explicitly referred to in *Knight*, it may be debated whether *Knight* stands for a rejection of element analysis and the difficulty of distinguishing elements.²⁴⁶ However, at a minimum (for those that agree with the policy achieved through element analysis), *Knight* exposes the frailty of a policy maintained within the common law.

In New Zealand, it is possible to trace a similar course of indecision in relation to the reform of attempts. The current law, set out in section 72 of the Crimes Act 1961, requires D to act with the 'intent to commit an offence'. However, in the 1989 Crimes Bill, it was proposed that the law of attempts should be remodelled using element analysis: allowing for a conviction where D is reckless as to a circumstance element.²⁴⁷

The New Zealand Crimes Consultative Committee, reviewing the Bill in 1991, was split over whether this clause should be retained.²⁴⁸ They recognised the attractions of the policy (allowing recklessness as to circumstance) in relation to crimes like attempted rape, with one member making explicit her belief that it was 'right in principle'.²⁴⁹ However, the majority of the Committee felt bound to reject the use of element analysis, not for reasons

²⁴⁴ For example, Mc Sherry and Naylor have described the old position of requiring intention for every element as an 'absurdity'. Mc Sherry and Naylor, *Australian Criminal laws – Critical Perspectives* (Oxford University Press, Oxford 2004) 388.

²⁴⁵ *Knight* (1992) 175 C.L.R. 495 (Aus).

²⁴⁶ For discussion, see Arenson, 'The pitfalls in the law of attempt: A new perspective' (2005) 69 *Journal of Criminal Law*, 146, 148-149.

²⁴⁷ Crimes Bill 1989, cl 65(5).

²⁴⁸ Crimes Consultative Committee, *Crimes Bill: Report of the Crimes Consultative Committee* (New Zealand, 1991) 35.

²⁴⁹ For example, the Committee makes specific reference to the case of *Pigg*. *Ibid*, 35.

of principle (in the sense of convicting those reckless as to circumstance), but because of the difficulty of distinguishing elements and of explaining the law to a jury. Their solution was therefore to opt for a policy that did not require element analysis: requiring D to intend the full offence.²⁵⁰ If one agrees that the policy structured on element analysis is ‘right in principle’, this is clearly not a satisfactory conclusion.

With the Crimes Bill failing to incorporate element analysis into the law of attempts, it is again the courts that have taken the lead. In 2006, in a unanimous judgement of the New Zealand Supreme Court, it was held that ‘intent to commit an offence’ in section 72 of the Crimes Act 1961 does not rule out liability where D is reckless as to a circumstance element.²⁵¹ Overruling an earlier decision in the High Court that had interpreted the law of attempts to require intention for each element,²⁵² and without reference to the debate surrounding the 1989 Crimes Bill, the Supreme Court instead followed the English case of *Khan*.²⁵³ However, although the case is clearly a positive step for those that support an attempts policy structured on element analysis, it remains problematic in two respects. First, none of the judges addressed the issue of objective element separation and so criticisms in this area remain undefeated.²⁵⁴ Secondly, as the Australian experience demonstrates, the policy also remains vulnerable as long as it remains uncoded.

²⁵⁰ Crimes Consultative Committee, *Crimes Bill: Report of the Crimes Consultative Committee* (New Zealand, 1991) 101.

²⁵¹ *L* [2006] 3 NZLR 291.

²⁵² *Shepherd v R* (High Court, Auckland, T 192/91, 20 Feb 1992) Anderson J.

²⁵³ *L* [2006] 3 NZLR 291, Chisholm J [19] and Tipping J [17].

²⁵⁴ The reason this topic was not addressed is probably due to the fact that the principal offence was that of rape. As a result, the court simply followed the case of *Khan*.

The most recent review of inchoate liability, outside of England, has taken place in the Republic of Ireland. However, again, we see the same pattern emerging. The Irish Law Reform Commission accept that ‘there is no objective method or criteria for distinguishing [results] from circumstances,’²⁵⁵ and yet it’s proposed policy (to allow recklessness as to circumstance for attempts)²⁵⁶ directly relies upon that distinction. Without any word as to how this problem might be solved, the Commission simply asks consultees whether the use of element analysis should be explicit in the statute, or, like England, be left for the courts.

America

The evolution of element analysis within America contrasts dramatically with the other common law jurisdictions already discussed. Chiefly, this is the result of the US MPC which explicitly uses element analysis both to define the fault terms²⁵⁷ and to structure the offence of attempt.²⁵⁸ Through the US MPC, element analysis has had a ‘major influence on all but two of the thirty-eight [US] jurisdictions where reform has occurred,’²⁵⁹ and has been characterised by certain academics as ‘the most significant and enduring achievement of the Code’s authors’.²⁶⁰

Another distinguishing factor is that the US MPC provides a definition of the act element:

²⁵⁵ Ireland Law Reform Commission, *Inchoate Offences* (Consultation No 48, 2008) [2.102], (the term ‘results’ replaces the Commission’s preferred term ‘consequences’).

²⁵⁶ *Ibid*, [2.107].

²⁵⁷ US MPC §2.02.

²⁵⁸ US MPC §5.01.

²⁵⁹ Robinson and Grall, ‘Element analysis in defining liability: The Model Penal Code and beyond (1983) 35 *Stanford Law Review*, 681, 691.

²⁶⁰ *Ibid*, 691.

(2) 'act' or 'action' means a bodily movement whether voluntary or involuntary²⁶¹

By defining the act element in this manner, advocates of element analysis claim that it becomes possible to objectively distinguish all the elements of an offence.²⁶² Thus, even though the US MPC does not define the circumstance and result elements, each can be defined in relation to the act element.

Employing the US MPC's definition of the act element, and adding this to our previous definitions of the circumstance and result elements, we appear to be left with an objective method of separation:

- **Act element:** The bodily movement (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.²⁶³

However, despite the *potential* in the code for objectivity and despite the 'remarkable' degree of acceptance that element analysis has enjoyed in America,²⁶⁴ problems still persist.

²⁶¹ US MPC, §1.13(2). Although the US MPC refers to the 'conduct element' rather than the 'act element', 'conduct' is defined in §1.13(5) to mean an 'action or omission and its accompanying state of mind, or, where relevant, a series of acts or omissions'. The issues of 'state of mind' are not relevant to our current search for objectivity. However, they will be discussed in the Chapter 6, pp162-168.

²⁶² See, Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 49-56; Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 706-725.

²⁶³ In a similar way, Robinson defines the result element as '*circumstances changed by the actor*' (original emphasis). Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 49-56; Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 724.

The main reason for these problems seems to be that although the definition of *act* set out above may appear objective and unambiguous, other sections within the US MPC combine to cause a ‘fuzziness’ that threatens that objectivity.²⁶⁵

The main area of concern is section 2.02 of the US MPC which employs element analysis to define the fault terms. In this section, instead of referring to the act element (or, to use the language of the US MPC, the ‘conduct element’) and thus to simple bodily movement, reference is made to ‘the nature of’ the act element.²⁶⁶ The problem is that although this alternative to act *simpliciter* appears to encompass more than simple body movement,²⁶⁷ its use within the US MPC still requires *the nature of* the act to be distinguished from the circumstance and result elements. Therefore, as in the other common law jurisdictions, courts are forced to make subjective judgements about what the *nature* of the act might include, and the potential for objective separation of offence elements is lost.

Re-modelling the previous definition of element analysis in line with this, we can see that with the obscuring of the definition of the act element, all three elements will be negatively affected:

²⁶⁴ Gainer, ‘The culpability provisions of the MPC’ (1987) 19 *Rutgers Law Journal*, 575, 581. It is also noteworthy that it was the American delegation that first requested the use of element analysis within the Rome Statute: Clark, ‘Drafting the General Part to a Penal Code: Some thoughts inspired by the negotiations on the Rome Statute of the International Criminal Court and the court’s first substantive law discussion in the *Lubanga Dyilo* confirmation proceedings’ (2008) *Criminal Law Forum* 519, 523-524.

²⁶⁵ Moore, *Act and Crime: The philosophy of action and its implications for criminal law* (Oxford University Press, Oxford 1993) 190, fn 5.

²⁶⁶ US MPC, §2.02(2)(a)(i) and 2.02(2)(b)(i).

²⁶⁷ Moore, *Act and Crime: The philosophy of action and its implications for criminal law* (Oxford University Press, Oxford 1993) 190, fn 5; Robinson and Grall, ‘Element analysis in defining liability: The Model Penal Code and beyond’ (1983) 35 *Stanford Law Review*, 681, 707.

- **Act element:** The bodily movement (including, where necessary, the essential surrounding facts) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

Another area of concern, discussed earlier, is the prevalence of statutory terms that appear to combine different elements in a way that defies separation. Robinson comments, for example, that these terms ‘create ambiguities and undermine consistency in the operation of the Code.’²⁶⁸ Certainly, where such terms are used, one would imagine that the wider definition of the act element offered by section 2.02 becomes more appealing for a court. And, to the extent that this proposition is correct, objective separation of offence elements (which relies on the narrow interpretation) becomes even less likely.

CONCLUSION

Having traced the potential attractions of element analysis and the criticisms that threaten to undermine them in the previous chapter, the primary focus of this chapter has become the search for an objective method of distinguishing the elements of an offence using element analysis. Without such objectivity, the process of separating offence elements becomes unpredictable. Whether element analysis is being used as a structure for legal discussion and presentation, or whether it is being used to create new options for reform, such unpredictability is fatal.

²⁶⁸ Robinson and Grall, ‘Element analysis in defining liability: The Model Penal Code and beyond’ (1983) 35 *Stanford Law Review*, 681, 709.

Our search for an objective method to distinguish the elements of an offence has led us to a single solution: the act element must be defined in terms of body movement (*simpliciter*) or a lack of bodily movement (omission), with the circumstance and result elements being defined in reference to it.

- **Act element:** The bodily movement (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

This is the only version of element analysis that is capable of facilitating a sufficiently objective method of separating offence elements. If it is applied consistently,²⁶⁹ it does not rely on subjective judgements about what the act element must include (for its nature or to be understood). Further, advocates claim, this method is even capable of making objective distinctions in the face of statutory language that appears to resist such separation.²⁷⁰

Describing the process, Bentham states:

As grammar is taught by sentences thrown on purpose out of regimen, and geography by dissecting maps, in a like manner might the art of legislation, particularly what may be styled the mechanical branch of it, be taught by means of shapeless laws, be taken to pieces and put together again after the manner of the model.²⁷¹

²⁶⁹ This is a big 'if' when we reflect upon our discussion of the law in England and America above.

²⁷⁰ Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 720 and fn 185.

²⁷¹ Bentham, *Of Laws in General* (Atheone Press, 1970) 245.

However, any celebration at this conclusion must quickly be tempered. The contention that the act element of an offence must be defined in terms of simple body movement is not a new one: with several academics and law reformers having advocated it over a number of years.²⁷² Despite this, our discussion has been unable to identify a single jurisdiction where element analysis is applied to the law in this manner.

The question that emerges is an obvious one. What are the objections to this narrow definition of the act element that have prevented its use, even where such prevention effectively undermines the viability of element analysis altogether? It is to this question, and Part 2, that our attention must now be directed.

²⁷² See, for example, Cook, 'Act, Intention, and Motive in the Criminal Law' (1916-17) 26 *Yale Law Journal*, 645; Moore, *Act and Crime: The philosophy of action and its implications for criminal law* (Oxford University Press, Oxford 1993); Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997); Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681.

PART II

THE COST OF OBJECTIVITY IN THE SEPARATION OF

ELEMENTS

In chapter 2 we identified the two main criticisms of element analysis: that it is impossible to separate the elements of an offence objectively, and that element analysis is too complex to be practically useful within the criminal law. Although both criticisms are potentially very damaging, our focus has so far been on the first. This is because, in order for element analysis to provide any of the benefits explored in the preceding chapters, an objective technique for separation must first be identified. It is only after we have developed an objective technique that we may then move on to evaluate the practical usefulness of that technique within the criminal law.²⁷³

Moving a considerable way towards that end, chapter 3 concluded that it is possible for element analysis to be constructed to facilitate objective separation. For this to be achieved, the actus reus of an offence must be split up in the following manner:²⁷⁴

- **Act element:** The bodily movement (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

²⁷³ This will be the focus of Part III.

²⁷⁴ The fault (mens rea) of each element will then be added separately, using the elements of the actus reus as a guide.

However, a complete endorsement of this model of element analysis (at this stage) would be premature. It may be the only model that we have identified that has the potential for objectivity, but we must now question whether compromises have been made to the model in order to make that objectivity possible. After all, despite the long history of this approach,²⁷⁵ and despite the problems caused by subjectivity within other models of element analysis, the previous chapter was still unable to identify a single common law jurisdiction that defines the elements of an offence in this way. It is this inquiry, examining the implications of the model of element analysis defined above, which forms the general mission of this Part: can we identify problems that would/should lead us to abandon our model of element analysis, sacrificing the objective separation of elements?

As we highlighted in chapter 3, the objectivity of the preferred method of element analysis (set out above) chiefly relies upon the definition of the act element. By defining the act element narrowly to include only bodily movement, the other two elements are then constructed from this objective base: the result element through a causal connection, and the circumstance element through a non-causal temporal connection. In view of the central role played by the act element, it is therefore little wonder that this has become the overwhelming focal-point for critics of element analysis contending that such objectivity is not possible. It is therefore the major focus of this Part.

In order to take full account of the range of criticisms identified in this regard, a separate area of concern will be explored within each chapter. In **chapter 4**, we discuss the most direct and all-encompassing class of criticism, contending that our preferred model of

²⁷⁵ For example, Cook, 'Act, Intention and motive in the criminal law' (1916) 26 *Yale Law Journal*, 645.

element analysis, and the definition of the act element, is illogical and unsound. Deriving from action theory, critics have employed varying conceptions of action to deny the identification of bodily movement as the basis of the act element, as well as the ability of our model to draw clear lines of distinction between circumstances and results. In **chapter 5**, we explore the claim that although our definition of element analysis (including the act element) *may* make sense in relation to certain crimes, it should nevertheless be rejected for its inability to operate across the full range of offences (for example, omissions and possession offences). In **chapter 6**, we analyse criticisms of the use and ability of the act element to facilitate the objective separation of offence element. Finally, in **chapter 7**, we discuss criticisms that, whilst not denying the potential objective operation of the preferred model, highlight the seemingly unintuitive and unexpected consequences of our definition of element analysis in order to contend that an alternative model should be found.

Part I not only concluded that objectivity is essential for element analysis, but also that the model of element analysis set out above is the only one capable of providing that objectivity. Therefore, exploring each class of criticism in turn, we must now question whether the criticisms levelled against the preferred model are sufficient to (in effect) undermine element analysis as a whole.

CHAPTER 4

THE IDENTIFICATION OF BODILY MOVEMENT

By defining the act element in terms of simple bodily movement, element analysis appears to be making wider claims about action theory. Where these claims are echoed in the philosophical literature, this may provide further grounding and support for that definition. However, where they find opposition, this can lead to direct challenges to the viability of element analysis.

For those working within the criminal law, being forced to ‘leave the sheltered bays of black-letter lawyering’²⁷⁶ in order to engage with philosophically based criticism can present a uniquely difficult challenge. It is a challenge which is evident, in particular, in the drafting of criminal codes where reformers are forced to look at definitions of terms like act and omission which *appear* to have such a natural convergence with philosophical debate. As we discussed in chapter 3,²⁷⁷ although it seems clear from the perspective of element analysis that such definitions are essential, we have seen an increasing tendency for codes to remain silent.²⁷⁸ For example, within their report on the New Zealand Crimes Bill 1989, the New Zealand Crimes Consultative Committee²⁷⁹ systematically removed clauses that had

²⁷⁶ Roberts, ‘Publication Review - Act and Crime: the philosophy of action and its implications for criminal law’ (1994) *Criminal Law Review* 393, 394.

²⁷⁷ See, Chapter 3 generally.

²⁷⁸ Even the US MPC, in which an explanation of ‘act’ (§5.01) and ‘conduct’ (§1.13(5)) is provided, we have a degree of ambiguity maintained by the drafters. As we discussed in the previous chapter, the use of phrases like ‘the nature of’ within specific sections goes a long way to undermine the use of those explanations as definitions. See, for example, US MPC §2.02.

²⁷⁹ Crimes Consultative Committee, *Report on 1989 Crimes Bill* (New Zealand, 1991).

attempted to define 'act and omission',²⁸⁰ 'involuntary acts',²⁸¹ and 'omissions',²⁸² reflecting in each case that the definitions 'raise more questions than [they] usefully resolve'.²⁸³ Similarly with the Australian Model Criminal Code, the drafting Committee decided to omit a definition of 'conduct' and again leave the issue to be decided by the common law. In order to justify their decision not to define 'conduct', the Australian Committee commented that:

The philosophy of action is very complex and the Committee was not satisfied that the proposed section improved the commonsense solution arrived at by the courts.²⁸⁴

The reasoning behind this statement appears to be, first, that the philosophy of action is directly relevant to the definition of conduct (the act element) within criminal law. Secondly, there also seems to be a concern that defining conduct in statutory form, without taking full account of that philosophical debate, may then open the definition to unforeseen criticism. However, in the absence any discussion about what the philosophy of action involves, we are left with very little idea of how this complex body of theory affects the task of defining the act element in criminal law. This then, is our primary task.

²⁸⁰ Crimes Consultative Committee, *Report on 1989 Crimes Bill* (New Zealand, 1991) 9. Draft Crimes Bill, cl 3.

²⁸¹ *Ibid*, 11. Draft Crimes Bill, cl 19.

²⁸² *Ibid*, 12. Draft Crimes Bill, cl 20.

²⁸³ *Ibid*, 12. In this case, the Committee are referring to the definition of omissions in clause 20. However, similar statements are made in relation to the other clauses.

²⁸⁴ Australian Model Criminal Code (commentary) s 202.

INTRODUCTION TO ACTION THEORY

Action theory, as a branch within the philosophy of action, is characterised by the search for the meaning of *action*. When D's arm moves, for example, we may not know whether it was D that moved it. Did D intentionally perform the act of waving to a friend, of signalling for a taxi, of arm moving, or was it a passive response to the external influence of a powerful wind or a forcible manipulation by P? If D's arm moves whilst D is in a somnambulistic state or whilst D is under the mental control of P,²⁸⁵ does D perform an *act* of arm moving at all?

As the action theorist looks to answer these questions (and many others like them), he or she is looking to identify what makes an action that D performs different from a mere happening or event in which D is involved. Thus, as the concept of action begin to converge with wider notions of agency and responsibility, so we begin to look more closely at D's intentions and how those intentions interact with D's physical movement. Davidson's conception of action, for example, identifies the basis of action as the things done by D that are 'intentional under some description.'²⁸⁶ For Davidson, this intention is focused on the bodily movement of D. If intentional, D is directly responsible for this basic action (bodily movement), and from this basis, we can also ascribe D agency for the more complex act descriptions as well (descriptions which include the circumstances and results of D's basic act). Thus, if D moves his or her arm in order to hail a taxi and a taxi stops as a result, D is

²⁸⁵ 'Control' in this context ranges over a spectrum from simple suggestion to a direct science-fictional style of mind-control. See, Williams B, 'The actus reus of Dr. Caligari' (1993) 142 *University of Pennsylvania Law Review*, 1661.

²⁸⁶ Davidson, *Essays on Actions and Events* (Oxford University Press, Oxford 2001), Essay 3: Agency, 50. The qualifier 'under some description' is necessary to avoid conclusions like 'D did not intend to pour the tea' where D believed he was pouring coffee. In this case, it is clear that D intended the action (the movement); he was simply mistaken as to one of the contextual facts surrounding it.

the agent of the complex act of *successfully hailing down a taxi*. However, within this complex description, D is also responsible for his or her basic act of *arm moving*.²⁸⁷

ACTION THEORY AND THE CRIMINAL LAW

Even without element analysis, it is relatively obvious why this area of philosophy has attracted the attention of those working within the criminal law. Just as the action theorist seeks to identify and isolate the acts that D is the agent of and is therefore responsible for, so to the criminal law seeks to punish only conduct that D has actively performed. This requirement is true even of strict-liability and absolute liability offences where D is said to be liable in the absence of fault.²⁸⁸ In such cases, although D may be convicted despite lacking fault as to certain particulars of the offence, the prosecution must still demonstrate that D's performance of the actus reus was voluntary.²⁸⁹ Thus, for example, if D was unconscious²⁹⁰ at the time of the offence, then the common law has generally accepted that basic rights of autonomy dictate that he or she should not be criminally responsible for his or her behaviour whilst unconscious.²⁹¹

However, focusing our discussion further, we may identify the particular relevance of action theory to the act element of an offence, and even more particularly, to the identification of

²⁸⁷ See generally, Davidson, 'Essay 3: Agency' in *Essays on Actions and Events* (Oxford University Press, Oxford 2001) 43.

²⁸⁸ For discussion, see, Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1529.

²⁸⁹ The term voluntary, of course, begs its own philosophical questions. These will be explored later in the chapter, pp117-128.

²⁹⁰ Unless that unconsciousness was caused by voluntary intoxication or negligence.

²⁹¹ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 54-55 and 58. See further, the US MPC, which expressly states that D will only be liable for an offence if liability is based 'on conduct that includes a voluntary act or omission' (§2.01(1)).

the conduct requirement within the act element. This is because, although there is a broad consensus that *all* criminal offences (just like all action) require some manner of intentional behaviour, both criminal and action theorists must identify what the *behaviour* is that must be intended.

The act element, as constructed in chapter 3, is designed to provide an objectively discoverable basis for D's criminal liability. In order to obtain that objectivity, we reasoned that the focus of the actus reus requirement within the act element must be identified as the bodily movement of D. After that bodily movement (or omission) has been established, we may then ask more complex questions about the surrounding circumstances and/or results of that movement as the offence definition requires. Within action theory, we can trace a very similar experience. As we saw with Davidson above, it is very common for an action theorist to identify basic action as bodily movement.²⁹² This is because, when faced with a complex act description like *successfully hailing down a taxi*, many action theorists perceive their task as the identification of the causal root of this complex description, the identification of the 'common character'²⁹³ or 'essence'²⁹⁴ of action. As a result, reducing the complex description to its most causally basic form,²⁹⁵ action theorists are often led to bodily movement: the most basic thing that D must have intentionally done in hailing a taxi is the raising of his or her arm.

²⁹² According to Smith, the identification of bodily movement as the basis of all action can be traced back as far as David Hume in 1740. Smith M, 'The structure of orthonomy' in Hyman and Stewart (eds), *Agency and Actions*, (Cambridge University Press, Cambridge 2004) 165, 165.

²⁹³ Prichard, 'Acting, Willing, Desiring' in White (ed) *The Philosophy of Action* (1968) 59, 59.

²⁹⁴ Baier, 'The search for basic actions' (1971) 8(2) *American Philosophical Quarterly*, 161, 161.

²⁹⁵ For a discussion of whether it is correct to refer to bodily movement as 'causally basic', see pp102-113.

Thus, despite the distinct motivations of those looking to identify the act element and those looking to identify basic action, the common search for the root of intentional behaviour marks a significant convergence between the two. It is a convergence that seems to appear quite naturally. However, it is also a convergence that has been actively encouraged by many of those theorists (for example, Moore²⁹⁶) that believe that the identification of bodily movement is a useful one. For these theorists, that wish to define the act element as bodily movement, there is a burden beyond objectivity to demonstrate *why* and *how* bodily movement can undertake its role within element analysis as the link between D and the criminal event. Why should the act element, for example, not include the context within which D is moving as well as the fact of movement? For offences like rape for example, surely it makes more sense to talk of *non-consenting sexual intercourse* rather than the *physical movement of the pelvis and hips* (with the rest of the offence being made up of circumstances or results).²⁹⁷ Yet, *if* it can be established through action theory that all complex action can be reduced to bodily movement, and that bodily movement is the correct basis upon which to ascribe agency for complex action, then the burden for Moore and others is easily met. Bodily movement becomes the outstanding choice upon which to define the act element and thus ground criminal liability, because in a wider sense it also provides the grounding of D's responsibility for *all* complex action.

The convergence between the definition of the act element and the definition of basic action has also been encouraged by the critics of element analysis.²⁹⁸ This is because, as

²⁹⁶ Moore, *Act and Crime: The philosophy of action and its implications for criminal law* (Oxford University Press, Oxford 1993). Hereafter in Part II, Moore, *Act and Crime*.

²⁹⁷ For further discussion of the unintuitive nature of element analysis, see Chapter 7.

²⁹⁸ See, for example, Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 240 (hereafter in Part II, Duff, *Criminal Attempts*). Although Duff also recognises important distinctions between the two (241), he

highlighted above, although the philosophy of action has been used to ground and justify the definition of the act element in terms of bodily movement, it has also created fresh vulnerability. This vulnerability can be exploited in two ways:

1. If the success of element analysis is dependent upon a particular philosophy of action, then criticism of that philosophy of action will also be criticism of element analysis; and
2. Element analysis's claim to provide a universal structure for legal discussion and analysis will be undermined unless the definition of the act element is as inclusive (to different theories of action) as possible. If one specific theory is chosen and relied upon, then the use of element analysis will create simply another (hidden) layer of complication for those who do not share the views of that theory.

Each of these potential vulnerabilities will be discussed in turn.

The first vulnerability: Undermining the philosophical foundation

The first vulnerability, which allows commentators to employ criticisms of a particular theory of action as part of their attack on element analysis, has been strongly targeted by Duff. Although the identification of bodily movement as basic action is the 'orthodox

emphasises the common routes taken by theorists on either side, and how similar misunderstandings lead them to bodily movement.

view²⁹⁹ within much of the philosophy of action, this is because most action theorists approach the subject from a realist perspective.³⁰⁰ Action theory realists and basic action theorists commit themselves to the discovery and definition of the concept of action. Although these theories will invariably differ from one another in several important ways, their common search for basic action has led to broad acceptance of the central role to be played by bodily movement.³⁰¹ In contrast, many nominalist and linguistic philosophers like Duff have rejected the search for basic action.³⁰² For Duff, as highlighted in chapter 3, the concept of action is not a natural kind to be discovered and defined, but rather, its identification will always be relative to its descriptions within a social context:

Actions and events are identified and individuated only by our descriptions of them: what someone does can be described in various ways... [depending] not on some objective truth about what 'the action' really is (since there is no such truth), but on our own interests.³⁰³

²⁹⁹ Moore, *Act and Crime* 44. See also, Duff, *Criminal Attempts* 248 and Hornsby, 'Agency and actions' in Hyman and Stewart (eds), *Agency and Actions* (Cambridge University Press, Cambridge 2004) 1, 3 where she describes it as the 'standard story' within the philosophy of action.

³⁰⁰ See, for example, Moore, *Act and Crime*; Davidson, *Essays on Actions and Events* (Oxford University Press, Oxford 2001); Hornsby, *Actions* (Routledge, 1980).

³⁰¹ One of the central divisions among action realists is that between a coarse and a fine grained approach. A coarse grained realist (for example, Moore and Davidson) looks to identify basic action and then classifies the circumstances and results of that basic action as facets of the wider (complex) act. In contrast, a fine grained realist (for example, Goldman), having identified the basic act, will represent the more complex descriptions as separate act tokens. The act tokens are rooted in the basic action, but unlike within a coarse grained approach, they remain logically separate from it. The debate between the two approaches is essential to a full understanding of action theory. However, due to their common search for basic action, the distinction between coarse and fine grained approaches does not affect our reasoning in this Part. For further discussion, see, Goldman, 'Action and crime: A fine-grained approach' (1993) 142 *University of Pennsylvania Law Review*, 1563, 1576-1579 and Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 318-329.

³⁰² See, for example, Duff, *Criminal Attempts*; Duff, *Intention, agency and criminal liability* (Blackwell, 1990); Baier, 'The search for basic actions' (1971) 8(2) *American Philosophical Quarterly*, 161; Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195. More recently however, Duff has expressed that it may be possible for the two theories of action to co-exist. See, Duff, 'Action, the act requirement and criminal liability' in Hyman and Stewart (eds), *Agency and Actions* (Cambridge University Press, Cambridge 2004) 69, 85.

³⁰³ Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 41.

If the definition of action is relative to its social context and the particular interests of those describing it within that context, then it will be impossible to discover a single objective criterion for it. Therefore, for Duff, any discussion of intentional action must include a full act-description. We cannot understand the question *did D intend to act* unless we know the context within which the question is asked. Duff gives the example of D that rings a doorbell which causes the waking of a baby.³⁰⁴ D may admit that he or she intended the act of ringing the doorbell, but deny that he or she intended the act of waking the child. For a realist like Moore, the example describes a single act of hand moving which was intentional, but for Duff, there may be several descriptions of the act (including different circumstances and results) which may or may not be intended depending upon their content. Because action is identified by our description of it, and because it is unnatural to describe something like *ringing a doorbell* in terms of physical movement alone, the role of bodily movement is of only peripheral interest.

By linking realist conceptions of action to the identification of bodily movement within the act element, Duff's 'blunderbuss scepticism'³⁰⁵ about action as a natural kind operates jointly as a criticism of the preferred model of element analysis. At its mildest, Duff's alternative theory makes the choice of bodily movement, as a definition of the act element, seem unhelpful: if action is relative to our descriptions of it then bodily movement will almost always constitute an incomplete account. However, more seriously, as Duff presents arguments in an attempt to undermine the realist conception of action, he targets claims that bodily movement is causally and intentionally basic (the criteria used to identify bodily

³⁰⁴ Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 42.

³⁰⁵ Moore, *Act and Crime* 61.

movement as basic action). By claiming that bodily movement is not basic in these ways, Duff seeks to undermine the foundations of both realist action theory and the preferred definition of the act element. In both cases, it is essential to justify why bodily movement has been singled out, and if there are no criteria to do this, then defining the act element as bodily movement becomes not simply unhelpful, but 'untenable'.³⁰⁶

The second vulnerability: Undermining the universality

The second vulnerability created by the convergence of basic action theories and the definition of the act element relates to the latter's claim of inclusivity. The previous chapter set out element analysis's potential as a universal structure for discussion and analysis of criminal law as one of its main advantages. However, if our definition of the act element is to be predicated entirely upon a single conception of action, as it is for Moore in *Act and Crime*, then this advantage will be lost. For those who agree with the Moorian conception of action, element analysis may be a useful structure for discussion of the criminal law. But for those who employ alternative action theories, even other realists who differ from Moore on some of the finer points of his theory,³⁰⁷ element analysis will not provide a structure they can use.

³⁰⁶ Duff, *Criminal Attempts* 13 and discussion on 254. Duff's theory also seeks to undermine a subjective conception of law. This is because, by merging movement and results within his conception of action, Duff seeks to refute the subjectivist claim that criminal liability should avoid reliance upon outcomes and outcome-luck. Ashworth, 'Taking the Consequences' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993) 107, 110.

³⁰⁷ For example, realist action theorists commonly differ in their approach to somnambulism and other states of semi-consciousness. See discussion in Chapter 5.

In order to preserve the potential for universality, we are therefore left with two options. Either we must unify all theories of action by conclusively demonstrating that a single theory should be preferred to all others: a formidable and slightly unrealistic task in the context of the current project. Or we must (as far as is possible) ensure that element analysis is inclusive of all logical action theories. Although this second option is viable, as we will see as the chapter unfolds, it requires the partial abandonment of action theory as a basis for element analysis.

MOORE, AND THE TWO VULNERABILITIES

As Moore's model of element analysis defines the act element in terms of bodily movement, and his theory of action provides support for this identification, it is easy to view his work as a helpful companion of the current project. However, this would be a mistake.

Within Moore's account of basic action and the act element, the *potential* damage caused by both of the vulnerabilities set out above must be accepted. In relation to the first, in which Duff criticises the search for basic action, Moore recognises what he describes as the criticism's pervasive influence across the full breadth of his argument:

Not only would such scepticism reject the idea that acts are willed bodily movements (Chs. 5, 6, 10, 11), Duff's nominal target here; it would also undercut any fixity to the distinction between acts, on the one hand, and [results] and circumstances, on the

other (Chs. 7 and 8), and it would render unanswerable the question of act-token individuation raised in Chs. 11 and 14.³⁰⁸

Having accepted the potential damage caused by Duff's criticism, Moore spends considerable time countering the arguments and defending his thesis.³⁰⁹ However, as with many conceptual debates, success for Moore is never likely to progress beyond the ability to present a more compelling argument: with each side presenting a logical view of action, we simply lack the necessary facts to be able to decide *conclusively* in either one's favour. Additionally, as Moore seeks to defend his thesis, he is caught by the second vulnerability. This particular problem, concerning a lack of inclusivity, is not discussed by Moore. Presumably his answer would be that the problem would not exist if others accepted his conception of action. However, from the sole perspective of element analysis, this remains a problem.

MOVING AWAY FROM A THEORY OF ACTION

Having identified the problems encountered by Moore when combining element analysis with a theory of action, it is tempting, in line with the heading, to try and move away from a reliance on action theory altogether. The task of this thesis is not, after all, to promote any one theory of action. If we were to change the label *act* element, and simply refer to the *first* element or the *physical* element for example, why couldn't we avoid debates about the theory of action altogether?

³⁰⁸ Moore, *Act and Crime* 60, fn 1. Referring to Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 41.

³⁰⁹ Moore, *Act and Crime* Ch 4.

Perhaps surprisingly in the light of the detailed critique provided by Duff and others, the route taken in the previous paragraph is not without merit. It is important to remember, for example, that Moore's thesis has a different rational to our own. Moore creates a mutually reinforcing account of both action theory and element analysis. In doing so, he not only uses his theory of action to support the identification of bodily movement as the basis of the act element. But also, working in the opposite direction, he uses the goals of element analysis and the criminal law to support his preferred conception of action.³¹⁰ Moore's dual focus, however, is not only mutually reinforcing, but as we have seen above, it is also mutually dependant. This creates the vulnerability; vulnerability that may not fully undermine Moore's thesis, but one that certainly weakens the *general* appeal of element analysis.³¹¹ As the sole focus of this thesis is element analysis, if a debate within the theory of action is not relevant to element analysis, then the thesis does not require the debate to be resolved: in fact, it may well require there to be no comment at all.

Although we are not required to identify and support any one theory of action however, we cannot escape every philosophical criticism of element analysis based simply on a re-labelling of the act element. This is because, especially in the absence of a supportive definition of action, we still need to justify why we have identified *bodily movement* as the initial ingredient required for all criminal offences (whether we call this the act element, the first element, or any other variation). In chapter 3, we identified the appeal of bodily

³¹⁰ For example, by stressing the ability of his coarse grained theories to identify (through bodily movement) the spatiotemporal location of an offence for jurisdictional and double jeopardy purposes.

³¹¹ Duff is therefore able to attack the definition of the act element (based on bodily movement) because it 'relies' on the 'analogous' philosophical identification of bodily movement. 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993) 75, 83.

movement as the definition of the act element, partly for its potential in terms of objectivity, but also because of its universal role within every criminal offence.³¹² As identified above, however complex an offence, it is always necessary for D to have completed and intended to complete certain bodily movements. Therefore, bodily movement holds an intuitive appeal as a base ingredient for element analysis. The act element (bodily movement) provides the most basic ingredient, and then further requirements in terms of circumstances and results can be constructed upon it. In this manner, the act element (as bodily movement) provides the essential nexus between the elements of an offence: causally linked to the result element and temporally linked to the circumstance element.

As we begin to flesh out this intuitive appeal, it is obvious that we cannot entirely jettison debates within action theory. This is because; just as action theorists dispute the role of bodily movement as the most basic ingredient of action, so our intuitive preference for bodily movement within the act element (set out above) follows a very similar script. Indeed, in order to test our intuition, and in order to establish the role of bodily movement within element analysis, we too require a criterion of basicness that confirms our preference. Therefore, although this thesis does not propose to advocate a theory of action more generally, it is still affected by the criticisms of realist theories of action that content that bodily movement cannot be identified as a basic ingredient of action (criminal or otherwise).

³¹² We discuss later the potential for thought and status based offences that do not include bodily movement (Chapter 5, pp153-158). These represent a *potential* criticism of the identification of bodily movement as the definition of the act element, but one that is not sufficient to undermine its use.

Although it is essential to explore the theoretical debate concerning the basicness of bodily movement, it is therefore equally important to distinguish between actions in the philosophical sense (action_p) and actions in relation to the act element (action_e). Whether bodily movement is the basic ingredient of action_p is only relevant if it provides us with criteria that will establish bodily movement as the basic ingredient of action_e within the criminal law. Without criteria to establish bodily movement as the basic ingredient of criminal behaviour, our definition of the act becomes artificial (objective, but lacking a principled identifier).

THE IDENTIFICATION OF BODILY MOVEMENT AS BASIC ACTION_p

In this section we will explore the basis upon which basic action theorists have identified bodily movement as basic action_p .

The Causal Criterion

One of the central justifications for the identification of bodily movement, both as basic action_p and as the basis of the act element, is that it is causally basic. In relation to basic action_p , the causal relationship between different actions_p can be represented in the following way:

... a non-basic action of agent [D] is an action [D] performs *by* performing some other action; a basic action of [D] is an action [D] does *not* perform *by* performing some other action.³¹³

Following this logic, D might describe his or her complex (non-basic) act_p as *hitting a bullseye whilst playing darts*. If asked how this was done, logically, D may reply that it was done *by throwing a dart accurately into the centre of a dartboard*. If asked the same question again, logically, D may reply *by moving my arm and fingers*. However, if asked the question again, the reply is likely to be more difficult. D does not move his or her arm *by* doing something else, he or she simply moves it. Therefore, D's bodily movement appears to be causally basic to all other complex act_p descriptions.

In relation to criminal offences, we can trace a very similar course. If D murders V; D does so by shooting V; D does so by pulling the trigger of a gun; D does so by moving his or her finger. Once more, within the causal chain, bodily movement represents the most basic act_p description. This is not to say that bodily movement will *always* be causally basic. For example, if D pulled the trigger with his or her finger, but the finger was in turn caused to move by a pulley system that D operated with his or her foot, then the basic action_p would be the movement of the foot and not the finger. Rather, the essential premise is that causally basic action_p is always bodily movement.³¹⁴

The premise that causally basic action_p is always bodily movement *appears* to be essential both to realist action_p philosophers like Moore within their conception of action_p, and to the

³¹³ Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 195.

³¹⁴ For further discussion of this point, see Moore, *Act and Crime* 44.

preferred definition of the act element. Within a theory of action_p, the premise is used to identify the root of D's agency: although D's movement might be the cause of various other complex actions, on a basic level, D can 'never do more than move [his or her] bod[y]: the rest is up to nature'.³¹⁵ Therefore, bodily movement provides an essential nexus between D and the complex descriptions of his or her act_p. If D intended the bodily movement then he or she is not only responsible for it *simpliciter*, but D will also have some degree of agency for the complex descriptions flowing from it.³¹⁶

Likewise within the criminal law, we are searching for the appropriate manner within which to link D to a certain event. The role of the act element (defined as bodily movement) is to provide that link. Within element analysis, once it can be established that D intentionally performed the body movement required for the offence, it is upon this basis that we may then go on to analyse the other aspects of the offence in order to establish possible liability.³¹⁷ However, if D does not satisfy the act element, if D's movement cannot be identified as the causal root to the offence definition (for offences containing a result element), then the law will be unable to isolate D as the perpetrator of the offence.

Duff contends that bodily movement is not causally basic.³¹⁸ In doing so, he aims to undermine its identification both within the philosophy of action (as the nexus between D and a complex act_p description) and within element analysis (as the nexus between D and a

³¹⁵ Davidson, 'Essay 3: Agency' in *Essays on Actions and Events* (Oxford University Press, Oxford 2001) 43, 59.

³¹⁶ Davidson refers to this as the 'accordion effect'. Davidson, 'Essay 3: Agency' in *Essays on Actions and Events* (Oxford University Press, Oxford 2001) 43, 54.

³¹⁷ Although within action theory we may say that D is the agent of every complex act_p flowing from his or her basic act_p, before D is held criminally liable for a complex act that satisfies an offence definition, it is likely that he or she will be required to have additional fault in relation to the extra facets of the complex action (circumstances and results).

³¹⁸ Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 83; Duff, *Criminal Attempts* 259-260.

criminal event). When D is repeatedly asked *how did you do that?* in relation to a complex act_p description, he or she *is* likely (as discussed above) to see bodily movement as a natural stopping point. However, just because an individual does not understand the full breadth of a causal chain, does not mean that further links do not exist. For example, an expert neurophysiologist could explain to D that, actually, his or her bodily movement was caused by the contraction of muscles, which were caused to contract by the firing of certain neurons, which were caused to fire by certain brain activity and so on.³¹⁹ Therefore, it is clearly incorrect that bodily movement alone is causally basic.

If the criticism is accepted, one option for the basic action theorist would be to continue the search for basic action_p by going beyond bodily movement. After all, if action_p does exist as a causal chain, then logically that chain cannot continue *ad infinitum*. As long as basic action_p can be identified the realist philosopher's theory will not be compromised, he or she will still be able to identify the nexus between D and a complex action_p description, in fact, the only change will be in relation to *what* is identified as the basic act_p.³²⁰ Equally, in relation to the act element within the criminal law, perhaps the act_e should be identified as a mental or internal event.

As soon as the identification of bodily movement is conceded in the search for more basic action_{e/p} however, it is very difficult to identify a natural stopping point. Baier highlights this problem in the work of Prichard, an early basic action theorist:

³¹⁹ For discussion of this point see, Duff, *Criminal Attempts* 259-260. As Duff also observes, the claim that such activity is always unintentional and therefore not an action_p is unsatisfactory. In the case of the expert, for example, it could be that the only reason he or she moves his or her body is to test the firing of neutrons and so, in this case at least, he or she has clearly 'fired neutrons intentionally'.

³²⁰ For a discussion of this approach, see Moya, *The Philosophy of Action: An Introduction* (Polity, 1991) 18-29.

'Prichard begins by instancing simple bodily movements [as basic action_p], but finds them ... to be indirect, the uncertain outcomes of volitions. In later essays he realises that volitions in turn are the uncertain outcomes of desires for volitions, desires the outcomes of thoughts about the goodness of the outcome of the to-be-willed action, thoughts the outcome of volitions to think and so on. The search breaks off, the quarry still not in sight.³²¹

The purpose of Duff's criticism is to try and force those attempting to define basic action_p and the act element to follow Prichard down a similar path.³²² Bodily movements may have an intuitive appeal as the definition of basic action_p and the act element.³²³ But once the basic action theorist is forced into an indeterminate class of mental acts, identifying basic acts as *tryings* or *volitions*, that intuitive appeal is soon lost. In relation to tryings for example, although it might sound logical to say that the most anyone can do is *try* to move their body,³²⁴ the separation of the act_p of trying from actual movement 'alienates us, as agents, from our bodies.'³²⁵ Beyond these intuitive problems, if volitions and tryings are correctly identified as basic action_p, the definition also has the potential to be unacceptably wide. For example, if D wills the movement of another person's body (without performing any physical movement him or herself), under this definition, D has performed an act_p.³²⁶

³²¹ Baier, 'The search for basic actions' (1971) 8(2) *American Philosophical Quarterly*, 161, 161.

³²² Duff, *Criminal Attempts* 264.

³²³ However, as Baier explains, this intuition is by no means universal. Baier, 'The search for basic actions' (1971) 8(2) *American Philosophical Quarterly*, 161, 161.

³²⁴ For a compelling account of actions_p based on tryings (linked to bodily movement), see Hornsby, 'On what's intentionally done' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 55.

³²⁵ Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 100.

³²⁶ For discussion of this point, see Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 206-209.

However, the conclusion D performs an $act_{e/p}$ in this example is not something that would be supported by any basic action theorist.

There is considerably more that might be said in relation to the definition of basic action_p if we go beyond bodily movement.³²⁷ However, before we abandon bodily movement as a possible definition of action_p and (more importantly) as a possible definition of the act element, we need to be sure that this is essential.

For basic action theorists like Moore, one response has been to combine the identification of bodily movement with the mental process that brings it about. Thus, for Moore, basic action_p is not simply bodily movement, but 'volition causing a bodily movement'.³²⁸ Similarly, for Davidson:

It may be true that I cause my finger to move by contracting certain muscles, and possibly I cause the muscles to contract by making an event occur in my brain. But this does not show that pointing my finger is not a [basic] action, for it does not show that I must do something else that causes it. Doing something that causes my finger to move does not cause me to move my finger; it *is* moving my finger.³²⁹

The advantages for action theorists like Moore and Davidson of combining pre-bodily movement processes within their definition of basic action_p are quite clear. In relation to at least two of the criticisms mentioned above, for example, both theories now have adequate

³²⁷ Duff provides a detailed exploration of this area, concluding that the search for basic action should be abandoned. Duff, *Criminal Attempts* Ch 10.

³²⁸ Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 251.

³²⁹ Davidson, 'Essay 3: Agency' in *Essays on Actions and Events* (Oxford University Press, Oxford 2001) 43, 50.

responses. Thus, although their definitions of basic action_p still identify bodily movement, they are causally basic because they also include the pre-movement processes. Further, because they go beyond these processes to include movement, they also avoid labelling purely mental processes, for example willing the movement of another person's body, as action_p.

Despite these advantages however, exactly how the pre-movement processes should be conceptualised has proven to be very problematic. This is because, although it is clear that mental processes have an important role in action_p, the philosophical debate is predicated upon a science that is unable to explain the process in the necessary detail. It is on this basis that Moore (despite advocating a volition based theory) openly concedes that 'volitions may not be the right answer',³³⁰ and it is also upon this basis that the door is opened to a variety of other competing explanations.³³¹

As well as causing problems for the basic action theorist, the contested nature of these theories is also problematic for our definition of the act element. If we have to supplement our definition of the act element by including pre-movement mental processes, then we are left with a very difficult choice concerning which conceptualisation of these processes should be chosen. Further, no matter which theory is preferred, we will inevitably be falling foul of the vulnerabilities discussed earlier: the additional element will provide fresh scope

³³⁰ Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 311.

³³¹ For a discussion of this and criticism of the alternative approaches, see, Moore, *Act and Crime* 113-168 and Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 316-7. For alternatives to Moore's volition based theory, see, for example, Hornsby, 'Action and aberration' (1993) 142 *University of Pennsylvania Law Review*, 1719, 1732 and Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1547, who discuss 'intention' and 'voluntariness' respectively.

for criticism and also alienate (from the use of element analysis) those who prefer an alternative approach. We must therefore question, for the purposes of the act element, whether it is essential to go beyond bodily movement in order to answer the causal criticism.

Distinguishing the definition of basic action_p from the identification of action_e within the act element, it seems that bodily movement alone (without the inclusion of pre-movement processes) *can* answer the causally basic criticism. For the basic action theorist, the debate concerning the possibility of action_p being identified (wholly or partly) in a pre-movement process is an essential boundary setting exercise to the concept of action_p. However, these debates are not relevant within the criminal law. This is because the criminal law is only concerned with acts_e that D performs that are external from his or her body (the external world). D may desire to perform a certain action_p; he or she may perform the relevant mental process; fire the relevant neurons and contract the relevant muscles, but unless this translates into physical movement (or omissions to move) within the external world then D's activity will not come within the definition of an offence.³³² Therefore, the criticism that bodily movement is not causally basic does not require us to follow basic action theorists into the conceptualisation of pre-movement processes. Bodily movement *is* a causally basic act_e in the external world, and as the criminal law is only concerned with action_p in the external world (i.e. action_e), bodily movement *is* causally basic within the criminal law.

³³² Omissions liability does not represent an exception: to be liable for an omission D must have intentionally omitted to move his or her body. In contrast, we are discussing failed attempts to move. The law of criminal attempts, in contrast, does represent a *possible* exception. If, for example, acts_e were defined to include pre-movement processes, D could be liable for an attempt when he or she completes the pre-movement processes (but not the bodily movement) necessary for an offence if it was held to be 'more than merely preparatory to the commission of the offence'. Criminal Attempts Act 1981, s1. However, the obvious problems associated with proving D performed these pre-movement processes (in the absence of movement) means that the exception will remain theoretical.

We are now able to recognise that the causal criticism affects the search for a definition of basic action_p differently from the identification of action_e within the act element. It is a recognition that not only helps us avoid the search for basic acts_p beyond bodily movement, but also one that can be employed to deal with a further set of examples that have troubled basic action theorists: examples of a failure to move. Common examples include where D is temporarily paralysed or restrained without his or her knowledge. When asked to raise an arm for example, D may complete all the relevant pre-movement processes and may even believe that he or she is raising the arm, but in the absence of physical movement, the basic action theorist can say nothing except that *D has not acted_p*.³³³ On the one hand, the example is used, like the causal criticism, to encourage basic action theorists to abandon bodily movement for more causally basic definitions of basic action_p.³³⁴ However, on the other, it has also been usefully employed to attack theorists like Moore and Davidson that have combined bodily movement and pre-movement processes within their definitions of basic action_p. This is because, although theorists like Moore and Davidson analyse bodily movement and pre-movement processes as part of the same event (basic action_p), the example forces them apart. Bodily movement becomes the uncertain result of the pre-movement processes, and thus, very similar to other non-basic act_p descriptions.³³⁵

Despite the problems caused by these examples for theories of basic action_p, they do not cause a problem for element analysis and the preferred definition of the act element. This is

³³³ See Duff, *Criminal Attempts* 262; Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 83; Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 204.

³³⁴ As Annas explains, if bodily movements are causally basic actions_p, then these examples would be 'impossible'. Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 205.

³³⁵ Duff, *Criminal Attempts* 262-263.

because, as discussed earlier, evidence that D has performed pre-movement processes (where those processes do not result in bodily movement) is not relevant to the criminal law. Criminal law only focuses on D's movement or lack of movement as it directly affects the external world.³³⁶ Therefore, it is sufficient for the purposes of element analysis to regard D's behaviour as a simple lack of bodily movement. Where D is charged with a criminal omission, D may wish to employ evidence of restraint or of temporary paralysis to prove that the omission was unintentional.³³⁷ However, even in this case, the evidence will be relevant to the mens rea attached to D's failure to move, not to a question of whether D's pre-movement processes themselves constituted an act_p.

Our exploration of the criticism that bodily movement is not causally basic has so far focused on pre-movement processes. However, the same criticism has also been made from a different perspective, this time focusing on complex act_p descriptions that include more than mere bodily movement. For example, having outlined the contention that bodily movement is causally basic, Annas criticises it in the following terms.

But we can easily think of cases where I perform an action such as tying my laces or playing a scale, without performing other actions by doing which I do the action in question. ... Different *by*-chains give us different results.³³⁸

If examples of this type were able to demonstrate that bodily movement is not causally basic, either in the context of action_p or action_e, then they would have the potential to be

³³⁶ At various points we have stressed and will stress the importance of element analysis to be able to cope with *potential* as well as actual offences. However, in this case, the possibility of an offence being created targeting pre-movement processes is sufficiently remote to be of no concern.

³³⁷ For a full discussion of omissions liability, see, Chapter 5, pp134-148.

³³⁸ Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 195-196.

very damaging. However, to present the examples, as Annas does, as criticism of the contention that bodily movement is causally basic, is highly misleading. This is because, if we focus solely on the causal mechanics of action_{e/p}, then it must be accepted that even when D ties his or her laces or plays a scale, D has done so *by* moving his or her body. Therefore, the bodily movement remains causally basic to the complex act_p description.³³⁹ Where these examples do become problematic for theories of basic action and the act element, is where they conflict with the separate contention that bodily movement is *intentionally* basic: claiming that D's intentions in these cases will always include more than simple bodily movement. This contention, and criticisms of it, will be explored in the following section. However, for present purposes, it suffices to say that such examples do not undermine the causal claim.

For Duff, the criticism that bodily movement is not causally basic is sufficient to undermine its identification, both as basic action_p, and as the definition of the act element.

... we need note only that the simple thesis that basic actions are always bodily movements seems to be undermined by the impossibility of providing a criterion of basicness which will identify only such bodily movements as absolutely basic actions.³⁴⁰

Duff draws this conclusion based upon his observation that basic acts_p (defined as bodily movement), like complex act descriptions, are in fact the fallible results of internal pre-

³³⁹ This observation, that the examples do not undermine bodily movement's claim to be *causally* basic, has been accepted by Duff. Duff, *Criminal Attempts* 259.

³⁴⁰ *Ibid*, 260.

movement processes.³⁴¹ Without seeking to undermine this observation however, we have found that Duff's reasoning (and therefore his conclusion) does not apply to the preferred definition of the act element. Even if we accept that bodily movement is not causally basic action_p, as long as it is causally basic action_e, the preferred definition of the act element is not affected. Bodily movement is causally basic action_e because the act element, serving the interests of the criminal law, is only concerned with action_{e/p} that takes place in the external world: bodily movement is the only form of action_{e/p} in the external world that is not always caused by other external action.³⁴² On this basis, the preferred definition of the act element *does have a criterion of basicness which will identify only such bodily movements as absolutely basic actions_e*, and thus Duff's conclusion, in relation to the act element, can be refuted.

The Intentional Criterion

The second limb to the identification of bodily movement as basic action_p is the contention that bodily movement is intentionally basic. Intentional basicness can be illustrated in the following manner.

Y is a basic action relative to X if I do or could do Y in order thereby to do X; and an action is absolutely basic when it is the immediate or direct object of the agent's intention.³⁴³

³⁴¹ Duff, *Criminal Attempts* 262.

³⁴² As discussed above at p99, the claim here is not that bodily movement is always causally basic, but rather that it is the only form of action_e that is capable of being causally basic.

³⁴³ Duff, *Criminal Attempts* 257.

Therefore, in order to establish that bodily movement is intentionally (absolutely) basic to all other action_p, it must be demonstrated that intentional complex acts_p are always brought about through intended bodily movement. Further, it must also be demonstrated that intended bodily movement cannot be brought about by intentionally doing anything other than that movement.³⁴⁴

The contention that bodily movement is intentionally basic has a very important role to play both for theories of basic action_p, and for the preferred definition of the act element. This is because, if bodily movement is the only form of action_p that can be directly intended (D performs it without intending to do something else in order to bring it about), then intentional bodily movement must lie at the root of every complex action_p and conduct based criminal offence. Thus, basic action and criminal law theorists are justified in their initial focus on bodily movement: if it is established that D intended this movement then his or her agency for the complex action_p or offence can be constructed upon this basis.³⁴⁵

This is not to say that we *only* intend our bodily movement, with all the facets of the complex act_p description resulting as unintended consequences. Such a position would clearly be false. In fact, theorists like Moore, that rely upon the intentional criterion, readily concede that when people perform everyday complex actions_p like brushing teeth and engaging in conversation, the conscious object of their intention is much more likely to be

³⁴⁴ The exception, where D uses one part of his or her body (for example, the arm) to move another part of his or her body (for example, the leg), does not undermine the claim that bodily movement is intentionally basic. In this case, the movement of D's leg is not intentionally basic. However, this is only because D's leg is being moved indirectly by D through the intentionally basic movement of another part of D's body (his or her arm).

³⁴⁵ If it is established that D did not intend the bodily movement, then this is also the correct basis upon which to deny agency for the more complex descriptions. Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 303.

the complex action_p as a whole rather than each physical movement.³⁴⁶ Rather, Moore's claim relies on the fact that, whatever our intentions are concerning the more complex act_p descriptions, we *always* directly intend our bodily movements when we act_p. Thus, even if, when brushing our teeth we do not consciously intend every movement of our hand, if we were asked to think back carefully over the event it would be possible to recall that within the intended complex action_p, these basic acts_p were directly intentionally performed.³⁴⁷

The intentional criterion has also proven to be a useful argument for basic action theorists as they respond to the causal criticism discussed above. This is because, the claim that bodily movement is causally basic action_p has to deal with the observation that, technically, bodily movement *is caused* by a host of pre-movement processes. However, although we may be able to recall *intending* bodily movement, we do not generally think of ourselves as *intending* the pre-movement processes that lead to that bodily movement. If we intend or will the movement of our bodies, then they move without the separate willing of muscles contracting or neurons firing. In fact, if we wanted to contract our muscles or fire neurons, we would only know how to do so by intending to move our body.³⁴⁸

Since we do not know how to will such things [as pre-movement processes], their occurrence when we move our bodies is no basic act of ours.³⁴⁹

³⁴⁶ Moore, *Act and Crime* 150-154.

³⁴⁷ *Ibid*, 153.

³⁴⁸ *Ibid*, 103.

³⁴⁹ Moore, *Act and Crime* 103.

Thus, although certain action theories may have struggled to defend the causal criterion for bodily movement when discussing pre-movement processes, the intentional criterion offers them fresh support for the identification of bodily movement.

Duff, however, contends that bodily movement is not intentionally basic.³⁵⁰ Attacking the proposition from either side, Duff argues that certain intentional complex actions_p can be performed without intentional bodily movement, and that it is possible to intend certain pre-movement processes. If successful with either of these lines of argument, the intentional criterion will be undermined.

The first line of criticism contends that certain intentional complex action_p can be performed without directly intended bodily movement. The most common example in this regard is of *D tying his or her shoelaces*. Although D's bodily movements cause the laces to be tied, critics contend that D's intention will always focus on the complex action_p (tying the laces) and not upon the basic action_p (the individual movement of D's fingers). In response, as mentioned above, basic action theorists could maintain that although D's focus may be on the more complex act_p, he or she is still directly (if not fully consciously) intending the basic actions_p and, if asked, would be able to recall them. However, this response does not undermine the criticism. This is because, the criticism is not simply that D will rarely intend his or her basic action_p in examples like this, it is that:

³⁵⁰ Duff, *Criminal Attempts* 258-259.

... [D] *cannot* directly intend those movements simply as bodily movements; [D] can identify them only by reference to the actions in which they are involved.³⁵¹

Thus, because D can only intend the bodily movements necessary to tie his or her laces *by* intending the full complex act_p of lace tying, the bodily movement is not intentionally basic to the complex description.

If successful in relation to the tying of laces, it is a criticism that can be expanded to include almost any example of co-ordinated behaviour.³⁵² This would mean that for a large proportion of human behaviour, including a large proportion of criminal offences, intentional bodily movement (if possible to intend at all) would not be intentionally basic. Such a conclusion would undermine the uses made of the intentional criterion discussed above. Beyond this, if the intentional criterion actually identifies variations of complex act_p descriptions rather than bodily movement as the basis of action_p, the conclusion has the potential to undermine the search for basic action_p altogether.³⁵³

Moore, whose theory of basic action_p relies upon the intentional criterion, has provided an interesting response. He maintains that although D may not consciously intend each bodily movement when performing various complex actions_p, they are still intentionally basic because when D first learnt to tie his or her shoe laces, or first learnt to ride a bike or to speak etc, bodily movement was intentionally basic within the learning process.³⁵⁴ It is

³⁵¹ Duff, *Criminal Attempts* 258.

³⁵² Duff provides the examples 'typing, playing musical instruments, riding a bicycle, and speaking.' *Ibid*, 258.

³⁵³ For a discussion of this point, leading to Duff's nominalist conception of action, see Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 116-135.

³⁵⁴ Moore, *Act and Crime* 161.

acceptable that, over time, complex actions_p become more routine and we no longer have to think consciously about the basic actions_p within them. This is because, if we encounter a new task, or if we have to think carefully about a routine one, the intentional basicness of bodily movement becomes clear. The problem with this response, as Duff highlights, is that complex acts_p like tying laces are not learnt in an abstract form of bodily movement and then applied to the task of lace tying: even during the learning process, the focus is on the complex action_p rather than D's individual movements. Further, even if we accept Moore's position, accepting that bodily movement was intentionally basic at one stage in the past does not translate into them being intentionally basic to D's current actions_p.³⁵⁵ Thus, following the same logic employed by Moore to conclude that pre-movement processes are not basic acts_p, bodily movement also appears vulnerable:

Since we do not know how to will such things [as bodily movements], their occurrence when we [complete complex actions_p like tying laces] is no basic act of ours.³⁵⁶

The second line of criticism against the intentional criterion is constructed as a companion to the first: focusing upon the ability of D to intend certain pre-movement processes. If basic action theorists wish to escape the first line of criticism, one option is the contention that bodily movement is basic, not because it is *always* directly intended, but because it is the most causally basic action_p that *can* be intended.³⁵⁷ Thus, although the intentional criterion alone might establish that the complex act_p of tying laces is basic to the bodily movements involved, because the bodily movements are performed intentionally, and because they are

³⁵⁵ Duff, *Criminal Attempts* 258-259.

³⁵⁶ This is a remodelling of a quote from Moore where he concludes that pre-movement processes do not represent basic action_p because they are not directly intended. Moore, *Act and Crime* 103. See p112 above.

³⁵⁷ This is a position often ascribed to Davidson. See, Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 202.

causally basic to the complex description, they still represent basic action_p. Thus, the basic action theorist is able to accept Duff's criticisms of both causal and intentional criteria, but through the combination of the two, still maintain that bodily movement is correctly identified as basic action_p.³⁵⁸

Despite the approaches initial plausibility, however, an individual's ability to intend (directly or not) anything that is causally basic to bodily movement will undermine it. It is an ability that, without the qualifier of *directness*, seems eminently plausible. A common example employed by critics is of an expert psychologist or neurophysiologist who intentionally moves a limb in order to measure brain patterns or the firing of neurons. In such a case, although the pre-movement processes are not *directly* intended, they are fully understood by the expert and thus clearly intentional under some description.³⁵⁹ Beyond this, it is also possible to imagine a non-expert moving his or her limbs in a certain way intending to perform pre-movement processes, certainly in order intentionally to contract muscles: a scientific understanding of movement has never been a criterion of action_p. Thus, in a similar manner to the causal criterion, theories of basic action are encouraged to concede bodily movement in favour of pre-movement processes.

Theories of basic action are therefore caught between the two criticisms. On the one hand, theorists might argue that the intentional criterion, combined with the causal criterion, highlights bodily movement as the most causally basic form of action_p that can be intended. However, in doing so, they are undermined by the observation that it is possible to intend

³⁵⁸ For discussion, see Baier, 'The search for basic actions' (1971) 8(2) *American Philosophical Quarterly*, 161, 165-168.

³⁵⁹ See, for example, Duff, *Criminal Attempts* 259; Baier, 'The search for basic actions' (1971) 8(2) *American Philosophical Quarterly*, 161, 166.

(though not directly) pre-movement processes. On the other hand, theorists might argue simply that bodily movement is intentionally basic because it is the only form of action that is directly intended. This avoids the regression into pre-movement processes (as these are not *directly* intended). However, it is undermined by the observation that when performing certain complex actions_p, D's bodily movements are not always directly intended.³⁶⁰ A theory of basic action may deal adequately with one of these lines of attack, but it is very difficult to avoid them both.³⁶¹

Before going into further detail about how basic action theorists might be able to respond to these criticisms, it is important to take stock of element analysis's *essential* requirements in relation to the intentional criterion. If the intentional criterion were able to establish that bodily movement is intentionally basic to all other action_p, then as discussed above, this would lend considerable support to the preferred definition of that act element. However, it appears that any attempt to incorporate the intentional criterion fully into element analysis would lead inevitably to the two vulnerabilities discussed earlier. Therefore, partly in light of the serious criticism that the intentional criterion has received, but also in light of our conclusion that the causal criterion already identifies bodily movement as basic on one level, our construction of element analysis will avoid relying on the *full* intentional criterion.

We concluded our discussion of the causal criterion with the observation that the criminal law is only interested with action_p that takes place within the external world. On this basis,

³⁶⁰ This same line of criticism also leads Moore to accept that, in certain circumstances, purely internal processes can represent basic action_p. This is where, for example, D learns to control the electrical charge of his body, sets up a machine that is activated by this charge, and then claims he or she has not acted_p when operating it. Moore, *Act and Crime* 264-265.

³⁶¹ Baier, 'The search for basic actions' (1971) 8(2) *American Philosophical Quarterly*, 161, 168.

we were able to identify bodily movement as a causally basic act_e within the criminal law, and it is also upon this basis that we should avoid an intentional criterion that again (within at least one of its guises) threatens to re-define the act element in terms of pre-movement processes.

The causal criterion alone, however, is not sufficient to establish bodily movement as an appropriate definition of the act element. For the act element to perform its role effectively as a nexus between D and the criminal event, a milder version of the intentional criterion will still have to be established: it must be demonstrated that within every intentional complex action_p, D also intends his or her bodily movement. Although bodily movement might provide a *causal* nexus between D and the criminal event, if D can intentionally commit a crime without intentionally moving his or her body, then bodily movement will not always be the appropriate starting point from which to construct D's agency. If the act element is to be useful, an inquiry into the mens rea requirement within the act element must always make sense: if movement is intended then it will form the basis upon which to assess D's agency for the more complex action_p (the circumstance and result elements within the offence), and if the movement is not intended then it will be the basis upon which D is freed of agency/criminal responsibility in relation to both the basic and complex act_{e/p} descriptions.³⁶²

³⁶² Duff criticises the identification of bodily movement as the conduct requirement within the act element because it 'does not tell us how to distinguish voluntary from involuntary movements.' Whilst, as a direct reply to the criticism, it seems perfectly reasonable to point out that this is not the role of the conduct requirement within the act element, it nevertheless remains the case that the identification of bodily movement must facilitate questions relating to mens rea. Thus, it must always make sense to ask whether D intended a certain bodily movement. See, Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 83.

Therefore, if the act element (defined in terms of bodily movement) is to be able to perform its role effectively, a role that is essential to the nexus between D and the criminal event,³⁶³ it must be established that within every complex action_p D also intends his or her bodily movement. Thus, in relation to the criticisms of the intentional criterion discussed above, we need only engage with those criticisms that would seek to undermine this *milder* criterion.

Having re-defined the intentional criterion, it appears that the main objection will come in relation to co-ordinated complex action_p. As we discussed above, where D performs a complex action_p like tying shoe laces or riding a bike, he or she will generally do so by intending the full complex action_p rather than through the willing of each individual bodily movement. In fact, if asked to perform the bodily movements without the relevant circumstances being present, without the laces or the bike, D is likely to find it very difficult (if not impossible).³⁶⁴ Therefore, we *may* conclude that D, in these cases, does not intend his or her bodily movement at all: he or she *only* intends the full complex action_p.

Such a conclusion, however, seems to be wholly unintuitive. Although we may accept that D does not *directly* intend his or her bodily movement, if the complex action_p is intentionally performed, and if D's bodily movements form an integral part of that complex action_p, surely D's complex action_p intention encompasses an intention to perform the required

³⁶³ Having concluded that act requirement (defined in relation to bodily movement) is a condition of liability rather than its object, Duff questions whether it retains an essential role. As we can now see, the provision of a nexus between D and the criminal event (the other elements of the offence) represents that essential role. See Duff, 'Action, the act requirement and criminal liability' in Hyman and Stewart (eds), *Agency and Actions* (Cambridge University Press, Cambridge 2004) 69, 79.

³⁶⁴ Duff, *Criminal Attempts* 258-9.

bodily movements. Indeed, when discussing the nature of intention more generally, Duff too seems to accept the logic of this proposition:

If the occurrence of X entails that of Y, the non-occurrence of Y will entail the non-occurrence of X, and thus the failure of the action which was intended to bring X about: the agent must therefore be taken to intend Y as well as X, since she intends any effect whose non-occurrence would entail the failure of her action.³⁶⁵

Despite this form of composite intention, in which the intentional complex action_p necessitates and therefore assumes the intention of certain bodily movements, there may still be a remaining concern about how this intention might be expressed. For Davidson, this is satisfied by the broad notion of intention *under some description*. Thus, although it might seem unnatural to speak of intentional bodily movements in relation to a co-ordinated complex action_p, if such movement is either directly intended or must be intended as part of the wider complex action_p, then it is intentional 'under some description'.³⁶⁶

Such descriptions are, to be sure, apt to be trivial and unrevealing; this is what ensures their existence. So, if I tie my shoelaces, here is a description of my movements: I move my body in just the way required to tie my shoelaces.³⁶⁷

³⁶⁵ Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 90. Duff comments (p91) that the rule will not always be easy to apply, for example, if it is unclear whether X really does *entail* the occurrence of Y. However, in relation to complex actions_p, it will usually be relatively clear whether bodily movement is required or not.

³⁶⁶ Davidson, 'Essay 3: Agency' in *Essays on Actions and Events* (Oxford University Press, Oxford 2001) 43, 50. Interestingly, it may also be satisfied where a facet of the complex action_p is not intended. For example, where a pilot intentionally depresses levers that have the unintended result of turning off the engines, only the bodily movement and not the result is intentional. See, Hornsby, 'Action and aberration' (1993) 142 *University of Pennsylvania Law Review* 1719, 1728.

³⁶⁷ Davidson, 'Essay 3: Agency' in *Essays on Actions and Events* (Oxford University Press, Oxford 2001) 43, 51.

The problem with this approach, for Davidson and other basic action theorists, is that it creates the potential for infinite regression in relation to what can be intended. Where D completes a complex action_p entailing certain bodily movement, this movement will always be intentional under some description. However, what about the pre-movement processes that led to that bodily movement? If these can also be intentional *under some description* then surely they too will count as action_p. Could we not say, for example, that when I tie my shoelaces, I fire neurons and contract my muscles *in just the way required to tie my shoelaces*, or that the tying of my shoelaces entails the movement of my fingers (such that a failure to move my fingers would result in a failure to tie my laces)?

Although this may cause problems for theories of basic action, however, infinite regression in terms of what can be intended does not harm element analysis even if it is successfully established. With the causal criterion already justifying the identification of bodily movement as the act element, all that is required of the intentional criterion is to demonstrate that bodily movement is always intended (within intentional complex act_p descriptions): a role that it performs with little difficulty.

Conclusion

Although we have rejected Moore's coupling of action theory with the preferred definition of the act element, it is clear that the essential justification for bodily movement as the conduct requirement within the act element has remained intact. Bodily movement can provide a nexus between D and a criminal event (circumstances and results) because it is

the most causally basic intentional act_{e/p} that D can perform in the external world. If intended, bodily movement is therefore a basis upon which to construct D's wider agency and liability for the full offence. However, if it not intended, it is a clear basis upon which to excuse D criminal responsibility.

In this manner, the preferred model of element analysis is able to avoid the specific criticisms advanced nominalist action theorists. However, although element analysis has been decoupled from action realists, there remains a question as to whether it now has the potential to co-exist with a nominalist perspective. This final question within this chapter remains important if the preferred definition is to avoid the second vulnerability identified above.

THE IDENTIFICATION OF BODILY MOVEMENT WITHIN A NOMINALIST THEORY OF ACTION

As discussed in the previous section, Duff (in line with other nominalist action theorists³⁶⁸) has contended that bodily movement is neither a causally nor an intentionally basic description of action_p. Therefore, any attempt to define action_p in these terms is misguided. Action_p is not a natural kind to be discovered and defined, but rather a concept which is always relative to socially contextualised descriptions of it.³⁶⁹ Therefore, as criminal action_{e/p}

³⁶⁸ See, for example, Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 198-199.

³⁶⁹ See Duff, *Attempts* 310. See also discussion above at pp94-97.

is also relative to its descriptions, a version of element analysis that defines the act element in the strict terms of bodily movement is untenable.³⁷⁰

As we have discussed in the context of the causal and intentional criteria above, nominalist theorists have provided a series of fundamental criticisms to the identification of bodily movement as basic action_p.³⁷¹ Despite this, by distinguishing between basic action_p and the act element, we have so far been able to avoid Duff's conclusion that criticism of the criteria establishing bodily movement as basic action_p also undermines element analysis. However, the ability to defeat these specific lines of attack is not yet to demonstrate that element analysis (with the preferred definition of the act element) can work within a nominalist conception of action_p. The latter task, neglected by the traditional advocates of element analysis,³⁷² is nevertheless essential in order to avoid the second vulnerability. The preferred definition of the act element does not claim to provide a definition of action_p, and therefore, if it is to be established as a general structure for discussion and analysis within the criminal law, neutrality between the various logical theories of action_p must be maintained.

In the way of this neutrality, however, is the apparent conflict between the act element's rigid identification of bodily movement, and the fluidity of a nominalist conception of action_p (varying depending upon individual descriptions). The conflict results from the very different manner in which each approach seeks to identify intentional behaviour. Within the preferred definition of the act element (much like a realist conception of action_p), we begin by isolating the relevant bodily movements and then ask whether D performed them

³⁷⁰ Duff, *Criminal Attempts* 13 and 254.

³⁷¹ See Moore, *Act and Crime* 60-77.

³⁷² For theorists like Moore, whose advocacy of element analysis takes place within a realist conception of action_p, such a task would amount to an implied concession of that theory of action_p.

intentionally.³⁷³ In contrast, within a nominalist conception of action_p, intention becomes the starting point. Asking simply *what did D do intentionally*, the resulting action_p description, which is very likely to include more than simple bodily movement, is nevertheless what constitutes D's act_p. For example, if D *brushed his teeth intentionally*, then D's act_p is not limited to the intentional hand movement involved, it extends to the full complex description: intentional brushing of teeth. As a result, the identification of bodily movement within element analysis (where this conflicts with an action's_p natural description) has the potential to be artificial and misleading.³⁷⁴

This is not, however, a problem that is entirely unique to element analysis. If action_p is synonymous with its most natural description, and if we can only understand intentional behaviour by also focusing upon that single description, then nominalist theories of action_p will always present problems for the criminal law. This is because, unlike action_p descriptions that will inevitably vary between individuals and over time, the criminal law can only have one definition (setting out the proscribed actus reus and mens rea) for each offence. Therefore, accepting the nominalist conception of action_p, the criminal law would either have to create many millions of offences, each with subtly different requirements in order to cater for various action_p descriptions, or it must be possible for the definition of an offence to encompass lots of different action_p descriptions under a single banner. For example:

V owes D (a violent drug dealer) a considerable sum of money. Upon seeing D on the street, V tries to run away. D shoots V to stop him getting away. V dies as a result.

³⁷³ Whether this is always a correct representation of basic action theorists will be discussed in Chapter 5.

³⁷⁴ Duff, *Criminal Attempts* 310.

The offence of murder requires D to kill V with the intention either to kill or to cause serious harm.³⁷⁵ Thus, in the example, D appears to be quite straightforwardly liable for the offence of murder.³⁷⁶ However, if D's intentional conduct can only be viewed in relation to action_p descriptions, then potential problems arise: if asked to describe his conduct and intentions, D may well answer that he was merely trying to stop V getting away. The risk here is that, because D's descriptions of his own conduct and intention do not match the offence definition verbatim, nominalist action_p theorists may be forced to claim that he has not acted_p in the manner proscribed by the offence.³⁷⁷ However, such a claim has the potential to lead to the highly unacceptable position that D will only be liable for an offence when his or her action_p descriptions correlate with the offence definition exactly. An occurrence that is likely to be very rare unless D was actively seeking to break the law as a primary motive.

Despite the apparent conflict, however, this kind of criticism of nominalist action_p theory is relatively easy to dispatch. For example, when discussing a similar problem in relation to intention and criminal attempts, Duff comments that:

An agent acts 'with intent to commit an offence' if the content of her intention is such that, given the context in which she forms and acts on it, she would necessarily commit an offence in carrying it out.³⁷⁸

³⁷⁵ *Woollin* [1999] 1 A.C. 82.

³⁷⁶ We are assuming that D does not have a valid defence.

³⁷⁷ Although a third party viewing the offence might describe D's action_p in a manner more reflective of the offence definition, when it comes to the fault requirements of an offence, it is D's view of his or her own conduct that is our focus.

³⁷⁸ Duff, *Criminal Attempts* 23. 'Intent', in this context, is referring to direct as opposed to oblique intention. D is not acting upon an intention whilst foreseeing the potential occurrence of another event. Rather, the event

Therefore, although D (in our example above) would describe his actions and intention in a different manner from the offence definition, he is still caught by the offence because his intentional conduct *necessarily* involved the intentional infliction of serious harm upon V: the infliction of serious harm was entailed within the wider intended action_p because, without it, the intended action_p could not have come about. In this way, Duff is accepting that D's action_p description and possibly even the most natural description of D's act_p does not have to be reflected in the offence definition.³⁷⁹ The definition of an offence is not claiming to be an exact description of an individual act_p. Rather, it is a construction that is employed to forbid multiple harmful acts_p under a single provision, and, as such, it is legitimate to look within action_p descriptions in order to establish potential liability.³⁸⁰

Returning to element analysis and the preferred definition of the act element, we may now employ the same logic (as that explored above) to justify the use of element analysis alongside a nominalist conception of action_p. Duff criticises the preferred definition of the act element because action_p is relative to socially contextualised descriptions and is therefore not always constituted by bodily movement. However, we have already concluded in the previous section that the definition of the act element is different from, and not dependent upon, the contention that basic action_p should be identified as bodily movement. Therefore, although the preferred definition of the act element is unlikely to reflect an act_p description from a nominalist perspective, unlike the clash between

is an essential part of the wider intended action: without the occurrence of the event, D's intended enterprise would have failed.

³⁷⁹ For further discussion, see Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 89-91.

³⁸⁰ A further example, discussed by Duff, related to duress. If D is forced to commit an offence under duress then he or she may well claim that it was done against his or her will, and may describe the action_p in terms of the prevention of injury. However, the offence is still done intentionally 'on some level'. *Ibid*, 52-53.

nominalist and realist action_p theories, this lack of correlation is more akin to the current lack of correlation between nominalist action_p descriptions and a standard (offence analysis) offence definition: the act element, like the offence definition, is not intended to reflect an act_p description.³⁸¹

As soon as the definition of the act element is liberated from any ties with the realist conception of action_p it can be correctly identified alongside any other method of offence definition. In relation to the murder example above, nominalist action_p theorists can only accept D's conviction for murder by accepting that D's description of his own intentional actions_p do not have to be reflected exactly by the definition of the offence. Rather, D is liable because his intentional actions_p *necessarily* included the intentional conduct proscribed by the offence definition. Therefore, although a description of D's bodily movement (the act element) will rarely reflect a nominalist action_p description, it may nevertheless be employed by the criminal law: D may not describe his actions_p (when shooting V) in relation to the intentional movement of his body, but such movements will be necessarily involved within (will be an essential ingredient of) any description that D does provide. Therefore, if a nominalist action_p theorist can accept the compatibility of their own action_p theory with offence analysis, then it must also be compatible with element analysis.

³⁸¹ This is why Duff's criticism of the identification of bodily movement in relation to theories of basic action_p, that it strips so much detail away from action_p that it undermines the search for its essence, does not apply to the preferred definition of the act element. The act element does not claim to provide any more detail than the specific movements of D's body, and to the extent that this strips away any more detail than offence analysis (which Duff accepts in practice) this is quickly remedied by an examination of the other elements. Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 103.

CONCLUSION

The preceding discussion does not claim to have demonstrated that nominalist action_p theorists should employ or even approve of the use of element analysis within the criminal law. Rather, it has shown that despite the preferred definition of the act element focusing on bodily movement, element analysis (like offence analysis) is not incompatible with a nominalist action_p theory. Element analysis and the preferred definition of the act element are not attempts to define a conception of action_p, but rather devices of the criminal law. Thus, for example, although Smith and Hogan believed that ‘obviously the sensible way of describing’³⁸² action_p is to do so including relevant circumstances and results, it is entirely consistent for them to have also believed that ‘for the purposes of the criminal law it is sometimes necessary to break down an ‘act[_p],’ so comprehensively described, into the constituents’ involved in element analysis.³⁸³

³⁸² Smith and Hogan, *Criminal law* (5th Ed, Butterworths, London 1983) 35.

³⁸³ *Ibid*, 35.

CHAPTER 5

THE UNDER (AND OVER) INCLUSIVITY OF THE ACT ELEMENT

We have so far demonstrated (in chapter 4) that the preferred definition of the act element, neutral between the various philosophies of action_p, is nevertheless capable of providing an effective nexus (in terms of agency) between D and a criminal event. However, in doing so, we have tended to focus our discussion of the criminal law upon a relatively small selection paradigm offences (for example, murder and rape), each of which contain a very obvious requirement of bodily movement. The challenge for the preferred definition of the act element, within this chapter, is to demonstrate that it is capable of operating within *any* criminal offence, even those that do not appear at first glance to contain a requirement of bodily movement. As stated earlier in chapter 4, the viability of element analysis partly hinges upon the contention that every offence contains an act_e: the act element provides the link between D and the criminal event³⁸⁴ and it is only then, grounded upon this link, that D's potential liability can be determined. Thus, if it can be demonstrated that certain offences do not require an act_e (as defined), and yet we still believe that these offences have a place within the criminal law, then the preferred definition of the act element must be rejected.

³⁸⁴ The criminal event refers to the full complex description of the offence, including its circumstance and result elements.

Objections to the preferred definition of the act element, based upon the contention that certain offences do not require bodily movement, have been widely explored in the literature. The debate has centred on verbal offences, omissions offences, possession offences and (the potential criminalisation of) thought and status based offences. Discussing each in turn, we must now assess whether the preferred definition of the act element is capable of performing its role effectively in each case.

VERBAL OFFENCES

The first area in which the preferred definition of the act element has received criticism is in relation to its treatment of offences that can be committed verbally, such as harassment,³⁸⁵ inciting racial hatred³⁸⁶ or encouraging crime.³⁸⁷ The question here is to what extent speaking can be labelled as bodily movement in order to come within the act element. For Robinson, who also defines the act element in relation to bodily movement, speaking would come within this category quite straightforwardly. Thus, when discussing the offence of harassment, Robinson states that:

... the [act] element is the *simple act of speaking*; the conduct's characteristics – it's insulting character, its likelihood of provoking a violent response – should be treated as circumstance elements.³⁸⁸ (emphasis added)

³⁸⁵ Contrary to the Public Order Act 1986, s5.

³⁸⁶ Contrary to the Public Order Act 1986, s18.

³⁸⁷ Contrary to the Serious Crime Act 2007, Part 2.

³⁸⁸ Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681.

Robinson's separation of the elements of harassment is very appealing. Certainly, in terms of simplicity, it would be most natural to describe and analyse D's act_e as one of speaking. However, as Duff has correctly pointed out, the *simple act of speaking* describes considerably 'more than simple bodily movements.'³⁸⁹ For example, it would be very difficult to maintain that the sounds emitted from D's mouth are in any manner an extension of D's physical being. Thus, if we accept Duff's criticism, as it seems that we must, we can either extend the definition of action_e to include speaking or we can reject Robinson's reasoning and isolate only the bodily movement involved in speech, but we must do one of these.

Although the first solution of extending the definition of action_e might have an initial appeal in terms of simplicity, to allow ourselves to move away from bodily movement has the potential to bring into question our definition of the act element more generally. Moore, when discussing the problem cases of status, possession and omission offences in a chapter headed 'the doctrinal unity of the act requirement',³⁹⁰ does not deal explicitly with verbal offences. Indeed, *Act and Crime* (as I read it) provides a mixed response to the question of whether there can be an act element of speaking.³⁹¹ However, Moore's general thesis about the identification of bodily movement as the basis of the act element, that bodily movement is the most basic thing that can be intentionally done, may be interpreted to lend support to the further identification of speaking. For example, Moore (like Davidson) excludes pre-movement processes as a lone form of action_{e/p} because if D sets out to perform them, he

³⁸⁹ Moore, *Act and Crime* 82.

³⁹⁰ Moore, *Act and Crime* 17-37.

³⁹¹ Moore, *Act and Crime*. On the one hand, Moore refers favourably to Austin's separation of speaking in terms of the act_e of bodily movement and the result of sound being emitted (p221). However, on the other hand, Moore also refers without qualification to 'ones bodily movements (of speaking)', which implies that the noise is also part of the act_e (p220).

or she can only do so by intentionally moving part of his or her body: the two are intrinsically linked.³⁹² Likewise, if D wanted to perform the vocal cord and mouth movements required to speak, he or she would only be able to do so by intentionally speaking. Thus, it could be argued that upon this basis speaking should be identified alongside bodily movement within the definition of the act element.

However, just as we distinguished our reasoning from Moore's when identifying bodily movement as action_e (free from volitions), so we must do so again. This is because if we accept the line of reasoning that includes speaking (including noise) within the act element, we must also accept the same conclusion for all variations of complex co-ordinated behaviour. As Duff explains, just as D cannot intentionally move his or her mouth and vocal cords without intentionally speaking, so must D actually tie his or her laces or ride his or her bike in order to perform the bodily movements involved in those tasks as well.³⁹³ Thus, to extend the act element in relation to verbal offences would be to effectively undermine our preferred definition.

Therefore, staying true to our preferred definition, we must reject Robinson's identification of sound as part of the act element. As Austin contends,³⁹⁴ the act element should relate solely to the bodily movement of D. Bodily movement that in this case will include the movement of D's mouth. The sound created by these movements, like anything caused by an act_e of D, will constitute a result element. Thus, drawing back to Robinson's example of

³⁹² Moore, *Act and Crime* 103-108.

³⁹³ Duff, *Criminal Attempts* 258-259.

³⁹⁴ See, Austin, *How to do things with words* (2nd ed, Harvard University Press, 1975) 114.

harassment that has led to this criticism, we may now separate the elements of the actus reus in a way that compliments (rather than undermines) our version of element analysis:

Act: The bodily movement required to make a noise;

Result: The sounds emitted; and

Circumstance: The sounds meaning, the insulting character etc.

Although we have chosen this method chiefly to avoid creating problems for our analysis of other offences, we may well find that this method of separation is better equipped to deal with a few problem cases. For example, if D is restrained and his or her voice is muffled in some way, it may well be that although the act element is satisfied the muffler prevents any sound being emitted. Thus, the separation of physical movement from sound is able to do some genuine work. Further, we may also pre-empt a claim that the narrowness of the act element means that it (in effect) has no function. As with all other offences, we are relying upon the act element to provide a nexus of agency between D and the criminal event. The movement required to speak can perform this role if done intentionally, and if not intentional, for example if D is speaking in his or her sleep, it is also able to exclude D's agency. Therefore, verbal offences do not represent a counter-example to the preferred definition of the act element.

OMISSIONS OFFENCES

In relation to verbal offences, we have been able to identify relevant bodily movement upon which to construct an act element. However, omissions liability represents both an obvious, and a very extensive, category of offences that do not require bodily movement at all.³⁹⁵ This category includes a raft of regulatory offences.³⁹⁶ However, even beyond this, it also extends to include a multitude result crimes, including murder.³⁹⁷ For example, if D puts his or her car into cruise control and locks its steering, only then realising that V (D's enemy) is standing in the road ahead, D will be liable for murder if he or she does not at least attempt to intervene in order to prevent the car from hitting and killing V.³⁹⁸ Thus, D will not simply be liable for murder in the absence of bodily movement; he or she will be liable *because of* the absence of bodily movement.

If element analysis requires that the act element should be defined solely in terms of bodily movement, and every criminal offence requires an act_e, then D (the motionless driver) will not be liable. This is clearly unacceptable. It is for this reason that the act element, although principally defined in relation to bodily movement, must also extend to include omissions if it is to adequately cater for the full range of possible offences:

- **Act element:** The bodily movement (*or omission*) necessary for the offence.

³⁹⁵ See, Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 204.

³⁹⁶ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 61-62.

³⁹⁷ *Gibbons and Proctor* (1918) 13 Cr. App. R. 134.

³⁹⁸ Example taken from Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1538.

As we stated in chapter 3, omissions in this context are defined simply as a lack of bodily movement.³⁹⁹ Thus, D, in the driving example above, cannot escape liability upon the basis that he or she did not move his or her body whilst possessing the requisite mens rea for murder: the omission to move may still constitute an action_e. For several action theorists however, again interpreting the act element as if it was an attempt to define action_p, the preferred definition of an omission and its inclusion within the act element are both perceived as unsound. Therefore, just as the critics of element analysis have employed their theories of action_p in an attempt to undermine the identification of bodily movement as action_{e/p}, we see a similar attack in relation to omissions (a lack of bodily movement) and its inclusion within the act element.⁴⁰⁰ If such criticisms are successful, and if omissions cannot be included within the act element, then element analysis will be unable to explain this important area of the criminal law and must be rejected.

As with the identification of bodily movement, it is also possible to draw on certain action_p theorists in order to gain support of our definition of an omission as the absence of bodily movement.⁴⁰¹ Moore, for example, defines true omissions⁴⁰² simply as ‘absent actions_[p]’.⁴⁰³ However, if like Moore we are required to defend this thesis on a philosophical level, such a position becomes very difficult to maintain. It is not greatly troubled by the criticism that

³⁹⁹ This definition of omissions, as the absence of bodily movement, already accords with several Criminal Codes. For example, the US MPC §1.13(4).

⁴⁰⁰ For example, Duff uses the example of omissions based offences to claim that bodily movement is not ‘what interests the criminal law’. Duff, ‘Action, the act requirement and criminal liability’ in Hyman and Stewart (eds), *Agency and Actions* (Cambridge University Press, Cambridge 2004) 69, 80-84. See also, Moore, *Act and Crime* 86.

⁴⁰¹ See, for example, Moore, *Act and Crime* 22-34, and Kamm, ‘Action, omission, and the stringency of duties’ (1993) 142 *University of Pennsylvania Law Review*, 1493, 1495.

⁴⁰² I say *true* omissions because certain offences that appear to criminalise omissions can often be reanalysed to include an act_p. For example, the offence of practising medicine without a licence: the act_{e/p} is the bodily movement required to practice medicine and the omission of the licence becomes a circumstance element. See, Moore, *Act and Crime* 32.

⁴⁰³ Moore, *Act and Crime* 87.

when D is omitting to perform a certain bodily movement he or she may well be performing any number of other bodily movements: although D is moving, he or she is still omitting to undertake the bodily movements necessary to perform the specific movement required.⁴⁰⁴ However, even Moore accepts that there may be some blurring of the distinction between acts_p and omissions at a certain stage. For example, Moore believes that active resistance to movement can be correctly classified as an action_p:

‘A resisting occurs when an agent’s body is about to be made to move by outside forces, but he keeps his body from moving by activating the appropriate muscles.’ [An] example of standing on one’s head is a good example of resisting, where ... I would conclude there is an action.

As long as we ‘construe “bodily movements” to include muscle-flexing’, as we should in these cases where we use our muscles to resist an outside force, there is nothing inconsistent with my theory of action in concluding that such resistings are actions, not omissions.⁴⁰⁵

A slight blurring of the distinction between acts and omissions may not appear to be greatly troubling; after all, they both come within the act element and so there is no issue of objective separation. However, just as we found when attempting to gain philosophical support for the identification of bodily movement, adopting a certain theoretical stance can

⁴⁰⁴ The criticism that by performing other movements (X) D is acting_p when he or she is omitting to do a certain activity (Y) is very weak. Although D is doing X, he or she is still *omitting* to do Y, an omission that entails the absence of the bodily movement required to do Y. See, Fletcher, ‘On the moral irrelevance of bodily movements’ (1993) 142 *University of Pennsylvania Law Review*, 1443, 1452 and Moore’s response, Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 267.

⁴⁰⁵ Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 272-273. Quoting Moore, *Act and Crime* 87 and 88 fn4.

often lead to the two vulnerabilities discussed in the previous chapter: the widening of the target for critics and the alienation of those that do not share the same theoretical view. This would certainly seem to be the case if we were to employ the Moorian theory.

Although Moore's contention that certain resisting can be action_p is presented as a minor issue and one that can be reconciled with the rest of his theory, it nevertheless represents a point of weakness that can be exploited by his critics. This is because, although the example of *resistance* is clearly distinguishable from an example where D fails to complete a legally *required* movement,⁴⁰⁶ Moore is less convincing when he attempts to distinguish it from *refraining* from movement more generally. For example, when discussing D who remains standing and motionless on a burning deck when everyone else has fled,⁴⁰⁷ Moore states that:

... 'such refraining are not actions'. Standing still may become so difficult physically that it is like standing on one's head, in which case it will become a resisting and thus, on my account, an action; yet as [the] example of the boy frozen to the deck illustrates, one more usually stands still and in standing still does nothing at all.⁴⁰⁸

The problems emerge for Moore when we attempt to identify the criteria he is employing to distinguish refraining (the motionless child) from resisting (the man standing on his head). First, evidenced from the first abstract quoted, Moore could be interpreted as suggesting

⁴⁰⁶ For example, D's failure to intervene to prevent his or her car from killing V.

⁴⁰⁷ The example is taken from Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 204.

⁴⁰⁸ Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 273.

that there is an objective criterion based upon 'outside forces':⁴⁰⁹ resisting *is* action_p because D is using his or her muscles to resist outside forces that would otherwise result in movement. However, the very same outside forces (gravity) are surely working in the same way upon the motionless child that must also use his muscles in order to stay standing. Moore seems to recognise this problem in the second quoted abstract when he accepts that it is possible to be resisting while standing up, but distinguishes it on the basis that standing (unlike standing on one's head) is not generally difficult. This is problematic. Either Moore is suggesting that physical difficulty is a criterion of action_p, in which case we are left to wonder just how much exertion is required before D begins to act_p. Or, as is more likely, Moore is creating a subjective criterion whereby D is only acting_p if, due to the difficulty of the non-movement, he or she has to think actively about not moving. However, even this more reasonable-sounding criterion would create inconsistencies with Moore's theory of action_p more generally. Moore makes pains to point out, for example, in relation to bodily movement that D does not have to be fully conscious of that movement in order for it to be classified as action_p.⁴¹⁰ As a result, Moore's conceptualisation of omissions not only raises problems of internal consistency, it also casts doubt on his description of action_p as bodily movement.

Moore is effectively forced into this compromised position because of the similarities, in terms of volitions, between resisting-omissions and bodily movement within his theory of action_p. However, without a concept of action_p to protect (and to be drawn in by), we are free to reject the complex (and problematic) route taken by Moore. Instead, just as we distinguished action_p from action_e, so we can distinguish omissions_p from our identification

⁴⁰⁹ *Ibid*, 273

⁴¹⁰ For discussion of this, see the causal and intentional criteria in Chapter 4, pp102-125.

of omissions within the criminal law as a lack of bodily movement (omissions_e).⁴¹¹ Indeed, when dealing with omissions_p and the criminal law, Moore also has to make use of a similar distinction. This is because, although Moore regards resisting as a form of action_p and thus being capable of coming within the act element, he also recognises that there are certain offences that are based upon true omissions (non-action_p). For example, although the motionless driver whose car runs down V in the example above is not *resisting* in the Moorian sense, his or her omission will still be caught within the act element.⁴¹² Therefore, Moore's distinction between types of omissions_p does not appear to aid the criminal law.

With a clear conflict of interests, Moore can be seen to prioritise his theory of action_p above the consistency and simplicity of his model of element analysis: a conflict of interests that we do not share, and a conclusion that we do not intend to replicate. As long as our definition of omissions_e is capable of performing its role within the act element as the nexus between D and the criminal event, and can deal adequately with the current omissions based offences, then it is acceptable in the criminal context. It is to this issue that we must now turn.

Omissions_e as a basis for element analysis

⁴¹¹ Our definition of omissions_e, and element analysis more generally, is not therefore affected by philosophical debate about whether certain omissions_p constitute acts_p.

⁴¹² Corrado mistakenly claims that because Moore does not recognise the motionless driver's omission as an act_p, Moore is forced to conclude that D has not committed a crime. However, Moore makes it clear in his response to Corrado that, although D has not acted_p, the omission will still come within the act element (as the sole exception to the act_p requirement). See, Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1538 and Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 268-271.

In order to assess whether our preferred definition of omissions_e can perform its role within the criminal law, we must first examine the effectiveness of omissions_e in terms of attributing agency and responsibility. However, beyond this, if we find that omissions are capable of performing the role effectively, we must then explore the possibility that this conclusion may undermine the identification of bodily movement as the paradigm of action_e.

In order to assess the appropriateness of bodily movement as a nexus of agency and responsibility between D and a criminal event in chapter 4, we enquired as to the most causally basic thing that D can intentionally do to bring about a criminal event. This inquiry confirmed that bodily movement can provide a nexus, even for result crimes, within the criminal law. However, as we have discussed, not all criminal results are brought about through bodily movement. The question now is whether the same inquiry can also lead us to a lack of bodily movement (omission_e)?

The main obstacle to the identification of omissions_e within this structure is the requirement of causality. Moore, for example, contends that a lack of movement can never cause anything.⁴¹³ The causal requirement, however, is vital in order to establish that D is responsible for the criminal result in terms of agency. D's movements, or lack of movements, must tie him or her to the other parts of the offence. Secondly, causation is also necessary for the functioning of element analysis and the ability to distinguish results (caused by the act element) from circumstances (not caused by the act element).

⁴¹³ Moore, *Act and Crime* 276-279.

For Moore, a lack of bodily movement cannot be causal in the same way as bodily movement or even a state of affairs, because it is essentially indeterminable. For example, when commenting on the state of an untouched patch of grass, Moore states that:

Such an absence of *any* change of such a state is hardly the same as the absence of elephants trampling the grass down; such an omission is only an absence of *one* way in which there could be a change of such a state.⁴¹⁴

Therefore, unlike the tangible inquiry into bodily movement and the static identification of states, omissions_p are infinitely expandable. As a result, if we conclude that my omission_p to help a drowning V to safety *caused* his or her death, we must also conclude that the omission of everyone else in the world from helping was equally causal.

Although we must accept Moore's reasoning, we do not have to accept his conclusion that a lack of movement cannot perform a causal role within the criminal law. This is because, whilst Moore is attempting to conceptualise *all* omissions_p, we are only concerned with those omissions that are capable of coming within the criminal law (omissions_e). For example, the criminal law does not target people generally for not moving and allowing harms to come about, but rather, it will only target D who fails to perform a certain bodily movement that is specifically required by law.

Therefore, although Moore is concerned by an indeterminate class of omissions_p, for our purposes, individual offences will provide a focus that makes only a single individual and a

⁴¹⁴ Moore, *Act and Crime* 277.

single omission_e relevant. For example, let us imagine that it is a criminal offence for D not to drive his elephant herd across a patch of grass once a day to keep it flat. Upon discovering that the grass has been untouched for several days, Moore would be correct to point out that the untouched state of the grass is maintained by an indeterminate class of omissions to flatten it. It is a class which covers an infinite number of people. However, with the criminal law providing a specific duty upon D, we have a reason to single his or her omission out as the only cause that is relevant. Thus, despite the indeterminate causal nature of omissions, we do not have to complicate our analysis by claiming that D's omission_p should be reinterpreted as an action_p,⁴¹⁵ or construct a new class of 'punishable omissions',⁴¹⁶ either of which would distort our overall thesis.⁴¹⁷ Rather, through the identification of a legal duty, the offence definitions provide the focus upon a single omission_e that is necessary for a causal act element.

An omission_e therefore, like bodily movement, represents the most causally basic thing that D can intentionally do to bring about a criminal result. As with bodily movement, we are not concerned with pre-omission_e processes or motives. Thus, it does not affect our reasoning if D's omission_e can be classified philosophically as a refraining or a resisting. Rather, having established that D owes a legal duty to perform certain movements, we simply ask whether

⁴¹⁵ Corrado criticises Moore for stretching his definition of action_p in an unprincipled way in order to accommodate those omissions_p that he would like to punish. Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1541 (fn38).

⁴¹⁶ Although Hornsby does not fully articulate her conception of a 'punishable omission', she makes it clear that, unlike Moore's focus on a simple lack of movement, her thesis embraces 'the richness of the language of responsibility'. To the extent that this language would involve other elements of an offence being imported into the act element however, thus muddying the objective deconstruction of offences, it must be rejected. D should not be liable for an omission_e unless the relevant duty to act_e has been established, but such a duty is part of the circumstance element of an offence and nothing is gained from combining its analysis with D's physical movements. See, Hornsby, 'Action and aberration' (1993) 142 *University of Pennsylvania Law Review* 1719, 1740 and Moore's reply in Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 262-263.

⁴¹⁷ See also, Bennett, *The Act Itself* (Clarendon Press, 1995) 85-88.

D failed to move at the relevant time (the actus reus of the act element), and then, was this failure to move intentional (the mens rea of the act element).

Undermining the identification of bodily movement

We have concluded that an omission_e, like bodily movement, is capable of constituting the act element within the structure of element analysis. However, as soon as we have reached this position, we must address the criticism that claims that such a conclusion undermines the role and importance of our original identification of bodily movement. For example, when discussing the example of the motionless driver, Corrado explains that D should be liable for the murder of V. However, when it comes to the assigning of moral blame, Corrado also contends that this is not affected by the question of whether and to what extent bodily movement was involved.⁴¹⁸ And on this basis, if it makes no moral difference whether D has moved or omitted to move, then why should this question be relevant to the liability of D?

Moore's response to this criticism is to attempt to undermine its central premise. For Moore, an omission is not a causal entity and so D's bodily movements (which are causal) will always carry the potential for greater moral blame than a failure to move.⁴¹⁹ The problem with this position, of course, is that Moore does accept that even true omissions_e can come within the act element. Therefore, he is forced into a contradiction,

⁴¹⁸ For discussion, see, Duff *Criminal Attempts* 254-255; Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 83; Hornsby, 'Action and aberration' (1993) 142 *University of Pennsylvania Law Review* 1719, 1740; Annas, 'How basic are basic actions?' (1977) 78 *Proceedings of the Aristotelian Society*, 195, 204.

⁴¹⁹ Moore, *Act and Crime* 22-34.

simultaneously maintaining that the act element must have a causal relationship with the result element and that a non-causal entity can form the act element.⁴²⁰

In order to deal with this contradiction, Moore presents omissions_e liability as a rare exception from a general rule: omissions_e may come within the act element, but they do not do so on a level plain with bodily movement. He even goes so far as to question:

... the possibility that perhaps Anglo-American criminal law is mistaken in those rare instances where it genuinely imposes omissions liability. Perhaps there ought not to be such crimes, recognising that presently they do exist.⁴²¹

In this manner Moore is able to insulate the importance of bodily movement. However, in doing so, he is forced to present omissions_e liability as an unfortunate inconsistency. The problem with this is that every example of a true omission_e, which is deemed sufficiently serious for the criminal law, becomes a counter argument to his thesis.⁴²²

The line taken by Moore, however, is not the only one available to defend the identification of both bodily movement and a lack of movement within the act element. This is because the premise targeted by Moore, that the moral blame of the motionless driver is not contingent upon whether D moved or failed to move his or her body, does not have to be fully rejected (and certainly does not require us to dismiss the moral status of omissions_e).

The role of the act element is to provide a nexus in terms of agency between D and the

⁴²⁰ See, Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1541 (fn38).

⁴²¹ Moore, *Act and Crime* 34.

⁴²² For example, the motionless driver, or the parents that allow their child to starve to death. Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529.

criminal event. Therefore, on one level, we must expose the premise as inaccurate: without fulfilling the act element there will be no nexus to tie D to the event and, therefore, D will lack direct moral responsibility for it. So, if it transpired that the motionless driver was only motionless because he or she was being physically restrained by P, D would not satisfy the mens rea of the act element⁴²³ and would not be criminally, or morally, responsible for V's death. However, beyond this gate-keeping role in terms of moral blame, we do not have to reject the premise at all. The act element is simply not equipped (or designed) to assign this kind of moral blame unaided. Moral blame and criminal culpability are pivotal to the criminal law, but they apply to offences as a whole (every element combined). Therefore, any criticism of the act element based on its inability to establish moral blame is inaccurate, not for its content, but in its assumption that this is what the act element is designed to achieve.

POSSESSION OFFENCES

To be liable for a possession offence, such as the possession of a controlled drug or an illegal weapon, D must be in physical control of the criminal item. For example, if D is charged with possession of a controlled drug,⁴²⁴ he or she will satisfy the actus reus of the offence simply on the basis that it is discovered on his or her person. D does not, whilst in possession of the drug, also have to be performing any kind of bodily movements. Therefore, possession appears to provide a counter example to the contention (central to element analysis) that every offence requires an act_e.

⁴²³ For D to be liable for the murder of V, his or her omission_e must be intentional.

⁴²⁴ Contrary to the Misuse of Drugs Act 1971, s5.

Although possession offences appear to be targeting D's *state* of being in possession however, they may equally be interpreted in a manner that is consistent with the act element as defined. This is because the state of being in possession must always assume one of two events. D is either in possession because he or she has performed the relevant bodily movements necessary to gain possession, or, alternatively, if the criminal item was received without movement, D has omitted_e to fulfil the legal duty requiring him or her to move in such a way that would divest him or her of possession. Either way, without having to expand or distort the definition of the act element,⁴²⁵ it will always be possible to identify an act_e.⁴²⁶

Husak, however, has contended that our preferred analysis of possession offences, focusing on D's movement as opposed to the state of possession, is not able to cater adequately for every type of offence.

But what about those possessory crimes that are *not* defined in accordance with this generalisation? Consider *State v Cleppe*, in which neither intent nor knowledge was held to be an element of the crime of possession of a controlled substance. Or *Chajutin v Whitehead*, in which a defendant was summarily convicted for possession of an altered passport he did not know to have been altered. Are we to believe that the act requirement is preserved here because the defendants performed the omissions of

⁴²⁵ For Gross, possession offences are best catered for by extending the definition of act_p to include a state of affairs. However, as Moore comments, an unnecessary extension of the act element outside the confines of physical movement begins to undermine the act element itself. See Moore, *Act and Crime* 20-21.

⁴²⁶ See, Moore, *Act and Crime* 21. This is also the approach adopted by the US MPC §2.01(4).

failure to divest themselves of something they did not know they had? Why accept this strained account?⁴²⁷

There are two ways in which we may respond to this criticism. The first, pre-empted by Husak, is simply to say that such cases were wrongly decided and that D should only be liable for such an offence if he or she was at least aware of possession. However, this defence is not acceptable. It is not acceptable because, as element analysis claims to provide a structure for all criminal law, it must be able to accommodate any current offence that is not objectively without reason. In relation to possession, the quoted abstract clearly demonstrates the problem of holding D to be in possession of something that he or she is unaware of. However, placed in a different context, a finding of possession in such circumstances may appear perfectly reasonable. For example, if V had a surprise birthday present slipped into his or her bag without his or her knowledge, which was subsequently taken by a pickpocket, we would be unlikely to question a court that found V to have been in possession of the present at the time it was taken.⁴²⁸ We are therefore presented with a complicated and controversial area of the law. If element analysis were to take sides within the debate, as this first response assumes, it would therefore create an obvious point of weakness.

The second, and preferred response, is to draw into question whether the criticism is capable of undermining element analysis. The notion that D can be made liable for *performing* an omission (or anything else) unwittingly is certainly an uncomfortable one.

⁴²⁷ Husak, 'Does criminal liability require an act?' in Duff (ed) *Philosophy and the criminal law* (Cambridge University Press, Cambridge 1998) 60, 71.

⁴²⁸ Example taken from Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 167.

However, it appears that the problem identified by Husak that leads to what he calls a *strained account*, does not accurately reflect the target of his criticism: the Moorian version of element analysis. For D to be *performing* an omission implies that he or she is making a conscious decision, similar to Moore's volition-caused-bodily movement, that he or she is not going to move in the manner required to divest possession. But without the knowledge that the item is in his or her possession, D is obviously not capable of making such a choice. Therefore, if Moore's conception of omissions_p and omissions_e liability (or the preferred definition explored in this chapter) required D to *perform* an omission_e in order to come within the criminal law, then Husak's criticism would hold. Fortunately for both Moore and the preferred definition of the act element, neither theory contains such a requirement.

Although Moore's analysis of omissions is different in various ways from the one preferred in this chapter,⁴²⁹ neither one requires an omission_e to be the product of volition in order to come within the act element of the criminal law. Rather, the act element will require an actus reus of a lack of bodily movement, satisfied in this case by the omission_e to perform the necessary movements required to divest possession, and a mens rea of intention relating to that lack of movement. The mens rea requirement of intention will be satisfied, not in a manner akin to volition, but simply upon the basis that D has intentionally not performed the movements necessary to divest possession: D was not, for example, restrained and therefore (against his or her will) unable to move his or her body in the required manner. D's lack of knowledge concerning possession of the item will not directly affect the analysis of the act element; rather, it is an issue relevant to the mens rea of a circumstance of the offence (the fact of possession).

⁴²⁹ See discussion of omissions liability above, pp138-142.

The reason that the cases raised by Husak are problematic is not because they fail to satisfy the requirements of the act element. Such requirements are satisfied without staining. They are problematic because they are punishing an omission without the requirement of fault as to the circumstance of possession. When discussing omissions above, we commented that the act element alone is not designed to provide the sole basis for moral blame; rather, its role is to provide a nexus between D and the criminal event. Beyond the act element, therefore, in order to focus blame only on those omissions_e that are legally relevant, it is routine for omissions offences to include a circumstance element which requires D to have a special duty to act_e before he or she can be liable for the failure to do so. For possession offences, this circumstance element is brought about by the fact that D is in possession of illegal material: thus creating a unique duty to divest that possession. However, alongside this type of circumstance, it is also a matter of routine for omission offences to include a mens rea of knowledge or intent: requiring D to know about the fact of possession before he or she can be punished for failing to move to divest of it. It is this requirement that is lacking from the Husak examples.

This observation may lead us to question the viability of offences within this category. After all, if D does not know that he or she is in possession of illegal items, it is difficult to maintain that he or she warrants the censure of the criminal law for failing to divest of them. However, it does not lead us to question our definition of the act element or indeed any part of element analysis. Far from strained in fact, the structured reasoning facilitated by element analysis has allowed us to identify the problem of these offences in a way that Husak failed to do.

THOUGHT AND STATUS OFFENCES

There are no thought or status based offences that currently exist anywhere within the common law world. Therefore, although the possible creation of such offences in the future raises several interesting considerations and challenges for element analysis, we will not consider all of these possibilities in full, and our principal response can always be to maintain that such difficulties are purely theoretical and therefore of reduced weight.⁴³⁰ However, as we have discussed above, element analysis is a structure for discussion and analysis and does not claim a normative role within the evaluation of the law. Therefore, it is important to sketch out, however briefly, the manner in which element analysis and the preferred definition of the act element would accommodate such offences.

Thought and status offences have provided useful examples for critics of the preferred definition of the act element because D's liability would not be predicated upon bodily movement or a specific lack of bodily movement. For example, if the status of being intoxicated (as opposed to the possession of illegal drugs), or the thought of intending to commit a crime (as opposed to doing so whilst also physically attempting it) were to become offences, D's movements or lack of movements would be irrelevant. In the case of status offences, D would be liable because of the circumstance that he or she belongs to a certain class of people. With thought crime, it would be D's ulterior intention that would be targeted. Therefore, having stated that element analysis requires the identification of an

⁴³⁰ See, Moore, *Act and Crime* 18-19.

act_e within every offence, a physical nexus between D and the criminal event, the potential creation of thought and status offences appear to provide unhelpful counter examples.

The problem with potential thought and status offences, however, is not that they would lack such a nexus, but rather that it would have to be conceived differently from that of current offences. Where we have discussed conduct based offences that do not include a result element, for example, we have rightly focused upon D's bodily movements or lack of bodily movements because it is that specific physical activity (performed within certain circumstances and with certain fault) that the law is targeting. For offences that involve a result element, the focus is usually shifted to the harm created by that result. However, within the act element of these offences it is still correct to concentrate on D's physical activity because, to link D to that result, it must be demonstrated that D physically caused the result to happen. With status and thought crime, we have the potential for offences that target neither specific conduct nor specific results. Therefore, although we still require a physical nexus between D and the criminal event,⁴³¹ we have no requirement for that nexus to be a physical *activity*. Thus, the act element could be satisfied simply by the identification of D's physical presence at a time when the relevant circumstance applied (illegal status) or when D had the relevant ulterior fault (illegal thought). D's presence would have to provide the physical nexus between D and the criminal event, and therefore the basis for further investigation into the spatiotemporal location of the offence.⁴³²

⁴³¹ The criminal event in this context would be the application of a circumstance (illegal status) or ulterior fault (illegal thought).

⁴³² For a discussion of the role of the act element in providing the spatiotemporal location of an offence, see, Moore, *Act and Crime* 3 and 289.

The difficulties experienced by the preferred definition of the act element, when trying to accommodate thought and status offences, has led certain commentators to seek alternative definitions. Husak, for example, contends that the required identification of an act_e should be replaced with a *control* requirement.⁴³³ There must still be a nexus between D and the criminal event. However, that nexus will be established by the presence of D's control. Such a requirement would be able to replace the preferred definition of the act element for current offences, focusing either on D's control over his or her conduct or causal control over the result element. However, beyond this, Husak also contends that it will be better able to explain thought⁴³⁴ and status⁴³⁵ offences: asking to what extent D had control over such status and thought rather than focusing upon physical conduct. Thus, for Husak, the potential creation of thought and status offences requires a rethinking of the preferred definition of the act element as it applies to all criminal offences.⁴³⁶

Having set out the manner in which the act element (focusing upon D's physical presence) *could* accommodate such offences, however, we may now evaluate Husak's control requirement as an alternative approach. Indeed, as soon as we turn a faintly critical eye, the problems associated with a control requirement become very clear. This is because, in contrast with bodily movement, the concept of *control* introduces several uncertainties into the law. First, it is unclear whether Husak is using control in a specialised manner. This is important because, for example, it is very common to refer to an individual as *losing control*

⁴³³ Husak, 'Does criminal liability require an act?' in Duff (ed) *Philosophy and the criminal law* (Cambridge University Press, Cambridge 1998) 60.

⁴³⁴ *Ibid*, 86-90.

⁴³⁵ *Ibid*, 82-86.

⁴³⁶ Duff has also recently expressed his support for this approach. See, Duff, 'Action, the act requirement and criminal liability' in Hyman and Stewart (eds), *Agency and Actions* (Cambridge University Press, Cambridge 2004) 69.

due to frustration and anger, and yet we would not want such people to avoid liability for offences committed when *out of control* in these circumstances.⁴³⁷ Secondly, when assessing the requisite control required to find D criminally liable, Husak states that a court must assess the reasonableness of holding D responsible,⁴³⁸ commenting that the level of this requirement will vary between offences.⁴³⁹ Therefore, within every offence,⁴⁴⁰ the court would have to make fine line judgements both regarding D's level of control over the criminal event, and then what level is required for liability. Indeed, as if to concede this point of complexity, Husak states that:

The critical test of my thesis is not whether it makes hard cases easy but whether it raises questions that are relevant to the problem at hand.⁴⁴¹

Even forgiving the increased complexity, however, the control approach appears to fall foul of the same line of reasoning employed by Husak to criticise and then ultimately dismiss the act_e element defined in relation to bodily movement. When discussing the relationship between drug addiction and crime, Husak states that:

I do not believe that the justifiability of punishment in these cases should depend on whether drug possession by addicts can be said to qualify as voluntary action. Instead, the justifiability of liability should turn on whether addicted defendants exercise a

⁴³⁷ We are referring here to a loss of control induced by D working him or herself up. We are not discussing separate issues of intoxication or provocation.

⁴³⁸ Husak, 'Does criminal liability require an act?' in Duff (ed) *Philosophy and the criminal law* (Cambridge University Press, Cambridge 1998) 60, 78.

⁴³⁹ *Ibid*, 79.

⁴⁴⁰ We may concede that this type of assessment already happens within omissions liability. However, Husak's policy would extend it to all criminal offences.

⁴⁴¹ Husak, 'Does criminal liability require an act?' in Duff (ed) *Philosophy and the criminal law* (Cambridge University Press, Cambridge 1998) 60, 79.

sufficient degree of control over their use of drugs to be responsible for it. Surely withdrawal symptoms *might* be so unpleasant that an addict could not reasonably be expected to control his or her use of an illicit substance.⁴⁴²

In relation to the preferred definition of the act element, Husak was critical of the *supposed* inability of action_e to deal with the potential of thought and status offences, commenting that ‘the thought-experiment that criminal liability might be imposed despite the absence of an act does not appear to yield a contradiction.’⁴⁴³ However, if we imagine a drug addict (D) who commits a series of offences while suffering from even the most serious withdrawal symptoms, would their conviction yield such a contradiction? Not only is the answer to this question surely a resounding *no*, but unlike Husak’s preferred thought-experiment, this one is relevant to and present within the current law.

The control approach does not appear to provide an attractive alternative to the preferred definition of the act element. However, it is important to note that the method of dealing with thought and status offences outlined at the beginning of this section, based simply upon physical presence, is also far from ideal. This is because, for example, unlike bodily movement or the omission of bodily movement, physical presence will not contain a mens rea requirement: presence/existence without any further contextual qualifications cannot be unintentional. Therefore, if Husak or others were able to demonstrate the presence of actual thought or status offences beyond mere thought-experiments, the preferred definition of the act element may well be difficult to maintain. However, whether such

⁴⁴² Husak, ‘Does criminal liability require an act?’ in Duff (ed) *Philosophy and the criminal law* (Cambridge University Press, Cambridge 1998) 60, 81.

⁴⁴³ *Ibid*, 66.

offences are not present *because* they do not contain a requirement of bodily movement or omissions_e,⁴⁴⁴ or simply because they are seen as an affront to the rights of those to whom they would apply,⁴⁴⁵ their absence means that the preferred definition of the act element can emerge from this discussion unaffected. We may continue to define the act element simply in terms of bodily movement or omissions_e with, as yet, no need to extend it to include physical presence.

INVOLUNTARY ACTS_E AND OVER-INCLUSIVITY

As we have explored above, the primary criticism regarding the breadth of the preferred definition of the act element is that it is under-inclusive: because certain offences do not require an act_e as defined, either that definition, and/or element analysis as a whole, must be rejected. So far, we have been able to rebut this criticism by explaining the manner in which the preferred definition of the act element is able to perform its role in each of the problem cases discussed. However, anticipating such a defence, Duff has also criticised the breadth of the act element from the opposite direction: claiming that a definition of action_{e/p} capable of covering everything relevant within the criminal law would be an empty requirement, such that it would even include involuntary acts_e that should be excluded.

On the one hand, the notion of an 'act' could be given a reasonably determinate meaning: but it is then quite implausible to claim that the criminal law either is or should be founded on the 'act requirement', since there are plenty of cases in which

⁴⁴⁴ See, for example, Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 51.

⁴⁴⁵ See, for example, Simester, 'Robinson, *Structure and Function in Criminal Law*' (Book Review, 1998) *Cambridge Law Journal*, 616, 617.

the law, justly and reasonably, imposes liability in the absence of an 'act' by the defendant. On the other hand, we might extend the notion of an 'act' to cover these cases ... but this would be to empty the 'act requirement' of any substantive content, turning it into an utterly trivial requirement.⁴⁴⁶

Having maintained that the first part of this criticism does not undermine the preferred definition of action_e, we must now examine whether this position has led us to fall foul of the second part. Of course, we may concede a portion of Duff's target: unlike other proponents of element analysis, we do not wish to contend that the requirement of action_e has a formal role in the substantive content of the law (in the sense that it might outlaw the prospect of thought crime for example).⁴⁴⁷ However, although the act element does not claim to control the content of the law, its role within a structure of element analysis would be undermined if it performed no task at all.

As we have discussed in chapter 4, however, the role of the act element and the requirement of an action_e are employed within element analysis to perform very necessary tasks. The most important of these is the provision of a nexus that links D to the criminal event, isolating his or her role in the offence by isolating his or her actions_e: actions_e that either (along with certain circumstances and fault) constitutes the offence itself, or actions_e that provide the causal link to the result element. Where relevant action_e is identified and

⁴⁴⁶ Duff, *Criminal Attempts* 243.

⁴⁴⁷ However, unlike Duff, we do not believe that the inability of the preferred definition of the act element to outlaw thought crime represents a defect. We simply do not accept that this is one of the aims of element analysis. See, Duff, 'Action, the act requirement and criminal liability' in Hyman and Stewart (eds), *Agency and Actions* (Cambridge University Press, Cambridge 2004) 69, 90-91.

the nexus with the criminal event is established, the law has a basis upon which to assess D's liability in relation to the offences circumstance and result elements.⁴⁴⁸

On this basis alone we may conclude that the act element, as defined, is not trivial. However, although this response may be enough to undermine Duff's criticism in general terms, the criticism here is not directly targeted at the positive (nexus creating) role of element analysis. Rather, Duff's primary focus is upon what the act element is able to exclude from the criminal law. With the preferred definition of action_e encompassing both bodily movement and a lack of bodily movement, the claim is that it will be impossible for the act element to perform a filtering role: all physical behaviour will be caught within the act element, even if it is involuntary and therefore should not attract liability.

The act requirement now seems to come to this: No one can be punished unless she either moves or fails to move her body. That may seem to be an empty requirement (who could fail to satisfy it?).⁴⁴⁹

Before exploring specific examples of involuntary behaviour, it is first important to provide a general response to this criticism. That is because, although the provision of a nexus between D's act_e and the criminal event has been discussed in positive terms, the fact that it is a *requirement* also means that it performs a filtering role. Although it is true to say that we are always either moving our bodies or omitting to move our bodies, the act element is only interested in acts_e and omissions_e that are either directly proscribed by law, or have

⁴⁴⁸ This may also be used as a basis for the spatiotemporal location of the offence. See, Moore, *Act and Crime* 3 and 289.

⁴⁴⁹ Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1541. Corrado goes on to state that the act_p requirement, defined in a slightly different way from that preferred here, is not empty.

caused results that are proscribed by law. For example, just because D is moving his or her body at the time when V is killed does not mean that D's movement will satisfy the act element within the context of element analysis. D's movement must either have caused V's death, or, alternatively, D's movement must have been different from movement that was legally required.

Despite this general filtering role, however, there is a further question about whether the act element is also able to exclude those acts_e or omissions_e that may cause the criminal results for example, but are involuntary. Exploring this question further, we will centre our discussion on two common examples: involuntary seizures and somnambulism or hypnosis.

Involuntary seizures

One of the primary examples employed by Duff to expose the emptiness of the act element is that of a driver who unexpectedly experiences a seizure whilst at the wheel. Duff comments that:

... the 'act requirement' appears very weak. A driver rendered unconscious by a fit which he could not have been expected to foresee seems to satisfy it: his earlier voluntary acts, those involved in his driving before he became unconscious, made a significant causal contribution to the dangerous movements of his car when he was unconscious.⁴⁵⁰

⁴⁵⁰ Duff, *Criminal Attempts* 252.

The problem with this example, however, as a criticism of the act element, is that application of the act element will *not* result in the driver being held liable for dangerous driving. This is because, as Duff later concedes,⁴⁵¹ although the driver's voluntary movements prior to his unconsciousness are capable of constituting acts_e within the definition of the act element, such acts_e are not accompanied by the mens rea necessary for the other elements of the offence. D will only be liable if there is concurrent fault for all elements of the offence at the time he or she acts_e.⁴⁵²

For Duff, however, this explanation is unsatisfactory because of its reliance on issues of mens rea outside the act_e requirement itself. Criticising the act element, Duff states that it only requires:

... a minimal condition of criminal liability which is likely almost always to be satisfied.

It sets substantial limits on liability only when combined with the requirements of causation and fault: but ... [will] have little substantial force independently of the fault or mens rea requirements.⁴⁵³

Although, as Duff comments, this summary of the act element may conflict with claims made by certain advocates of element analysis,⁴⁵⁴ it is perfectly consistent with the version explored in this thesis. The actus reus of the act element, focusing upon bodily movement or an omission to move, is not required to exclude people from the law. Rather, it is a focal point and a basis for further questions. D's acts_e may always be *capable* of falling within the

⁴⁵¹ *Ibid*, 253.

⁴⁵² Moore, *Act and Crime* 35-36.

⁴⁵³ Duff, *Criminal Attempts* 254.

⁴⁵⁴ Duff, *Criminal Attempts* 254.

actus reus of the act element, but this is simply to focus on a specific target: if that action_e was performed without the requisite fault or without the required causal effect, D will not be liable. Thus, although the driving example can demonstrate that the act element does not perform *all* the tasks of the criminal law, it does not undermine any of the tasks that it is intended to perform and it does not show it to be empty.⁴⁵⁵

SOMNAMBULISM

The second set of examples used to test the ability of the act element to exclude involuntary behaviour, are those relating to somnambulism and hypnosis. For Moore, such behaviours will not come within the criminal law (even if D causes criminal harm) because they do not amount to examples of willed bodily movement: D may be causing his or her body to move but he or she does not have conscious control over those movements.⁴⁵⁶ Despite the initial appeal of this approach, or at least this conclusion, however, Moore struggles to discuss other examples in a consistent manner. Thus, when concluding that brain washed individuals will come within his definition of action_{e/p} and therefore within the criminal law, Moore states that this time D's movement is volitional (with only his or her beliefs and desires affected).⁴⁵⁷ The problem with this conclusion is that, in relation to somnambulism and hypnosis, Moore found that D's volitions were invalid: volitions, as Moore defines them,

⁴⁵⁵ Thus, when Duff criticises the actus reus of the act element for failing to distinguish between voluntary and involuntary acts_e, the simple response is that it is not required to do so. This distinction is made by inquiring into the mens rea attached to the actus reus of the act element. Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 83.

⁴⁵⁶ See, Moore, *Act and Crime* 253-8. Plus, unlike the conscious D that is simply moving on auto pilot (who is acting_{e/p} in the Moorian sense), D who is sleepwalking or hypnotised cannot simply snap out of that state and remember what he or she has been doing. Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 303.

⁴⁵⁷ Moore, *Act and Crime* 259-260.

are the decisions that result from the conscious choice between conflicting intentions, and thus, where D is prevented from making that active choice, volitions are unable to perform their 'resolving function'.⁴⁵⁸

We are therefore left with an apparent contradiction. If volitions are identified only where D plays an active role in resolving conflicting intentions, then surely the need to resolve conflicting intentions is equally absent from a brainwashed individual who has had his or her desires conditioned. With other action theorists contending that movement whilst in a somnambulist or hypnotic state could amount to action_{e/p},⁴⁵⁹ we are therefore left with controversy that would do damage if imported into the criminal law.⁴⁶⁰

As Moore struggles to avoid contradiction, so we may be reminded of the benefit of separating the conception of action_p from the definition of the act element. Unlike Moore, we do not have to make fine distinctions on the basis of volitions. Rather, we simply ask whether D has performed the relevant actus reus of the act element, which is likely to be satisfied, and then we move to the mens rea of the act element. There will remain a legitimate debate within the mens rea of the act element as to whether D was acting_e intentionally when hypnotised or brainwashed. Such debate will not be *resolved* by structuring it within element analysis. However, structuring it in this way will focus the debate (for example, it prevents its expansion into the physical dimensions of D's

⁴⁵⁸ Moore, *Act and Crime* 257-259.

⁴⁵⁹ See, Morse, 'Culpability and control' (1993) 142 *University of Pennsylvania Law Review* 1587, 1664-1649 and Williams B, 'The actus reus of Dr. Caligari' (1993) 142 *University of Pennsylvania Law Review* 1661, 1664-1671.

⁴⁶⁰ Even Moore accepts that these are issues that could go either way. However, if such a decision is defining the boundaries of the criminal law, surely we require a higher degree of certainty. Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 249.

movement), and equally importantly, it will also ensure the debate remains neutral between the different theories of action.⁴⁶¹ Again, the preferred definition of the actus reus of the act element emerges from these examples intact.

CONCLUSION

Combined with our discussion in chapter 4, we may now confirm the identification of D's bodily movement (or lack of movement) as the preferred definition of the act element. Providing an objective basis from which to separate the elements of an offence, it is a conclusion that is essential to the maintained viability of element analysis.

⁴⁶¹ We are then free to discuss issues within this debate such as the role of 'voluntariness' alongside intention within the mens rea of the act element. For discussion, see, Morse, 'Culpability and control' (1993) 142 *University of Pennsylvania Law Review*, 1587, 1591-2; Hornsby, 'Action and aberration' (1993) 142 *University of Pennsylvania Law Review* 1719, 1732-1747 and Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529.

CHAPTER 6

BODILY MOVEMENT AND THE SEPARATION OF ELEMENTS

Within chapters 4 and 5, we have concluded that the preferred definition of the act element is able to provide an objective basis for liability across the criminal law. Within this analysis we have also highlighted the important role of the act element within the separation of offence elements more generally. In this chapter, this important function of the act element, and criticisms of it, will provide our focus. First we explore internal separation of the act element between actus reus and mens rea, and then the role of the act element in identifying the circumstance and result elements.

SEPARATING THE ACTUS REUS AND THE MENS REA OF THE ACT ELEMENT

The central focus of Part II of this thesis has been an examination of the preferred definition of the actus reus of the act element:

- **Act element:** The bodily movement (or omission) necessary for the offence.

Within this analysis, we have also touched upon the mens rea requirements of the act element. However, our discussion of mens rea (in this context) has taken place merely as a supplement to the central thesis: demonstrating that all *physical* action_e can be intended

and that involuntary movement, although capable of satisfying the *actus reus* of the act element, will not satisfy the *mens rea* requirements. In this manner, as we will explore in more detail in chapter 8,⁴⁶² the analytical separation of the *actus reus* and *mens rea* of the act element has allowed us to focus debate and criticism in order to aid our discussion.⁴⁶³

Separating the *actus reus* and the *mens rea* of the act element however, is more controversial than a simple analytical choice, a controversy that has derived in part from action theory. For many commentators, an *action_{e/p}* can only be understood if it is done intentionally and thus a separation of the physical and mental aspects of the *act_{e/p}* does not make sense: if D has acted_{e/p} then both aspects are satisfied and, if either is not, D has not acted_{e/p}.⁴⁶⁴ Moore defines *action_{e/p}* as bodily movement caused by volition.⁴⁶⁵ Therefore, even when discussing the criminal law, Moore's definition of the act element (unlike the circumstance and result elements) fuses *actus reus* and *mens rea*.

... notice that the intention required to act at all – the intention to move one's limbs – is not the same in its object as the intention described by the *mens rea* requirement. The latter intention has as its object complex act descriptions like 'killing', 'disfiguring' or 'recording a confidential communication'; it does not have basic act descriptions like 'moving my fingers' as its object. We should thus describe the difference between the mental states prohibited by the *actus reus* requirement and the mental states prohibited by the *mens rea* requirement as at least a difference in the objects of the

⁴⁶² Chapter 8, pp198-203. Part III generally will also explore the related claim that separating the *actus reus* and the *mens rea* of the act element can aid the courts in applying the law.

⁴⁶³ Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 21.

⁴⁶⁴ See, for example, Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 44 and 54. See also, Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) [1.11] and fn. 16.

⁴⁶⁵ Moore, *Act and Crime* 113.

respective mental states: bodily-movement descriptions are the objects of mental-states part of the *actus reus* requirement, whereas complex act descriptions are the objects of the mental-states of the *mens rea* requirement.⁴⁶⁶

Moore is critical of the separation, employed within our preferred version of element analysis because he perceives a difference between the fault relating to basic action_p (bodily movement) and the fault relating to complex action_p (full offence). However, such a simple division is not reflected in any version of element analysis, even the one Moore himself is advocating. Moore provides examples of complex action_e descriptions including 'killing', 'disfiguring' and 'recording a confidential communication' in order to distinguish the specific fault requirements of the act element. But even when applying the mens rea requirements of the circumstance and result elements, such generally worded fault would be insufficient: as with the act element, we must look within the complex description in order to answer specific questions. For example, if D performed an intentional *killing*, we would separate the elements of the mens rea of murder in the following manner:

- Act element: Did D intend the movements that caused the death?
- Circumstance element: Did D know he or she was killing a person as opposed to another animal?
- Result element: Did D intend to cause death?

Each of these questions, including the one relating to the act element, is aided by the complex description of D's mens rea: intentional killing. However, specific answers are

⁴⁶⁶ Moore, *Act and Crime* 173.

needed to *each* of these questions in order to satisfy the mens rea requirements of murder. This is not a single separation between the act element on the one hand and the other elements on the other hand, but a separation of *each* of the three elements. Thus, the fact that the mens rea of the act element is asking a question that is unique from the other elements is no more of a distinguishing factor than the unique questions asked by either of the other elements.⁴⁶⁷

In this manner, although Moore's version of element analysis would not separate the actus reus and mens rea requirements of the act element, because Moore does not provide a compelling reason why such a separation should not take place, it does not undermine our analytical choice to do so. Further, although the separation is unlikely to gain Moore's support,⁴⁶⁸ it is not incompatible with his theory. As Moore briefly reflects before moving on to criticise the division:

[The] supposed *mens rea* requirement [for the act element] is just another way of stating the voluntary act requirement. Intentionally in [this] sense is a criterion of action itself, as Donald Davidson and, more recently, Jenifer Hornsby have shown.⁴⁶⁹

Although we are not defining the act element as *just another way of stating the voluntary act_{e/p} requirement*, it is nevertheless important that it should not be contradictory to this approach. Thus, it is open for Moore et al to maintain that D has not acted_p unless he or she satisfies both the actus reus and the mens rea of the act element. However, within the

⁴⁶⁷ For discussion of the different mens rea requirements of each element, see Part III generally.

⁴⁶⁸ Moore has been critical of Corrado, a commentator that has made a similar separation. Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 315-318.

⁴⁶⁹ *Ibid*, 316.

criminal law and the application of element analysis, we are still free to make the distinction.

Equally concerning to those theorists who reject the distinction are those who *would* separate the actus reus and mens rea of the act element, but would do so in a different manner from that discussed. Corrado, for example, contends that although we should distinguish the mens rea of the act element (intention to move one's body), from the actus reus of the act element, the actus reus should still be defined to contain a non-physical dimension: *voluntariness*. For D to satisfy the actus reus of the act element, D must have moved his or her body with 'the ability to choose to do otherwise'.⁴⁷⁰ However, both Corrado's support for a voluntariness requirement, and his choice to classify it as part of the actus reus, do not stand up to scrutiny.

Having concluded that it is useful to separate the mens rea and the actus reus of the act element, there is a burden on Corrado to explain why this separation is not done straightforwardly between the physical and mental aspects: why this element should be inconsistent with the circumstance and result elements.⁴⁷¹ Corrado's response is unsatisfactory. In order to support the inclusion of a voluntariness requirement at all, Corrado provides an unconvincing 'movie scenario'⁴⁷² in which D is programmed to kill and does so intentionally but without the voluntary ability to choose otherwise. He also discusses, more realistically (but also more controversially), the possibility that drug and

⁴⁷⁰ Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1560.

⁴⁷¹ When separating the mens rea of the circumstance and result elements, any purely mental aspect will be considered as part of the mens rea.

⁴⁷² Corrado, 'Is there an act requirement in the criminal law?' (1993) 142 *University of Pennsylvania Law Review*, 1529, 1547.

gambling addicts may also lack the free choice of whether to commit certain crimes, although, again, they would certainly be acting intentionally.⁴⁷³ However, despite the provision of some interesting points in relation the debate about voluntariness within the act element, Corrado does not provide an adequate reason for why (if it is included) it should not be included within the mens rea of the act element. After all, when concluding that volitions or intention should not form part of the actus reus of the act element, Corrado states that:

We could understand [the actus reus] as a strong requirement, so that it includes volitional action. It is significant, however, that we need not, and that by doing so we duplicate a condition already secured by mens rea. What I draw from that is that there is no separate requirement of a volitional act.⁴⁷⁴

Employing this line of reasoning, surely it is open to us to retain our current method of separation (maintaining consistency with the other elements and greater simplicity), and yet avoid contradiction with Corrado's preference for a voluntariness requirement.⁴⁷⁵ If a voluntariness requirement is found desirable, then, in line with other mental aspects of the act element (intention or volition), it should form part of the mens rea. After all, if we did wish to excuse the criminal conduct of a drug addict on the basis of the voluntariness requirement for example, it is surely more accurate to do so on the basis that D lacked fault for his or her actions_{e/p}, rather than claiming that D did not act_e at all.

⁴⁷³ *Ibid*, 1552.

⁴⁷⁴ *Ibid*, 1528-1529.

⁴⁷⁵ On the basis of our response to Corrado's argument, we may remain unconvinced about the merits of a voluntariness requirement. However, it is nevertheless important that our version of element analysis should not rule out the possibility of its inclusion.

Therefore, although the separation of the actus reus and the mens rea of the act element remains a controversial choice, it does not seem to attract sufficient criticism to undermine our use of it. Indeed, the separation is not uncommon among criminal theorists. For example, both Ashworth and Hornsby have, on separate occasions, commented upon the analytical benefits.⁴⁷⁶ Even Duff has followed a similar line:

In paradigm cases of action there is no separation between the subjective [mens rea] and objective [bodily movement] (although they can be distinguished for analytical purposes).⁴⁷⁷

It is therefore important to remember that, although care has been taken not to contradict the reasoned analysis of action theorists, neither element analysis nor the act element is attempting to provide a theory of action_p. Rather, we are attempting to define the building blocks with which the criminal law has been constructed: a process which, as we will discuss further in the chapters within Part III, is aided by the uniform separation of actus reus and mens rea for each of the elements of an offence.

THE ROLE OF THE ACT ELEMENT IN DISTINGUISHING CIRCUMSTANCES AND RESULTS

⁴⁷⁶ See, Ashworth, 'Taking the Consequences' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 107, 109 and Hornsby, 'On what's intentionally done' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 55, 62.

⁴⁷⁷ Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 201.

The act element has been the focus of the chapters in this Part, and the focus of debate generally concerning element analysis, partly because it claims to provide the objective basis upon which each of the other elements can be identified.⁴⁷⁸ Therefore, before we are able to fully endorse it, we must now explore whether the preferred definition of the act element is capable of performing this role.

- **Act element:** The bodily movement (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act_e necessary for the offence.
- **Result element:** Those things caused by the act_e necessary for the offence.

The most common way of attempting to undermine the role of the act element and the objective separation of elements, as we have explored, is to claim that action_e cannot be defined narrowly to include only bodily movement or a lack of bodily movement: if an act_e includes more, then it begins to overlap (indeterminately) with the other elements. However, although this is the most common route, there has also been criticism claiming that *even if* the act element can be defined in this way, it will not facilitate a clear demarcation between circumstances and results. It is this second line of criticism that will be explored in this section.

Duff exposes the perceived inability of the act element (defined in relation to bodily movement) to aid the separation of circumstances and results, not in order to demonstrate that his definition of action_e is capable of facilitating such a separation, but to contend that such an inability means that element analysis must be rejected. We have already discussed

⁴⁷⁸ For discussion, see, Moore, *Act and Crime*, ch 8.

variously the importance of the ability to distinguish circumstances and results, especially in relation to the inchoate offences, in order to allow different fault standards to be applied to different elements of an offence. Reflecting upon this, Duff states:

The real problem in the case of 'reckless attempts', for instance, concerns not the identity of the 'act', but the distinction between circumstances and [results]: a distinction which this account [of action_e] does not help us to draw.⁴⁷⁹

Focusing discussion on the *real problem*, Duff questions the ability of any version of element analysis accurately and objectively to isolate the result element of an offence. For example, for the offence of 'abduction of an unmarried girl under the age sixteen from her parent or guardian',⁴⁸⁰ is the result of D's action_e 'simply that "something is taken" ... or is it that ... "a girl (or an unmarried girl) is taken"; or "an unmarried girl is taken out of the possession of a parent"; or what?'⁴⁸¹ Likewise for the offence of rape, is the result element (if there is one⁴⁸²) to be identified as "'non-consensual sexual intercourse", or simply "sexual intercourse"?⁴⁸³ For homicide, "'death", or "human death"?⁴⁸⁴ Such questions are not pivotal to these offences in their substantive forms. However, if such offences become the

⁴⁷⁹ Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 82. See also, Duff, *Criminal Attempts* 250.

⁴⁸⁰ The Sexual Offences Act 1956, s20 (repealed by the Sexual Offences Act 2003, s42 sch7 para1). Although the offence was abolished in 2004, its provisions are mirrored to a large extent by sections 1-3 of the Child Abduction Act 1984.

⁴⁸¹ Duff, *Criminal Attempts* 13.

⁴⁸² The exact separation of the elements within the offence of rape has become a highly controversial focus of debate on the use of element analysis, not least because it is often used as a straightforward paradigm for commentators using conflicting methods. See discussion in Chapter 7, pp185-186.

⁴⁸³ Duff, *Criminal Attempts* 14.

⁴⁸⁴ Duff, *Criminal Attempts* 14.

focus of an inchoate offence drafted to require different fault standards for each element,⁴⁸⁵ they become absolutely essential.

On one level, of course, if we apply the preferred version of element analysis and its definition of the result element consistently,⁴⁸⁶ the answer to each of these questions should be relatively clear and objectively discoverable. To identify the result element of an offence, we simply ask what part of the offence definition must be *caused* by D's act_e in order for D to be liable for the offence. If part of the offence must be present, but it does not have to be changed or caused by D's act_e, then it should be identified as part of the circumstance element. Thus, for the abduction offence, the only part of the offence definition that must be caused by D's act_e, buried within the term abduction, is what Duff calls the 'taking'.⁴⁸⁷ For rape, it is the penetration. For murder, it is the death. However, for each of these examples, such a minimal interpretation of the result element appears problematic. How can D intend to *take* or *penetrate* or cause *death* in isolation? Surely for the result element to be intelligible, employing the abduction offence for example, D must intend that what he or she is taking is a *girl*, or at least that it is a *person*.

The unintuitive nature of the minimally defined result element has therefore, in several cases, led the proponents of element analysis to look for an alternative way of defining results. This essentially involves bolstering the result element with a minimum content from

⁴⁸⁵ For example, the Serious Crime Act 2007, Part 2.

⁴⁸⁶ One of the major criticisms of element analysis, however, is that even its proponents rarely seem able to apply it to examples in a consistent manner. See discussion in Chapter 7, pp183-185.

⁴⁸⁷ Duff, *Criminal Attempts* 14.

the circumstance element, either in the absence of a formal test⁴⁸⁸ or, more ambitiously, through one.

Williams, for example, has suggested a test in which the circumstances of an offence that are 'customarily'⁴⁸⁹ regarded as part of the act element, should now (due to a narrow interpretation of action_e) be reclassified as part of the result element.⁴⁹⁰ For example, for the offence of 'assaulting a constable in the execution of his duty', D's act element may (customarily) be identified as *assaulting a policeman*. However, if the act element is defined strictly to include only bodily movement, it will exclude the fact that V is a policeman. Such a fact would usually be regarded as a circumstance. However, as it also formed part of the customary act_{e/p} description, under William's test, it will now form part of the result element.⁴⁹¹

Another proponent of element analysis to have extended the result element beyond the preferred definition is Moore. For Moore, the preferred definition should be supplemented by a moral criterion.

⁴⁸⁸ Smith has stated that:

It is not thought possible to state any logical test for defining [the result element], but it seems that in practice it is not difficult to determine it by eliminating the various circumstances required by the definition of the crime.

However, when identifying the result element of murder as the 'killing of a human being', Smith does not explain why the fact that V is a human has not been eliminated as part of the circumstance element of the offence. Smith, 'Two problems in criminal attempts' (1956) 70 *Harvard Law Review*, 422, 424.

⁴⁸⁹ Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 369.

⁴⁹⁰ *Ibid.*

⁴⁹¹ *Ibid.*, 369.

We need to ask of each act-type prohibited by a criminal code what, if anything (beyond the [preferred definition]), must motivate an actor to render that actor most culpable in his doing of the overall act prohibited by the statute. It is this moral criterion that allows us to include 'person' in the event-type 'death of a person' as a [result] element.⁴⁹²

Therefore, a court will have to decide in relation to each case which parts of the circumstance element are morally essential to the result element and adjust the formal separation of elements appropriately.

The problem for both Williams and Moore, however, is that neither approach is successful in extending the result element without also conceding the ability to separate elements objectively. Although Williams could not see 'any possibility of the circumstance-[result] distinction involving difficulty',⁴⁹³ under his suggested rule, it was rightly rejected by Moore as insufficiently precise because it is unable to state consistently which aspects of an offence are *customarily* regarded as part of the act element.⁴⁹⁴ Since the narrow definition of action_e is designed to avoid reliance on the subjective nature of act_p descriptions, it would be highly unsatisfactory if we returned to such a concept when undertaking the similarly important task of isolating results. Equally, with Moore's moral criterion, we have the same problem. If moral weighting influences the separation of elements, and judges as subjective actors disagree about the moral weighting of certain aspects of an offence, so they will separate elements inconsistently. Employing the offence of rape for example, even if we concede

⁴⁹² Moore, *Act and Crime* 208.

⁴⁹³ Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 369.

⁴⁹⁴ Moore, *Act and Crime* 208. See also, Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25, 31 and discussion in chapter 3, pp56-60.

Moore's point that the fact V is a human should be included within the result element, the extent to which the sex of V matters will be much more controversial.⁴⁹⁵ With such controversy inevitably leading to inconsistency.

It may also be questioned what benefits to the criminal law are offered by an extended definition of the result element. Moore is concerned that certain circumstantial aspects of an offence should require D's intention.⁴⁹⁶ For example, that what is intentionally killed is a human for murder, or what is intentionally abducted is a female person for the abduction offence discussed above. However, this does not require circumstances to be reclassified as part of the result element; it simply requires those specific circumstances to require a fault of intention. Indeed, even within the more general complaint that the preferred definition of the result element seems unintuitively narrow, we must remember that we are dealing with an analytical separation designed for the purposes of the criminal law. For example, although the result element of murder is identified narrowly as death, that does not undermine the requirements of the full offence that (en masse) require the death to be the death of a person caused by D etc. As long as it makes sense to say D intended to cause death, to focus questions of mens rea on each element separately as well as collectively, then the separation is tenable.

As Smith has commented, although it is often tempting to keep adding to an element of the offence to make it appear more concrete as a separate entity, to do so will undermine the

⁴⁹⁵ For a discussion of the difficulty of creating a rule that extends the result element and maintains objective separation, see, Sullivan, 'Intent, subjective recklessness and culpability' (1992) 12 *Oxford Journal of Legal Studies*, 380, 382.

⁴⁹⁶ Moore, *Act and Crime* 208.

objective separation of elements and thus element analysis as a whole.⁴⁹⁷ A narrow definition may seem unintuitive at times, but as long as we can apply fault to it, and as long as the offence takes shape when each of its elements are combined, then such a definition is acceptable within the criminal law. On this basis, we are able to maintain the preferred definition of the result element.

CONCLUSION

The definition of the act element is objectively discoverable within every criminal offence and is also capable of facilitating the objective distinction between circumstances and results. It is therefore capable of rebutting the philosophical criticism that has been used in an attempt to undermine it specifically and element analysis more generally. Importantly in relation to the first half of this chapter, it is also able to facilitate this separation without conceding (or threatening) the more general separation of actus reus and mens rea.

⁴⁹⁷ Smith, 'Two problems in criminal attempts' (1956) 70 *Harvard Law Review*, 422, 423.

CHAPTER 7

THE UNINTUITIVE NATURE OF BODILY MOVEMENT

Unlike within chapters 4 to 6, the criticisms of element analysis that will be explored in this chapter do not claim that the preferred definition of the act element is untenable. Rather, they maintain that despite the potential for element analysis to operate objectively, due to the unintuitive nature of that operation, an alternative approach should be found.

Although it is important to canvass these arguments, we will not examine them to the same degree as we have the criticisms in the previous chapters of this Part. This is because, as Moore correctly states:

It is quite open to the moral or legal theorist to propose such a hidden systematisation, even if the concepts and principles employed in doing so are quite alien to ordinary ways of thinking and speaking.⁴⁹⁸

In the same manner that we now realise that ordinary statements about the morning and evening star (pre-Babylonian astronomy) were incorrect,⁴⁹⁹ so ordinary language should not undermine the preferred version of element analysis unless it is supported by evidence of substantive problems within its operation.

⁴⁹⁸ Moore, *Act and Crime* 42.

⁴⁹⁹ An example often referred to by Moore. See, Moore, *Act and Crime* 43.

THE ACT AND RESULT ELEMENTS ARE TOO NARROW

In the preceding chapters of Part II we have already examined criticisms of the preferred version of element analysis based upon the contention that the act and result elements are defined too narrowly. However, in each case, the focus of these criticisms was the viability of element analysis: claiming either that such a narrow definition was philosophically unacceptable,⁵⁰⁰ or that the definitions were too narrow to apply questions about mens rea. As a result, our discussion and rebuttal of those criticisms also focused on the question of viability. However, even if those rebuttals are accepted, the same criticisms can be recycled in this section. Although they may not undermine the viability of element analysis as an objective tool of for structuring discussion and reform, they may cast doubt on its general appeal.

The act element

The central criticism of the act element in this area is that, by defining action_e in terms of bodily movement, we are removing the necessary detail from D's offence. In order to explain the criticism, Duff uses the analogy of painting. He states that although it may be possible to define *painting*, like action_p, in terms of the bodily movements required, such a course should be resisted.

⁵⁰⁰ For example, the claims that invalid criteria are used to identify bodily movement as the basis of the act element.

[An account of bodily movements] would not, however, be an account of what paintings are as artistic products, which is what we are talking about when we talk about paintings; and not all paint marks, nor even all deliberately made paint marks, are paintings.⁵⁰¹

Thus, although our definition of action_e might perform its role within element analysis, it should be rejected because the cost of objectivity has been the essence of the original target itself: our objective definition of action_e is no longer reflective of action_p.⁵⁰²

However, Duff's logic does not appear to hold. First, we are not concerned that the preferred definition of action_e does not reflect a single philosophy of action_p. To reflect a single theory, as discussed above in chapter 4,⁵⁰³ is to lead to unacceptable vulnerability within element analysis. It is therefore enough that the preferred definition does not contradict any one theory of action_p. Secondly, reflecting Moore's defence to a similar criticism, the act element does not claim to provide a full account of action_p or a criminal offence, any more than bodily movements claim to provide a full account of painting. As long as the act element performs its specific tasks adequately,⁵⁰⁴ and the amalgam of each element is able to describe the full offence,⁵⁰⁵ then the narrowness of the act element is perfectly acceptable. Thus, although our definition of action_e might be unintuitively narrow according to Duff's theory of action_p, because we are only concerned with the criminal law, the criticism appears to be undermined.

⁵⁰¹ Duff, *Criminal Attempts* 295.

⁵⁰² For a similar criticism relating to the definition of omissions as a lack of movement, see, Fletcher, 'On the moral irrelevance of bodily movements' (1993) 142 *University of Pennsylvania Law Review*, 1443.

⁵⁰³ See pp91-98.

⁵⁰⁴ See, Moore, *Act and Crime* 89-90.

⁵⁰⁵ See, *Ibid*, 169, describing the concept of complex action_p.

For Duff, however, the unintuitive nature of the preferred definition of the act element (as it relates to action_p) is capable of undermining its use within the criminal law. This is because, although it may be possible to interpret the act element consistently and objectively, commentators and courts have consistently lent back upon ordinary usage when discussing acts_{e/p} even within a criminal law context.

Duff first draws attention to inconsistency within the advocates of element analysis. In each case, having stated that the act element should be defined narrowly to include only bodily movement, they then make reference to act elements including the 'possession of stolen goods', 'bringing goods into the country without paying duty', 'the simple act of speaking' and 'driving',⁵⁰⁶ each of which goes well beyond bodily movement. The argument here is that, if the proponents of element analysis cannot even interpret the act element consistently, then it is not capable of providing an objective structure for analysis and reform within the criminal law. However, such criticism may well be overstated. First, it is important to establish that an occasional loose example does not undermine a valid theory, especially one that is still relatively novel within academic discussion: it simply demonstrates that we must be more careful not to fall into the same trap. Secondly, and more importantly, the specific examples highlighted by Duff have resulted from a very narrow and unforgiving reading on his part. Thus, in each case, he is able to demonstrate loose expression, but he does not demonstrate a single example where that loose expression has affected the reasoning and the conclusion of an author when discussing a particular

⁵⁰⁶ Duff, 'Acting, trying and criminal liability' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 75, 82, referring to Enker, Robinson and Grall. See also, Duff, *Criminal Attempts* 250.

example. Unless the occasional slip can be demonstrated to have affected the reasoning of a certain case, then it cannot cause injustice and the criticism becomes very weak.

Where Duff has attempted to demonstrate the potential for injustice is through the inconsistent application of the act element within the courts. As Duff highlights, the practice of the courts generally is not to look for the existence of bodily movements first and then to construct liability upon this basis, but to look for the complex act description relevant for each offence. For example,

In asking whether a defendant whose gun went off and killed the attendant of a petrol station he was robbing could be convicted of murder ... the court looked, not for a voluntary bodily movement, but at acts such as 'discharging ... a loaded firearm', or 'press[ing] the trigger of a loaded and cocked rifle.'⁵⁰⁷

However, again, Duff's conclusion that such an approach undermines the future use of element analysis is unconvincing. First, as we discussed in chapter 3,⁵⁰⁸ the use of element analysis in the status quo is far from universal, both in general (different offences) and specific (within individual offences) terms. Therefore, even if Duff is able to demonstrate inconsistency within the courts, this does not preclude the possibility of element analysis and the preferred definition of the act element establishing themselves in the future.⁵⁰⁹ Secondly, the examples Duff provides to demonstrate that the courts do not discuss bodily movement all involve factual scenarios in which it is quite clear that D has performed an

⁵⁰⁷ Duff, *Criminal Attempts* 251.

⁵⁰⁸ See pp52-72.

⁵⁰⁹ Indeed, a likely explanation for judicial problems in this area is the lack of clear guidance.

intentional bodily movement. Indeed, Duff readily concedes that where there is some doubt over whether D's conduct was intentional, the courts language will often change to discuss bodily movement.⁵¹⁰ Thus, although Duff chooses to interpret the language of the court to indicate that bodily movement is not consistently relevant, there is an alternative interpretation that although intentional bodily movement is always relevant, courts will not generally discuss it unless it emerges as a point of contention. In either case, bearing in mind the current uncertainty about the status of element analysis discussed in chapter 3, the criticism does not appear to be sufficient to create serious problems for our preferred analysis.

The result element

Although we concluded that a narrow interpretation of the act element was required for the objective functioning of element analysis, there is a level of controversy created about how this affects the makeup of the result element. For example, the offence of rape⁵¹¹ is often employed as a paradigm example of an offence that does not include a result element, the actus reus being separated in the following manner:⁵¹²

- **Act element:** Penal penetration of the vagina, anus or mouth.
- **Circumstance element:** The absence of consent.

⁵¹⁰ Duff, *Criminal Attempts* 261-262.

⁵¹¹ The Sexual Offences Act 2003, s1.

⁵¹² See, The Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on Draft Criminal Code Bill* (Law Com No 177, 1989) [13.45] and Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 366.

However, if the act element is defined narrowly to include only bodily movement and the result element is identified as anything caused by that movement that is relevant to the offence, then the actus reus breakdown changes to include a result element. This is because D's body does not *do* a penetration, but rather, its movement causes penetration to occur.

- **Act element:** The requisite bodily movements.
- **Circumstance element:** The fact that what was penetrated constitutes the vagina, anus or mouth of V. And the absence of consent.
- **Result element:** Penetration.

For theorists like Moore that interpret the act element narrowly to include only bodily movement, this interpretation is fully acceptable.⁵¹³ However, it is likely to seem unintuitive to many other commentators.⁵¹⁴ This again may be seen as a stumbling block for the general acceptance of element analysis, but one that cannot be avoided in order to maintain the objectivity of the elements.

THE CIRCUMSTANCE ELEMENT IS TOO WIDE

Due to the narrow interpretations of the act and result elements, the circumstance element may appear unintuitively wide. This is because the circumstance element will not simply

⁵¹³ See, Moore, *Act and Crime* 169 and 191. The fact that the offence of rape includes a result element however, does not lead to the conclusion that all offences will include a result element. Although, as Moore indicates, the proportion of offences that include a result element may be significantly higher than expected, certain offences (for example, certain strict liability offences such as being found drunk in a public place) will still lack a result element. For discussion, see Moore, *Act and Crime* 209-210 and 218.

⁵¹⁴ See, Gardner, 'Review: Act and Crime' (1994) *Law Quarterly Review* 496, 498, who criticises Moore, concluding that the offence of rape includes a result element.

include facts surrounding D's action_e (including issues of consent and the validity of relevant licences for example), but will also include the facts surrounding the result element as well (including the part of V's body that D may have struck or damaged for example).⁵¹⁵ The concern here, as discussed in chapter 1,⁵¹⁶ is that certain commentators have attempted to make these divisions within the circumstance element formal ones without identifying an objective means of separating them.⁵¹⁷ However, as such a separation does not appear to provide any tangible benefits to the criminal law, a sufficient response is simply to reject it.

ELEMENT ANALYSIS SUBVERTS THE WILL OF PARLIAMENT

The final consideration in this area is that, due to the supposedly unintuitive nature of our preferred version of element analysis, it has the potential to subvert the expressed will of Parliament. Although we discussed the democratic advantages of element analysis in chapter 2,⁵¹⁸ allowing Parliament to reclaim from the courts the focus to legislate on the intricacies of the criminal law, it is important to remember that existing offences have not been created with element analysis (let alone our preferred version of element analysis) in mind. Therefore, if the preferred version of element analysis is used to apply inchoate offences such as assisting and encouraging crime,⁵¹⁹ where the manner in which elements are separated has a material effect upon the mens rea requirements of D, we may be

⁵¹⁵ For discussion see Moore, *Act and Crime* 196-198.

⁵¹⁶ See pp15-16.

⁵¹⁷ See Smith, 'Two problems in criminal attempts' (1956) 70 *Harvard Law Review*, 422.

⁵¹⁸ See pp23-26.

⁵¹⁹ The Serious Crime Act 2007, Part 2.

producing consequences that were not expected by the legislature and possibly not desired.⁵²⁰

This potential weakness of our version of element analysis operates on two distinct levels. The first relates to the use of element analysis as all. If an offence was not conceived and drafted with element analysis in mind, then however objective its separation is, that separation will not necessarily have been pre-empted by Parliament and it may operate in a manner they would not approve. The second area of weakness relates to our choice to adapt the current version of element analysis that has been advocated by the Law Commission. The Law Commission's recommendations in relation to the reform of inchoate liability, and Parliaments' construction of the Serious Crime Act, both reflect the Law Commissions version of element analysis. Therefore, any change to the method of separation at this point will affect the way that legislation operates in practice: potentially in a manner that is deemed unacceptable.

Offences drafted without element analysis in mind

One potential resolution to this problem is to adopt the stance taken within the US Model

Penal Code:

§2.02(4): Prescribed culpability requirement applies to all material elements. When law defining an offence prescribes the kind of culpability that is sufficient for the

⁵²⁰ Like the US, the presumption of fault will, however, prevent the potential exposure/creation of gaps in mens rea. See, Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond (1983) 35 *Stanford Law Review*, 681, 700 and 712.

commission of an offence, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offence, unless the contrary purpose plainly appears.

The result of this provision is that if the offence appears to resist separation, then offence analysis (as opposed to element analysis) should be employed. Thus, the will of Parliament is thought to be protected. Although the adoption of such an approach has found some notable support in this jurisdiction however, both from academics⁵²¹ and even within the 1989 Draft Criminal Code,⁵²² it entails several problems. The most important of these is simply the uncertainty of the court's approach: whereas one court might decide that an offence is capable of separation, another court might come to the opposite conclusion. Where the substance of the offence is dependent upon this decision, as it could be when applying inchoate offences, such uncertainty is unacceptable.⁵²³ Further, the support this approach has gained has been partly based upon the absence of an objective method of separating elements within element analysis. With this now in place, we are not balancing one type of uncertainty against another. Rather, we are balancing uncertainty verses objectivity. We must surely favour the latter.

The criticism that element analysis subverts the will of Parliament is also often overstated. This is because, although certain inchoate offences employ element analysis to require a particular mens rea in relation to certain elements of the principal offence, these

⁵²¹ See Williams, 'The mental element in crime: The Law Commission's Report No. 89 (1) The meaning of terms' (1978) *Criminal Law Review*, 588, 591.

⁵²² The Law Commission, *A Criminal Code for England and Wales: Volume 1 Report and Draft Criminal Code Bill* (Law Com No 177, 1989) [8.28].

⁵²³ See Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond (1983) 35 *Stanford Law Review*, 681, 714-716 and 724.

prescriptive requirements (currently) only apply to the act and result elements.⁵²⁴ Therefore, as both of these elements are defined narrowly under our preferred definition of element analysis, and the mens rea of the circumstance element is allowed to reflect that of the principal offence, any subversion is kept to a minimum. Indeed, even where the preferred definition gives rise to an unexpected result element,⁵²⁵ this will almost always have come from what might (under an alternative model) have been labelled the act element rather than the circumstance element. Beyond this, although there may be cases in which our version of element analysis leads to unexpected consequences, at least it is being done in an open way which allows Parliament to take remedial action as necessary: by, for example, redrafting the principal offence. Under the status quo, as we discussed in chapter 3 in relation to the case of *Khan*,⁵²⁶ we have a situation in which element analysis is employed haphazardly, and when it is applied, it is not applied in an objective manner. Therefore, Parliament has no control over its operation.

The criticism clearly has the ability to detract from the democratic ideals of element analysis. However, it is doubted that it does so to a sufficient extent to undermine its use. What it does is raise the question about whether element analysis can be introduced without some form of criminal code. Within a criminal code, the introduction of element analysis would be buttressed by its democratic source and so any unexpected consequences, relating to offences drafted without the new structure in mind, could be seen in that light. The very important issue of how the preferred version of element analysis might be introduced into the criminal law will be discussed in chapter 14.

⁵²⁴ The mens rea of the circumstance element will reflect that of the principal offence, unless it requires a mental state below subjective recklessness, in which case subjective recklessness will be required.

⁵²⁵ See discussion above, pp181-182.

⁵²⁶ *Khan* [1990] 1 WLR 813.

Adapting the Law Commission's version of element analysis

One of the central criticisms of the new offences of assisting and encouraging crime, as defined within the Serious Crime Act, is that the offence definitions initially spread the net of criminality too widely; relying on specific defences to avoid over-criminalisation.⁵²⁷ With this in mind, a narrowing of the act element, the only element within these offences that consistently requires a mens rea of intention or belief, will only go further to exacerbate this issue. As aspects of what the Law Commission would have defined as the act element move to become part of the circumstance element for example, so the fault attached to them may be reduced to as low as subjective recklessness.⁵²⁸

Unfortunately, although this an issue with which we may partially sympathise, it is a problem that is easy to exaggerate. First, the same wide ranging defences that are surrounding the current offences will continue to operate such, for example, that D will not be convicted of assisting or encouraging an offence if his or her behaviour could be considered reasonable in all the circumstance.⁵²⁹ Secondly, through the replacement of a subjective method of separation with one that operates objectively, Parliament will be in a vastly superior position to amend either the inchoate offences or specific offences in order to achieve the desired policy.

⁵²⁷ See, for example, Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 446-464.

⁵²⁸ Unless the substantive offence requires a mens rea of more than recklessness in which case that mens rea requirement will be reflected by the inchoate offence.

⁵²⁹ Serious Crime Act 2007, s50.

CONCLUSION

Despite the varying impacts of the criticisms outlined above, the preferred definition of the act element remains intact. It is with hope and expectation, of course, that as the definitions of the various elements become more settled over time (ideally in line with those advocated in this thesis), so these criticism will weaken further.

PART III

CONSTRUCTING A USABLE MODEL OF ELEMENT

ANALYSIS

Within Part II we identified and evaluated an objective definition of the actus reus of the act element.

- **Act element:** The bodily movement (or omission) necessary for the offence.

The identification of an act element will be necessary for every offence. However, although this is a minimal requirement, Duff counters that:

... this minimalist interpretation of the 'act requirement' will go through only if the interpretation itself embodies a tenable definition of an 'act'; only if the philosophical account of 'basic actions' as bodily movements on which it relies is itself tenable.⁵³⁰

Duff's objection here is the central fallacy that Part II has attempted to expose and reject. Duff is correct that the definition of the act element must arise from something, it cannot simply be plucked from the air, but this does not require it to be tied to a single theory of action_p. We have presented the preferred definition of the act element as the basis, not for agency in general, but for *criminal* agency. Isolating the requirements of the criminal law, we have been able to justify our preferred definition on the grounds that bodily movement

⁵³⁰ Duff, *Criminal Attempts* 254.

is the most causally basic thing that can be done intentionally. Such a definition and a basis allows the act element to perform its role effectively within the criminal law, to provide the nexus between D and the criminal event and to provide a basis for the objective identification of circumstances and results, and yet the act element also remains neutral within the wider theories of action_p.

We have not heralded the preferred definition of the act element as the *magic formula* presented as the (overambitious) goal at the end of chapter 2. Particularly when discussing some of the more unintuitive areas within the definitions, the task of objective separation is not an easy one.

However, having presented an objective method of separating the elements of an offence, we are able to move into the next stage of the thesis. Within Part III, moving beyond issues of objectivity, we will now explore the second major criticism of element analysis first identified in chapter 2: simplicity and usability.

This second criticism makes a less tangible claim than the first, but a claim that is equally damaging to both of the potential benefits of element analysis. The criticism here is that, whether or not element analysis can achieve objectivity, it must still be rejected because it introduces unnecessary or disproportionate complexity into the criminal law. This second criticism is capable of undermining element analysis as a vehicle for academic discussion because if it is introducing unnecessary complexity, it will distract and obscure the issues that it is being used to explore. Further, it is also important to remember that *academic discussion* should be as accessible as possible to the professionals within the court and

Parliamentary systems to whom academics are often targeting their work. As Smith has previously reflected on this issue:

The criminal law is ... supposed to have some connection with life, and to be more than an exercise in abstract diàlectics.⁵³¹

Unnecessary complexity is also capable of undermining element analysis as a structure for law reform because, when dealing with already very complex offences, further complexity can result in mistakes: mistakes within the drafting of the law, and mistakes within the court system.

The basis of Part III is therefore that, although element analysis is capable of operating objectively (avoiding the first criticism), neither potential benefit of element analysis can be realised unless it is able to operate straightforwardly within the criminal law. We will therefore explore the use of element analysis within its various guises in order to discover first, what the most straightforward method of element analysis involves, and secondly, whether any complexity inherent within *this* process is disproportionate to the potential benefits that element analysis can provide. Our discussion will be divided into six areas: choate offences, bespoke inchoate offences, general inchoate offences, ulterior clarifications, secondary liability and defences.

⁵³¹ Smith, 'Intention in criminal law' (1974) *Current Legal Problems*, 93, 105. Smith is in turn quoting from Brett, *An Inquiry into Criminal Guilt* (Law Book Co, Sydney 1963) 134-5.

CHAPTER 8

SEPARATING THE ELEMENTS OF CHOATE OFFENCES

Separating the elements of a choate offence should involve the most straightforward application of element analysis. Unlike inchoate offences, where D's mens rea extends beyond his or her conduct,⁵³² choate offences require nothing beyond the fault and conduct requirements of D's act, circumstance and result. Despite this however, traditionally at least, this form of the complexity criticism has tended to dominate the debate.

It is important not to be misled however. Although several commentators have focused on complexity in relation to the use of element analysis in this area, much of that criticism amounts to a repetition of the *subjectivity* criticism explored in the chapters within Part II. For example, when the Law Commission rejected the use of element analysis in 1980 for being 'unduly complex',⁵³³ they did so because in the absence of an objective method for separating and identifying the elements of an offence, it would be very difficult to apply element analysis to all but a few paradigm offences.⁵³⁴

It is therefore hoped that the work of the previous chapters, the identification and defence of an objective method of element analysis, can be employed again in order to answer this

⁵³² See the discussion of inchoate offences in Chapters 9 and 10.

⁵³³ Law Commission, *Attempts and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12].

⁵³⁴ Law Commission, *Attempts and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12] – [2.13]. See also, Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25, 26-27 and Dawkins, 'Parties, conspiracies and attempts' (1990) 20 *Victoria University Wellington Law Review*, 117, 138.

part of the complexity criticism. The preferred method can be set out in the following manner:

- **Act element:** The bodily movement (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

Simply stating the preferred method, however, is insufficient for present purposes. This is because, although we have explored the objectivity of the method, we have not gone far enough beyond this in order to ascertain how effectively it is able to work in practice. Therefore, although we may have already undermined part of the complexity criticism pre-emptively, it remains necessary to set out a step-by-step guide to the method's application; it remains necessary to question whether *this* method also introduces undue complexity.

HOW SEPARATION WORKS IN PRACTICE

We will now analyse the process behind the separation of elements. In order to do so, it is useful to employ the example of criminal damage⁵³⁵ discussed in previous chapters. Having set out the process, we will then move on to apply the same method to some of the offences that have been highlighted by critics of element analysis as being particularly problematic.

⁵³⁵ Criminal Damage Act 1971, s1(1).

Example 1: D intentionally throws a stone at V's window. The stone breaks the window.

The act element

As the in-depth analysis within the chapters in Part II demonstrate, the task of identifying the act element of an offence has become interwoven with a highly complex philosophical debate. Indeed, it has partly been the concern to avoid (at least outwardly) the rigours of this debate that has led to the act element remaining undefined, even within several jurisdictions that have formally employed element analysis.⁵³⁶ However, having demonstrated in the chapters within Part II that the definition of the *actus reus* of the act element is able to avoid reliance upon this philosophical debate, our preferred definition is effectively liberated from its detail.⁵³⁷

- **Act element:** The bodily movement (or omission) necessary for the offence.

As a result, the *act* required of D in example 1 becomes relatively straightforward to identify: the bodily movement targeted by the offence is that performed by D when throwing the stone.

Example 1	Act Element
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⁵³⁶ See the discussion that led the Australian Model Penal Code to omit their definition of an 'act' from the final Code draft. Australian Model Criminal Code (commentary) s202. See also, Chapter 4, pp88-89.

⁵³⁷ For the problems experienced by lawyers and judges without this manner of liberation, see Roberts, 'Publication Review - Act and Crime: the philosophy of action and its implications for criminal law' (1994) *Criminal Law Review*, 393, 394.

Actus Reus	The movement of D's arm
Mens Rea	Intention

These are the first two conditions of D's liability for criminal damage. A court must ascertain first, whether D did move his or her body (in this case arm) in the manner required to cause damage to V's property, and secondly, whether this movement was intentional.

Although the exact requirements of the actus reus of the act element will vary greatly between offences, they can be broadly divided into two categories. The first category of offences, typified by criminal damage and traditionally referred to as 'result crimes',⁵³⁸ target any movement or omission by D that has caused the particular criminal result. Thus, although in example 1 we are focusing on the movement of D's arm, had D caused the damage to V's property in a manner other than through the throwing of a stone, then the requirements of the act element would have to be recast to focus on that movement or omission. By contrast, the second category of offences, traditionally referred to as 'conduct crimes',⁵³⁹ will tend to be more precise in their identification of the movement required for the offence.⁵⁴⁰ For example, the actus reus of rape specifies the penile penetration of the vagina, anus or mouth.⁵⁴¹ Therefore, the actus reus of the act element cannot simply be *any act or omission* that caused the penetration, but rather, *any movement or omission of the*

⁵³⁸ See, Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 46.

⁵³⁹ See, *Ibid*, 46 and 47.

⁵⁴⁰ This is because, for conduct crimes, the focus of the offence (D's culpability) tends to be on D's conduct rather than the result of that conduct. For discussion, see, Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 366-368.

However, if the version of element analysis preferred within this thesis is accepted, this line of reasoning may no longer apply: with the act element reduced to simple bodily movement, much more of the offence will be effectively shifted to the result element.

⁵⁴¹ The Sexual Offences Act 2003, s1.

penis that caused the penetration. This relatively simple observation represents the only area of complication within the identification of the act element.

Before we move on, however, it is necessary to explain our division of the act element into *actus reus* and *mens rea*. As we discussed in chapter 6,⁵⁴² although the separate examination of *actus reus* and *mens rea* is standard to the analysis of circumstances and results, the act element is not commonly divided in this manner by the proponents of element analysis. In fact, the majority of commentators maintain that the act element resists such a division and can only be understood as an amalgam of the two.⁵⁴³ However, we concluded in chapter 6 that not only is such a separation theoretically acceptable, but that there may also be several practical benefits.⁵⁴⁴

The practical benefits gained from discussing *actus reus* and *mens rea* separately in relation to the act element will be highlighted in various chapters within Part III. In particular, it is a division that aids the analysis of inchoate offences.⁵⁴⁵ However, even when dealing solely with choate offences like criminal damage, it is still possible to discern a number of advantages.

Chiefly, these advantages relate to the importance of consistency. First, if it is accepted later that the division of the act element is necessary in order to make sense of inchoate liability, it is obviously preferable that the act element should always be analysed in the same way

⁵⁴² See pp166-172.

⁵⁴³ See, for example, Moore, *Placing Blame: A general theory of the criminal law* (Clarendon Press, 1997) 315-318.

⁵⁴⁴ See pp166-172.

⁵⁴⁵ See Chapter 10.

(consistency between inchoate and choate offences). It would certainly be undesirable to vary the analytical structuring used to examine the same choate offence depending upon whether it is the principal offence within an inchoate charge, or whether it is charged alone as a full offence.⁵⁴⁶

Secondly, there are also benefits to having the act element treated in the same way as the circumstance and result elements (consistency between elements). Without such consistency, even our most basic building blocks of *actus reus* and *mens rea* begin to look under threat and commentators are forced to defend ever more complex positions. A useful example of this can be seen in a recent debate between Michael Moore and Jeremy Hall. Hall, highlighting the fusion of conduct and fault within the act element, has claimed that the distinction between *actus reus* and *mens rea* more generally is unsustainable: how can the *actus reus* of the act element include an element of fault that, 'by definition, must be excluded'?⁵⁴⁷ Moore, defending the inconsistency, has attempted to distinguish the act element from the rest of an offence on the basis of its unique focus on bodily movement alone.

We should thus describe the difference between the mental states prohibited by the *actus reus* requirement and the mental states prohibited by the *mens rea* requirement as at least a difference in the objects of the respective mental states: bodily-movement descriptions are the objects of the mental-states part of the *actus reus*

⁵⁴⁶ It is accepted, of course, that the strength of this first point is entirely dependent upon the contention that this division is necessary in order to effectively analyse inchoate offences.

⁵⁴⁷ Hall, *General Principles of Criminal Law* (Cavendish, 2005) 227.

requirement, whereas complex act descriptions are the objects of the mental states of the *mens rea* requirement.⁵⁴⁸

Moore's position in this extract is not objectively false as a possible structure for the understanding of fault requirements. However, by forcing commentators to distinguish between species of fault that attach either to the *actus reus* or the *mens rea*, it is both subtle and highly complex. Beyond this, it may also be *unnecessarily* complex. We may be sympathetic to Moore in his attempt to defend the useful analytical separation of the *actus reus* and *mens rea* from Hall. Moore's method of doing so however, the defence of inconsistency and the creation of complex new distinctions in fault, does not warrant a similar response. He justifies the inconsistency on the basis that the act element is unique in its focus on bodily movement. However, the circumstance element and the result element, with their own distinct focuses, are unique in exactly the same way.⁵⁴⁹ Therefore, if it is acceptable to separate the *actus reus* and the *mens rea* aspects of these elements, even when the language of the offence in question may appear to resist such a separation, surely it is equally acceptable to separate (at least analytically) the *actus reus* and the *mens rea* of the act element as well.

If Moore's position was the only one available to maintain the general *actus reus*/*mens rea* distinction, then we would have to balance its added complexity against the harm that would be caused by conceding the distinction altogether. However, if we do not have to merge conduct and fault considerations within an analysis of the act element, and if by not

⁵⁴⁸ Moore, *Act and Crime: The philosophy of action and its implications for criminal law* (Oxford University Press, Oxford 1993) 173.

⁵⁴⁹ See discussion of fault terms in Chapter 11.

merging we can avoid blurring the *general* distinction between actus reus and mens rea, then Moore's position becomes very unattractive. Certainly, for our preferred separation to be undermined, we will require evidence of substantive harm or philosophical impossibility, neither of which can be located.⁵⁵⁰ With this in mind, the choice within this thesis to separate the discussion of actus reus and mens rea of the act element appears to serve the legitimate interests of consistency and simplicity without any major concessions.

The result element

Once an objective definition of the act element has been established, the circumstance and result elements become relatively straightforward to identify and individuate. This is because, as the circumstance and result elements are defined in reference to the act element, any subjectivity within the latter will be quickly transferred into the identification of each of the elements. However, having defined the act element objectively, such objectivity and clarity can be maintained.

For the result element, we are looking to identify which parts of the offence must be causally linked to the act element.

- **Result element:** Those things caused by the act necessary for the offence.

It is important to note within this definition, that the result element does not include *all* things that are caused by D's act_e, but rather all things caused by D's act_e that are *relevant*

⁵⁵⁰ See discussion in Chapter 6, pp166-172.

for the offence. For example, when D in example 1 throws the stone at V's window, his or her bodily movements may cause the motion of the stone, the air to move around the arm and the movement of the stone, the damage to the window, the glass of the window to fall, the upset to V and his or her family et cetera ad infinitum. However, when we analyse the consequences of D's act_e in reference to the result element of criminal damage, the only relevant part to the definition of that offence is the causing of damage: this is the only part of the offence that D's act_e must *cause*.

Having identified *damage* as the actus reus of the result element, we then question whether the offence requires any fault to be attached. In this case, the offence requires D to either intend or be reckless as to whether that damage occurs.⁵⁵¹

Example 1	Act Element	Result Element
Actus Reus	The movement of D's arm	Damage
Mens Rea	Intention	Recklessness

The actus reus and mens rea requirements of the result element represent the next two questions within our criminal damage example: did the movement of D's arm cause damage, and was D at least reckless as to whether that damage would be caused?

⁵⁵¹ Criminal Damage Act 1971, s1(1).

The circumstance element

Like the result element, the identification of the circumstance element also relies upon an objectively defined act element. Once this is achieved, as it was through the chapters in Part II, the circumstance element is quite straightforwardly identified as the surrounding facts that have not been caused by D's act_e.

- **Circumstance element:** The facts at the time of the act necessary for the offence.⁵⁵²

As with the result element, it is again important to note that the circumstance element only includes circumstances that are *necessary for the offence*. Thus, although at the time of D's act_e, it may have been true, for example, that it was raining, that D had a law degree and that D's friend X was washing his car, none of these circumstances form part of the circumstance element of criminal damage.⁵⁵³ Rather, the circumstances required to make D liable for the offence are that the damage was caused to 'property' and that that property did not belong to D.

Having identified the relevant circumstance element, however, the mens rea to be attached is a little more difficult. With the statutory definition of criminal damage failing to make clear reference to fault in this area, we must look beyond it to case law in order to fill in the

⁵⁵² In certain cases circumstances can also be located temporally with the result element. However, this does not affect our general reasoning or the construction of element analysis.

⁵⁵³ This is true even if the particular fact may have had an influence on the result element. For example, even if the stone would not have hit V's window were it not for a strong wind, that wind will still not come within the circumstance element. It is nowhere stated in law that wind is required for the offence of criminal damage. Therefore, as long as D has foreseen the possibility of damage and that damage has come about (the result element), it is not necessary to question D's fault in relation to the factors that brought it about. We would not, for example, want to require D to believe in gravity in order to be liable. Yet, if we were to be led down this path, it may be where we end up.

blank. In this vein, the leading case of *Smith*⁵⁵⁴ suggests that the minimum fault required here is recklessness.⁵⁵⁵

<i>Example 1</i>	Act Element	Circumstance element	Result Element
Actus Reus	The movement of D's arm	The damage was caused to property (the window) That property did not belong to D	Damage
Mens Rea	Intention	Recklessness for both	Recklessness

With the addition of the circumstance element, we now have the final two questions that are relevant to our analysis of this kind of choate offence. For D to satisfy the circumstance element within example 1, we must first question whether the damaged window (capable of being property) belonged to D, and secondly, whether D was reckless as to whether it did not belong to him or her?

Unlike the result element, however, the circumstance element also extends to include facts that will rarely be an issue within a case. In our analysis of the circumstance element of example 1 for example, we focused on the fact that D damaged *property* and that that property *did not belong to D*. However, for D to be liable for criminal damage, it is also necessary, for example, for D to be human, for D to be over the age of criminal responsibility, for D not to have permission from the owner of the window and so on. Each

⁵⁵⁴ [1974] Q.B. 354, [1974] 1 All. E.R. 632.

⁵⁵⁵ [1974] 1 All. E.R. 632 at 636.

of these considerations are also facts (at the time of the act_e) that are necessary for the offence: they are also circumstances capable of coming within the circumstance element. This is not to contend that *all* relevant circumstances should be explicitly discussed within every case, such a policy would be unnecessarily cumbersome and inefficient. It is important simply to recognise that in relation to such issues, when they become relevant to a case, their analysis should fall within the circumstance element.

SEPARATING THE ELEMENTS OF *PROBLEMATIC* OFFENCES

Although we have focused almost solely on the example of criminal damage above, the method of separation that has been employed should be able to apply with equal success to *any* criminal offence.⁵⁵⁶ This claim of universality however, universality across an ever increasing and varied body of offences, inevitably places the proponent of any method of element analysis at a disadvantage. Whereas the proponent must demonstrate that the method of separation is capable of applying to all offences, the critic need only find a single offence for which it does not work in order to prevail.⁵⁵⁷

The sheer quantity of criminal offences in England and Wales⁵⁵⁸ makes a demonstration in each case impractical. However, in order to give our preferred method the best possible test, we can focus on those offences highlighted by critics as being either impossible or very

⁵⁵⁶ It must be able to apply to *any* offence because of the use of element analysis to structure the general inchoate offences: offences that apply across the criminal law.

⁵⁵⁷ Indeed, it was the fear that the Law Commission's method of element analysis could not apply universally that originally prompted them to reject the technique in 1980. Law Commission, *Attempts and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12].

⁵⁵⁸ Estimated at over 8000 offences in total (not including by-laws): Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 9.

difficult to separate. Below, we explore examples of two such offences: causing death by dangerous driving⁵⁵⁹ and abduction of an unmarried girl from her parents or guardian.⁵⁶⁰ In each case, we will test not only whether the preferred method makes separation achievable, but also whether it is able to do so in a reasonably straightforward and logical manner.

Causing death by dangerous driving

A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.⁵⁶¹

Example 2: D, in a rush, drives his car out of control and hits V. V dies as a result.

⁵⁵⁹ Contrary to the Road Traffic Act 1988, s1.

⁵⁶⁰ The Sexual Offences Act 1956, s20 (repealed by the Sexual Offences Act 2003 c42 sch7 para1). Although the offence was abolished in 2004, its provisions are mirrored to a large extent by the Child Abduction Act 1984, s1-3.

⁵⁶¹ Road Traffic Act 1988, s1 (as amended by the Road Traffic Act 1991, s1).

<i>Example 2</i>	Act Element	Circumstance element	Result Element
Actus Reus	The movement of D's body	Fact of vehicle status Fact it is on a 'road' or 'public place' Fact that the car movement caused by D's body movement is considered 'dangerous' Fact that it is a 'person' (V) that is killed	Movement (of the car) Death
Mens Rea	Intention	No fault for all	No fault for both

There are several areas within which a driving offence such as this one might be considered problematic. For example, although the offence is one of strict liability, it must be remembered that the act element still requires D to intend his or her bodily movement. Beyond this, as has been highlighted by Smith and Hogan,⁵⁶² there are a couple of important causal relationships that must not be misrepresented: between D and the dangerous movement of the car, and between D and the death of V. This is because, although movement of the car that is caused by D is relevant to the offence, movement caused by events like an unforeseeable break failure or a shunt from another car is not. By defining the act element narrowly to include only the voluntary movement of D's body, this distinction is clearly secured.

⁵⁶² Smith and Hogan, *Criminal law* (5th Ed, Butterworths, London 1983) 39 and 40.

It should be reiterated that the requirement of dangerousness will always constitute a circumstances element under our preferred model of element analysis. As discussed in chapter 3, although the Law Commission have expressed support for discretion regarding the placement of these kinds of requirements,⁵⁶³ they have failed to demonstrate how such discretion will benefit the law in this area. Rather, it is contended that such discretion would simply amount to an added and unnecessary complicating factor.⁵⁶⁴

Abduction of an unmarried girl under the age sixteen from her parent or guardian

It is an offence for a person acting without lawful authority or excuse to take an unmarried girl under the age of sixteen out of the possession of her parent or guardian against his will.⁵⁶⁵

Example 3: D falls in love with V (aged 15) and takes her away to live with him.

⁵⁶³ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.19-2.27].

⁵⁶⁴ See discussion in Chapter 3, pp70-72.

⁵⁶⁵ The Sexual Offences Act 1956, s20(1) (repealed by the Sexual Offences Act 2003, c42 sch7 para1).

<i>Example 3</i>	Act Element	Circumstance Element	Result Element
Actus Reus	The movement of D's body while taking V	Fact of no lawful authority Fact of the girl being unmarried, in possession of her parents or guardian and being under sixteen	The taking of possession by D
Mens Rea	Intention	Recklessness	Intent

The abduction offence, set out in by example 3, has already been discussed at several points in the previous chapters. This is because the offence has assumed a central role within the criticism of element analysis, with even proponents of the method disagreeing fundamentally about how the elements of the offence should be separated.⁵⁶⁶

Despite the controversy, however, the preferred model of element analysis is able to dissect the elements of the offence quite straightforwardly. 'Taking of possession' is the only result element of the offence because it is the only component that has been caused by D's act. The other factors necessary for the offence are classified as circumstances because, although required within the offence definition, they are not causally connected to the act element.

⁵⁶⁶ See discussion in Chapter 3, pp56-58. See also, Buxton, 'Circumstances, consequences and attempted rape' (1984) *Criminal Law Review*, 25.

CONCLUSION

For each offence explored, the preferred method of element analysis is able to dissect the elements in a relatively logical and straightforward manner. However, before moving on it is important to recognise the limitations, as well as the advantages, of the technique. Separating the elements of an offence can have a clear benefit to the understanding and consistent application of the law. However, no method of element analysis claims to answer specific complexities that exist within each element. For example, although we demonstrated in chapter 5 that element analysis is able to deal with offences that can be committed by an omission,⁵⁶⁷ it cannot tell us which omissions should come within this category. It can tell us that a 'lack of legal authority' is a circumstance element within example 3 above, but it cannot tell us what authority is sufficient if there is a dispute. Thus, although the analytical function of element analysis may improve the focus of the court and the academic alike, it will not (and does not attempt to) provide answers to substantive and often complex questions of content.

⁵⁶⁷ See pp136-148.

CHAPTER 9

SEPARATING THE ELEMENTS OF BESPOKE INCHOATE OFFENCES

Before moving on to explore the general inchoate offences of conspiracy, attempt and assisting and encouraging in chapter 10, it is first important to address the further category of bespoke inchoate offences. Bespoke inchoate offences are special part offences that have been drafted in such a way as to include an inchoate element: to include a requirement of ulterior fault that does not correspond to any part of the actus reus of the offence itself. Thus, D's liability will depend not only on the completion of certain acts, circumstances and results (each potentially requiring a level of fault), but it will also depend on D possessing a further element of mens rea that is independent of these.⁵⁶⁸

There are two species of bespoke inchoate offences. The first, including offences such as burglary⁵⁶⁹ and grooming,⁵⁷⁰ involve D acting in a certain proscribed manner with the intention⁵⁷¹ to complete a substantive offence.⁵⁷² For example, the offence of burglary requires D to enter a dwelling with intent to steal, inflict grievous bodily harm or commit criminal damage.⁵⁷³ D will only be liable if he or she *both* completes the proscribed conduct (with the requisite fault), and holds the necessary intention to commit the further offence.

⁵⁶⁸ For a discussion of these offences, including a defence of their role within the criminal law, see Horder, 'Crimes of ulterior intent' in Simester and Smith (eds), *Harm and Culpability* (Clarendon Press 1996) 153.

⁵⁶⁹ The Theft Act 1968, s9(1)(a).

⁵⁷⁰ The Sexual Offences Act 2003, s15(1).

⁵⁷¹ Here, intention could apply to only certain elements of the principal offence.

⁵⁷² For a comprehensive list of the offences that come within this category, see Law Commission, *Conspiracy and Attempts: A Consultation Paper* (Consultation Paper No 183, 2008) Appendix C.

⁵⁷³ The Theft Act 1968, s9.

This species of bespoke inchoate offence operates (and is therefore appropriately analysed) in the same manner as the general inchoate offences. Our exploration will therefore be deferred to the discussion of ‘general inchoate offences’ in chapter 10.

The second species of bespoke inchoate offences, however, does not fit into the same mold. For this group, which includes offences such as theft⁵⁷⁴ and certain criminal damage offences,⁵⁷⁵ although D’s liability requires that he or she hold a certain ulterior fault, this fault will not amount to an intention to bring about a future substantive offence. For example, the offence of theft requires D to take unlawful possession of something *with the intention of permanently depriving its legal owner*.⁵⁷⁶ D will only be liable if he or she *both* completes the proscribed conduct (with the requisite fault), and holds the necessary ulterior fault (regarding the permanent deprivation). Although permanent deprivation does not amount to an independent substantive offence, it is a necessary component of the offence of theft.

Conforming to a rigid structure of acts, circumstances and results therefore becomes very problematic in relation to this species of offence. D’s ulterior fault requirement not only fails to correspond to an actus reus requirement, but it also struggles to fit into any of our offence elements as defined:

⁵⁷⁴ The Theft Act 1963, s1(1).

⁵⁷⁵ For example, committing criminal damage being reckless as to whether life is endangered thereby. The Criminal Damage Act 1971, s1(2).

⁵⁷⁶ The Theft Act 1963, s1(1).

- **Act element:** The bodily movement (or omission) necessary for the offence.
- **Circumstance element:** The facts at the time of the act necessary for the offence.
- **Result element:** Those things caused by the act necessary for the offence.

Perhaps its closest relative within the above structure is the circumstance element. We could say, for example, that D's 'intention to permanently deprive' is a surrounding fact that must exist at the time D completes the act element. Indeed, although the proponents of element analysis have been generally silent in relation to this kind of example, there may be some indication that the Law Commission would take this line. In the Conspiracy and Attempts report,⁵⁷⁷ for example, the Commission explain that when an assault is not 'because of its nature' sexual, it may nevertheless be deemed a sexual assault if the circumstances are such as to make it sexual.⁵⁷⁸ Following this logic, if an assault is deemed to be a sexual assault on the basis of D's sexual motive (ulterior intent),⁵⁷⁹ then this intent must be a circumstance element.

The problem with this approach, however, is that it allows an aspect of D's fault to come within the actus reus of the offence definition. If D's intention to permanently deprive or D's sexual motivation becomes part of the actus reus of the circumstance element, then the distinction between actus reus and mens rea (a foundation of the preferred approach to element analysis) is undermined. The preferred approach to element analysis is no longer a straightforward and dependable model to be applied to any offence within the criminal law. Rather, as Sullivan points out, 'although invariably adequate, [the model] on occasion may

⁵⁷⁷ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

⁵⁷⁸ *Ibid*, [2.22-2.24].

⁵⁷⁹ See, for example, the case of *Court* [1988] 2 ALL E.R. 221 in which D's sexual motive was held to be decisive evidence that his assault upon a young girl could constitute a sexual assault.

underplay a significant aspect of what may be termed the internal aspect of criminal liability.⁵⁸⁰

With a multitude of such offences currently within the criminal law,⁵⁸¹ the proponent of element analysis seems to be left with an unpalatable choice: accept that D's fault can form part of the actus reus or abandon element analysis as a whole. However, such a choice is predicated upon a misconception. This species of offences are not standard choate offences that fit wholly within the three offence elements, but inchoate offences for which the offence definitions necessarily include requirements ulterior to that model. Moving further away from the current models of element analysis therefore, our preferred model of element analysis would include a fourth element:

- **Ultrior fault element:** Fault required by the offence that does not correspond to an element of the actus reus.

Once we have distinguished an element of ulterior fault, we are able to avoid compromising the definitions of the other offence elements, and the analysis of this species of offence becomes considerably easier.

In order to illustrate this, we explore three offences that have been previously highlighted as problematic: theft, indecent assault (sexual assault) and criminal damage reckless as to the endangerment of life.

⁵⁸⁰ Sullivan, 'Bad thoughts and bad acts' (1990) *Criminal Law Review*, 559, 559.

⁵⁸¹ Mc Sherry, 'Expanding the boundaries of inchoate crimes: The growing reliance on preparatory offences' in Mc Sherry, Norrie and Bronitt (eds) *Regulating Deviance – The redirection of criminalisation and the futures of criminal law* (Hart, Oxford 2009), 141, 142.

THEFT

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it...⁵⁸²

Example 1: D finds an unattended wallet in the street. He decides to take the wallet home and keep the contents.

<i>Example 1</i>	Act Element	Circumstance Element	Result Element	Ultterior Fault Element
Actus Reus	D's bodily movement	Fact that property did not belong to D	D's possession or control of the property	
Mens Rea	Intention	Knowledge	Intention	D's dishonesty D's intention to permanently deprive

For Sullivan, example 1 represents a clear demonstration of fault considerations playing a part within the actus reus of an offence.

⁵⁸² Contrary to the Theft Act 1963, s1(1).

If D's intention is to hand in the wallet at the nearest police station no appropriation of property would in the meaning of the law of theft have occurred. If D intends to keep it for himself we have the *actus reus* of theft.⁵⁸³

However, if we employ the preferred method of element analysis, as set out above, no such mingling of *actus reus* and *mens rea* will occur. The physical part of the offence, focusing on D's acquisition of the property, can be analysed without any reference to D's intentions (ulterior or otherwise). Then, having established D's *mens rea* in relation to the elements of the *actus reus*, we can separately question D's ulterior ambitions.

INDECENT ASSAULT (SEXUAL ASSAULT)

It is an offence ... for a person to make an indecent assault on a woman.⁵⁸⁴

Example 2: D (a grown man) slaps V (a young girl) on the bottom whilst she is in his shop. D later explains that he did so because he has a 'bottom fetish'.

⁵⁸³ Sullivan, 'Bad thoughts and bad acts' (1990) *Criminal Law Review*, 559, 560.

⁵⁸⁴ The Sexual Offences Act 1956, s14(1). This offence has since been replaced by the offence of sexual assault, contained within the Sexual Offences Act 2003, s3.

<i>Example 2</i>	Act Element	Circumstance Element	Result Element	Ulterior Fault Element
Actus Reus	The movement of D's hand	Fact that the contact could be deemed 'indecent' The fact that V is a woman	The contact with V	
Mens Rea	Intention	Recklessness for both	Intention	Where D's act <i>may</i> be innocent, D must have an indecent/sexual intent

Sullivan has also highlighted indecent assault (now sexual assault⁵⁸⁵) as an example of fault considerations playing a part within the actus reus of an offence. Discussing the case of *Court*⁵⁸⁶ (example 2), Sullivan explains that although certain assaults are clearly sexual, this is an example in which a potentially innocent (or at least non-sexual) act becomes an indecent assault because of D's sexual motive, a motive that Sullivan would categorise as part of the circumstance element of the offence.⁵⁸⁷ However, as demonstrated above, we are again able to avoid Sullivan's conclusion by correctly categorising D's sexual motivation

⁵⁸⁵ Sullivan's contentions (and the responses to them) are equally applicable to the new offence of sexual assault.

⁵⁸⁶ *Court* [1988] 2 ALL E.R. 221.

⁵⁸⁷ Sullivan, 'Bad thoughts and bad acts' (1990) *Criminal Law Review*, 559, 559-560.

as an ulterior fault requirement. D's sexual motive is not an external world fact to be discovered, but rather, it is the product of D's mind.

An interesting facet of this offence, as opposed to theft, is the conditional nature of the ulterior fault element. As Lord Ackner makes clear in the case of *Court*, if D's actions had been indecent or sexual in an obvious manner then D's motivations would be 'irrelevant'.⁵⁸⁸ However, where there is some ambiguity as to whether his actions are indecent or not (as with the smacking of a child), it becomes necessary to demonstrate the additional element of ulterior fault.⁵⁸⁹

The ulterior fault element plays a similar conditional role in other offences too, for example the possession of an offensive weapon in a public place.⁵⁹⁰ Where the weapon in question is clearly offensive, for example a firearm, then the offence does not require an element of ulterior fault. However, where the weapon is not self-evidently offensive then it will be necessary to prove that it is being carried with an offensive intention.⁵⁹¹

⁵⁸⁸ *Court* [1988] 2 ALL E.R. 221, 230.

⁵⁸⁹ It is important to note that the circumstance element requiring D's actions to be at least *potentially* indecent will always be a requirement of the offence. 'The undisclosed intention of the defendant could not [on its own] make the assault an indecent one'. *Court* [1988] 2 ALL E.R. 221, 229 [Lord Ackner].

⁵⁹⁰ Contrary to the Prevention of Crime Act 1953, s1.

⁵⁹¹ For example, a stone. See, *Harrison v Thornton* (1966) 68 Cr. App. R. 28. For discussion, see Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 661-663.

CRIMINAL DAMAGE RECKLESS AS TO THE ENDANGERMENT OF LIFE

A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and

(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence.⁵⁹²

Example 3: Following a bitter divorce, D sets light to a package and posts it through the door of his ex-wife V.

<i>Example 3</i>	Act Element	Circumstance Element	Result Element	Ulterior Fault Element
Actus Reus	Bodily movement of D	That what is damaged is property Lack of lawful excuse	Damage	
Mens Rea	Intention	Knowledge or recklessness for both	Intent or recklessness	Intending or reckless as to the endangerment of life

⁵⁹² Criminal Damage Act 1971, s1(2).

The inclusion of this example is simply intended to demonstrate that the ulterior fault element is capable of including fault requirements other than intention. D, in example 3, will be liable for the offence if when setting light to V's property he is at least reckless as to whether this act will endanger her life. He need not *intend* that it should do so.

It is necessary to provide this kind of example because of the unhelpful manner in which certain textbooks have discussed this issue. Ormerod for example, within the latest edition of *Smith and Hogan: Criminal Law*,⁵⁹³ provides a general definition of mens rea as:

Intention, knowledge or recklessness with respect to all the elements of the offence together with any *ulterior intent* which the definition of the crime requires.⁵⁹⁴
(emphasis changed)

He then goes on to contend, in relation to ulterior intent (ulterior fault), that:

Where an ulterior intent is required, it is obvious that recklessness is not enough. On a charge of wounding with intent to cause grievous bodily harm, proof that D was reckless whether he caused grievous bodily harm will not suffice.⁵⁹⁵

In relation to offences like wounding with intent to cause grievous bodily harm, we can have no dispute: the ulterior fault required will clearly only be satisfied by intention. However, the fact that Ormerod uses the label *ulterior intent* rather than *ulterior fault* within his general definition of mens rea implies that he is not using it as a specific term for a certain

⁵⁹³ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008).

⁵⁹⁴ *Ibid*, 126.

⁵⁹⁵ *Ibid*, 126.

sub-class of offences. Rather, it implies that he does not accept that an ulterior fault requirement can exist that is not based upon intention.

The example above is therefore included for the avoidance of doubt and possible confusion. The ulterior fault element is capable of requiring any level of fault in relation to anything outside the actus reus of D's offence. Contrary to Ormerod, there is no definitional stop.

CONCLUSION

This species of bespoke inchoate offences is not often individuated as the source of problem examples for element analysis. However, failing to recognise the requirement of a fourth element of ulterior fault can lead to complication and (potentially) undermine the method altogether. It is only with the addition of the ulterior fault element that the separation of elements is once again a straightforward process, and a process that preserves the division between actus reus and mens rea.

CHAPTER 10

SEPARATING THE ELEMENTS OF GENERAL INCHOATE OFFENCES

Criticism of element analysis based on objective separation has always centred on the general inchoate offences⁵⁹⁶ because of their wide application across the criminal law: a general inchoate offence employing element analysis relies on the ability to dissect the elements of *all* offences objectively.⁵⁹⁷ However, more recent years have also demonstrated the emergence of the complexity criticism relating specifically to this class of offence. When discussing the use of element analysis for attempts, for example, the New Zealand Crimes Consultative Committee comments that:

Our concern is that the introduction of [element analysis] might unnecessarily complicate the law of attempts by focusing on the distinction between the elements of an offence... Such a distinction is not easily explained to a jury.⁵⁹⁸

There have also been similar concerns expressed in this country following the enactment of Part 2 of the Serious Crime Act 2007, which contains the new and reformed offences of assisting and encouraging crime. Ormerod, for example, contends that the express use of element analysis within these offences has rendered them 'excessively'⁵⁹⁹ and 'torturously

⁵⁹⁶ Attempt, conspiracy and assisting and encouraging.

⁵⁹⁷ See discussion in chapter 3 generally.

⁵⁹⁸ Crimes Consultative Committee, *Report on 1989 Crimes Bill* (New Zealand, 1991) 35.

⁵⁹⁹ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 449.

complex'.⁶⁰⁰ Indeed, it is a concern that even leads him to question whether the reforms were necessary.⁶⁰¹ When balancing the benefits of element analysis against the addition of further complexity to already highly complex inchoate offences, it is a criticism that creates a very real question mark over the practical usefulness of the model.

As with the discussion of choate offences in chapter 8, part of this criticism can be undermined pre-emptively with the work done in the chapters within Part II. As we explored in chapter 8, the preferred model of element analysis is able to provide an objective and relatively straightforward method of separating the elements of even the most *difficult* choate offences.

However, unlike with choate offences and even bespoke inchoate offences, the general inchoate offences also entail a second layer of complication for the use of element analysis. This is because, unlike the species of bespoke inchoate offences discussed above, the ulterior fault required for these offences relates to an entire substantive offence. The result of this is that, when discussing acts, circumstances and results, the structure of general inchoate offences make it very difficult to tell whether we are discussing the actual conduct of D, or the elements of the principal offence that has not yet completed (the ulterior fault).

This difficulty has not been aided by the approach taken by the Law Commission in their recent publications in this area. In each case, the Commission (understandably) spend considerable time exploring the requirements of D in relation to each of the separate elements of the principal offence. However, when discussing what each inchoate offence

⁶⁰⁰ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 447.

⁶⁰¹ *Ibid*, 446-454.

requires D to actually do,⁶⁰² the Commission have been much less willing to employ element analysis. For example, in relation to encouraging crime, we have a discussion of what amounts to possible encouragement, but this is not set in the context of offence elements.⁶⁰³ The result of this is that the two layered nature of inchoate offences is obscured from the reader and it becomes much easier to make mistakes when attempting to interpret the policy, both within the publications and (where relevant) the appended draft legislation.

It is a problem that has even infected the language of Part two of the Serious Crime Act. For example, as Ormerod has highlighted in relation to the dual role of the act element:

Note the trap for the unwary of confusing the use of the term 'act' in ... the statute.

'Act' is used inconsistently and without clarification. Although from a reading of s47, it might appear as if D's 'act' capable of assisting and encouraging might include 'a failure to act; a continuation of an act that has already begun; an attempt to do an act...' In fact the 'act' being discussed in that section is P's. cf s65(2)(b) where 'the act' refers to D.⁶⁰⁴ (emphasis added)

Despite this, the contention that the current reforms (incorporating the Commission's model of element analysis) are introducing an *undue* level of complexity is still far from being established. The dual requirements within mens rea and within actus reus are, after all, already a feature of the general inchoate offences. Indeed, within the law of attempts at

⁶⁰² As opposed to trying to do (attempt), planning to do (conspiracy) or assisting or encouraging P to do (assisting and encouraging).

⁶⁰³ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.36-5.45].

⁶⁰⁴ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 451, fn523.

least, the emergence of element analysis has come about through the practical inventiveness of the common law.⁶⁰⁵ Therefore, although the use of element analysis may add a further dimension of complexity, it still seems to represent a level of complexity that the courts believe they are equipped to work with. In this vein, it is also reassuring that within the recent Law Commission consultation on the reform of attempts and conspiracy,⁶⁰⁶ the use of element analysis was broadly supported by judicial consultees that did not foresee specific problems of complexity.⁶⁰⁷

However, although this indicates that the use of element analysis in this area does not create undue complexity, it may well be that the Commission's model of element analysis does introduce a level of *unnecessary* complexity. It must be noted that, although the leading judicial consultees did not identify complexity as a major concern, various other consultees did.⁶⁰⁸ Therefore, the specific issues relating to complexity and the use of element analysis within the general inchoate offences remain an area of concern.

One of the few proponents of element analysis to have both recognised the problems in this area and attempted to resolve them is Paul Robinson. For Robinson, the most effective way of dealing with inchoate offences is to introduce a further offence element: a future conduct or future act element.⁶⁰⁹ For choate offences, this element will simply duplicate the role of the standard 'act requirement' (act element), ensuring that D must intend the act relevant

⁶⁰⁵ *Khan* [1990] 1 W.L.R. 813. See discussion in chapter 2, pp36-41.

⁶⁰⁶ Law Commission, *Conspiracy and Attempts: A Consultation Paper* (Consultation Paper No 183, 2008).

⁶⁰⁷ See, the response of the Criminal Sub Committee of the Council of HM Circuit Judges and the response of the Higher Courts Judiciary.

⁶⁰⁸ See, for example, the responses of Professor John Spencer, Mr Justice Calvert-Smith, Peter Glazebrook, and Professor Antony Duff.

⁶⁰⁹ Robinson, 'Should the criminal law abandon the actus reus – mens rea distinction?' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 187 and Robinson, 'A functional analysis of the criminal law' (1994) *Northwestern University Law Review*, 857.

to the offence definition.⁶¹⁰ However, where D is charged with an inchoate offence such as attempt or conspiracy, the further element will be used to distinguish the conduct and fault requirements of D in relation to the act element of the principle offence (whether that will be completed by D or a separate party) from the conduct and fault requirements of D in relation to the act he or she has already completed.⁶¹¹ By separating the two species of act element in this manner, each can be investigated separately by a court, minimising the confusion caused by any overlapping discussion of the two.⁶¹²

The problem with Robinson's approach, however, is that he focuses on (and therefore seeks to resolve) only one aspect of the complexity criticism introduced above. Let us take the following example:

Example 1: D encourages P to have sexual intercourse with V, intending that he should do so.

When analysing whether D is liable for the inchoate offence of encouraging rape,⁶¹³ dividing between the investigation of D's fault in relation to his or her act element, and his or her fault in relation to P's act element, is very useful. Particularly, as Robinson states, because although D can only intend or not intend his or her own action, he or she may hold any of a full range of potential fault requirements in relation to the actions of P.⁶¹⁴ However, on the

⁶¹⁰ Robinson, 'A functional analysis of the criminal law' (1994) *Northwestern University Law Review*, 857, 864.

⁶¹¹ *Ibid*, 864.

⁶¹² See, *Ibid*, 869, for a pictorial representation of the separate offence elements.

⁶¹³ Contrary to the Serious Crime Act 2007, s44.

⁶¹⁴ As a result of this, it is therefore open to legislators to apply a different fault requirement than intention to the fault required by D in relation to P's act. See, Robinson, 'Should the criminal law abandon the actus reus – mens rea distinction?' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 187, 204.

basis that the other elements are not affected in the same way within inchoate offences, Robinson chooses not to divide circumstances and results in a similar manner.

This is a mistake. First, it may be exposed as a mistake by employing Robinson's own reasoning. For Robinson, only D's *act* element should be distinguished from P's prospective future act element because of the wider variety of (potential) fault requirements that can apply to D's foresight of P's act.⁶¹⁵ This is because, although D's act element takes place in the present (can only be intentional or unintentional), P's act element is a future act that is yet to have taken place. The problem with this as a means of distinguishing the other elements is that, although fault applicable to the result element (for both) will consistently involve the anticipation of a future event, the circumstance element will vary in the same manner as the act element. Where we are discussing D's fault in relation to his or her conduct we are analysing current circumstances. However, when discussing D's fault in relation to a circumstance element of a principal offence (committed in this case by P), we are now analysing a future circumstance element.⁶¹⁶ The result, as with the act element, is that the applicable fault requirements must be adapted. For example, although in a case of handling stolen property it is possible to know whether the property handled is stolen (circumstance element), without the ability to look into the future, it is logically impossible to *know* that a future handling of property will also be stolen property.

⁶¹⁵ Robinson also requires a separation of D's fault in relation to his or her act element from that of P because of what he perceives as their separate roles within an offence: rule articulation and grading function. However, this is not directly relevant to the current discussion. See, Robinson, 'A functional analysis of the criminal law' (1994) *Northwestern University Law Review*, 857.

⁶¹⁶ A point that is not recognised by Robinson. See, *Ibid*, 863.

More importantly for present purposes, Robinson's model can also be criticised because of the potential confusion caused by an approach that applies inconsistently to the different offence elements. Any potential gains we have discussed in relation to the analysis of the act element are surely cancelled out by the fact that, having separated the discussion of D's and P's act element, we are now expected to re-merge the two parts of the offence for the analysis of the other two elements. Thus, Robinson's analysis of example 1 is likely to look like this:

<i>Example 1</i>	Act Requirement (Act Element of D)	Act Element (Act Element of P)
Actus Reus	D's bodily movement	P's bodily movement (not yet happened)
Mens Rea	Intent	D must intend or believe that P will act D must intend or believe that P will intend to act

<i>Example 1</i>	Circumstance Element	Result Element
Actus Reus	D's act must be capable of encouraging P	
Mens Rea	Intent or belief D must be reckless as to whether V will not consent to sexual intercourse with P D must be reckless as to whether P will not have a reasonable belief that V will consent	D must be reckless as to whether P will achieve penetration of V's vagina, anus or mouth

Although Robinson marks a clear distinction between the two species of act element, it remains problematic. First, this is due to the inconsistency between the act element and the circumstance and result elements: expecting a division between D's conduct and P's to be established and then abandoned. As highlighted above, Robinson is unable to demonstrate why the act element should be so distinguished. Secondly, it is contended that by bundling the requirements of D in relation to his or her own and to P's conduct within the circumstance and result elements, there is a serious risk of confusion and misapplication.

Despite the advantages of Robinson's formulation, therefore, it is rejected. An alternative approach must be identified.

APPLYING THE PREFERRED APPROACH TO THE PROBLEM OF COMPLEXITY

Using the work of Robinson as a lead, and following the approach taken in relation to bespoke inchoate offences above, the preferred approach would begin by separating the consideration of D's own conduct (and the attached fault) from the consideration of D's ulterior fault in relation to P and/or the principal offence. Importantly, this would not be isolated to the act element, but would also apply to the circumstance and result elements as well.

The first stage of our analysis of the general inchoate offences will therefore focus on the actus reus required of D, and any mens rea requirements attached to that actus reus.

<i>Inchoate offences</i>	Act Element	Circumstance Element	Result Element
Actus Reus	D's bodily movement required by the inchoate offence ⁶¹⁷	The circumstances surrounding D's act that are required by the inchoate offence. For example, in attempts, that D's bodily movement constitutes an act 'beyond mere preparation' towards the completion of the principal offence	The results of D's act that are required by the inchoate offence. For example, the forming of an 'agreement' for conspiracy
Mens Rea	D's fault in relation to his or her bodily movement	D's fault in relation to each circumstance	D's fault in relation to each result

From this basis, having fully explored the actus reus requirements, we then move on to consider the fault required of D in relation to the principal offence. D's fault relating to the principal offence is distinct from the first stage (offence elements) because it relates to mens rea that 'extends beyond the actus reus of the offence'.⁶¹⁸ As with the species of bespoke inchoate offences discussed above, we are now looking to D's ulterior fault requirements which involve future conduct that has not yet come about (and need never do so).

⁶¹⁷ If the offence is committed verbally or by omission, then further circumstances and results will apply. See discussion in chapter 5.

⁶¹⁸ Duff, *Intention, agency and criminal liability* (Blackwell, 1990) 39.

The second stage of our analysis of the general inchoate offences is to explore the ulterior fault element. When discussing this element in relation to bespoke inchoate offences in chapter 9, the fault generally related to one or two specific points.⁶¹⁹ For general inchoate offences in contrast, this element encompasses all of D's fault requirements in relation to the principal offence. As a result, although the ulterior fault element still only represents a single element of D's liability, it is most effectively analysed when it is further dissected into the individual elements of the principal offence. For each part of the principal offence, whether to be committed by D or P, the question will be what fault is essential of D in relation to this requirement.

⁶¹⁹ For example, an intention to permanently deprive in theft. See discussion of bespoke inchoate offences above, p217.

<i>D's Ulterior Fault element</i>	Act Element	Circumstance Element	Result Element	Ulterior Fault Element
D's fault in relation to the Actus Reus of the principal offence	D's fault in relation to the bodily movements required by the principal offence	D's fault in relation to the circumstances required by the principal offence	D's fault in relation to the results (if any) required by the principal offence	
D's fault in relation to the Mens Rea of the principal offence	D's fault in relation to the fault required within the act element of the principal offence	D's fault in relation to the fault required within the circumstance element (if any) of the principal offence	D's fault in relation to the fault required within the result element (if any) of the principal offence	D's fault in relation to the ulterior fault (if any) required by the principal offence

It should be remembered that as long as D's mens rea relating to his or her conduct is not confused with D's mens rea relating to the conduct and fault of the principal offence, other forms of this analysis are capable of reaching the same conclusions. The chart based structuring of offences discussed generally within Part III is not essential to the objective separation of elements. If it was, it would have come within the chapters in Part II. Rather, it

is believed that the preferred model presents highly complex offences in their most straightforward and practical dissection.

The quantity of boxes in the charts above, each representing a separate requirement of the offence, may seem daunting and complex at first glance. However, the preferred model (as discussed) provides an objective and relatively straightforward method of separating the elements of all offences: a task that is not likely to trouble the judiciary. And having separated the elements, although there are a lot of questions to ask a jury, the questions within each box should now be considerably easier for a judge to articulate and a jury member to understand.

Before we go on to analyse each of the general inchoate offences in turn, even at this stage, the potential benefits of the preferred model of element analysis are already apparent. If these complex offences can be separated within the structure outlined above, and if such a structure can simplify and standardise the individual stages of analysis, then they can have a positive and clarificatory role within the court system. What was once approached as a complex whole, is now assessed one step (box in the chart) at a time.

APPLYING THE PREFERRED APPROACH TO THE GENERAL INCHOATE OFFENCES

In this section we move on to apply the preferred method of element analysis to the three central general inchoate offences: assisting and encouraging, conspiracy and attempts. Apart from the offence of assisting and encouraging, which will be based on Part Two of the Serious Crime Act 2007, we will use the offence definitions recommended by the Law Commission in their recent report *Conspiracy and Attempts*.⁶²⁰ Although the same exercise could be employed to analyse the current law in relation to attempts and conspiracy, the Commission's recommended definitions are preferred partly because of their express use of element analysis,⁶²¹ and partly to avoid controversial elements within the interpretation of the current law.⁶²² We are nevertheless focusing on the Serious Crime Act in relation to assisting and encouraging. This is because, having preceded the Commission's work on the other two offences, the treatment given by Parliament of the Commission's recommendations on assisting and encouraging has been expressly taken into consideration by the Commission within their formulation of conspiracy and attempts. Therefore, when looking for patterns and consistency across the general inchoate offences, this represents the most appropriate combination of sources.

As we explore each of the general inchoate offences, we will be focusing upon two issues.

First, in relation to the structural use of the preferred method, we will ask whether the

⁶²⁰ Law Com No 318 (2009).

⁶²¹ Having contended in chapter 3 that the current model of element analysis is unable to adequately facilitate the Law Commission's recommendations in this area, part of this exercise is to discover whether the preferred model of element analysis is able to perform the role in its place.

⁶²² The aim of this section is to demonstrate the ability of the preferred method of element analysis to separate the elements of complex offences in a straightforward manner. To the extent that that will involve debate between competing case law as to what the policy is, although useful once the method is established, will simply prove distracting at this point.

offence is sufficiently straightforward to be of practical use. Secondly, in relation to use of the preferred method as an analytical tool, we will be asking whether the technique allows us to pick up on details or problems within the offence definition that might otherwise have been missed.

Assisting and encouraging

The new offences of assisting and encouraging crime represent a major challenge in terms of simplification. This is because, despite having originated in a recent Law Commission report that explicitly employed element analysis,⁶²³ they have still been subjected to a fierce level of criticism for overcomplicating the law.⁶²⁴ In this way, however, they also represent an ideal example for comparing the Commission's version of element analysis with the one preferred within this thesis.

Part Two of the Serious Crime Act sets out the definitions of three separate offences:

1. Intentionally encouraging or assisting an offence (section 44);
2. Encouraging or assisting an offence believing it will be committed (section 45);
and
3. Encouraging or assisting offences believing one or more will be committed (section 46).

⁶²³ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006).

⁶²⁴ See, for example, Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) which labels the provisions 'tortuously complex' at page 447. See also the discussion above at the beginning of the General Inchoate Offences section, pp220-227.

For the sake of this demonstration, we will focus solely on the first of these offences: intentionally encouraging or assisting an offence. However, employing the same method, either of the other two offences could be set out in exactly the same manner.

The first stage is to expose the actus reus and mens rea requirements that relate to D's *completed* conduct:

<i>Intentionally encouraging or assisting an offence</i>	Act Element	Circumstance Element	Result Element
Actus Reus	D's bodily movement	D's act is capable of encouraging or assisting the commission of an offence	None
Mens Rea	*None*	*None*	None

We now move on to the requirements of the ulterior fault element:

<i>D's Ulterior Fault Element</i>	P's Act Element	P's Circumstance Element	P's Result Element	P's Ulterior Fault Element
D's fault in relation to the Actus Reus of principal offence	Intention to assist of encourage the act of P	(Where required) Reckless as to whether P will act in these circumstances	(Where required) Reckless as to whether P will act with these results	
D's fault in relation to the Mens Rea of the principal offence	Reckless whether P will have the requisite fault or If D were to have done the act, he or she would have had the requisite fault	(Where required) Reckless whether P will have the requisite fault or If D were to have done the act, he or she would have had the requisite fault	(Where required) Reckless whether P will have the requisite fault or If D were to have done the act, he or she would have had the requisite fault	(Where required) Reckless whether P will have the requisite fault or If D were to have done the act, he or she would have had the requisite fault

Following the guidance of the preferred model of element analysis, the separation of the various offence elements is done quite straightforwardly. The advantage to this approach is

that, having separated the offence into its constituent parts, it should also be easier to use both within the court environment and academically.

Having explained that one of the roles of the preferred method of element analysis involves the exposing of legislative gaps, it should be noted that we have starred the (apparent) absence of any fault requirement in relation to D's act element and circumstance element. This is because, although no fault requirement is provided within the Serious Crime Act, it is contended that this absence is the result of oversight rather than design. For the act element, such an oversight is understandable: our choice to deal separately with the mens rea of the act element is not universal and so, when the statute refers to an 'act', it may well be interpreted to include an implicit dimension of fault.⁶²⁵ However, the absence of a fault requirement in relation to D's circumstance element, in contrast, is much more problematic.

The problem with not requiring D to have any fault in relation to the circumstance element of his or her conduct is that it has the potential to widen the scope of the offence beyond the limits that Parliament (and the Law Commission before them) seems to have intended. Let us take the first example employed by the Commission in their report *Inchoate Liability for Assisting and Encouraging Crime*:⁶²⁶

⁶²⁵ See, Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [8.110]. To avoid unhelpful repetition of this point, we will interpret the act elements of conspiracy, attempt and complicity as if they include a requirement of intention whether or not this is explicit from the Commission material.

⁶²⁶ Law Com No 300 (2006) [1.3]. We have adapted the example from a *believing* offence to an *intending* offence for consistency with the current discussion. This change does not, however, affect the point being made.

Example 2: D, in return for payment, lends a van to P intending that P will use the van in order to commit a robbery. The police arrest P in connection with another matter before P can even attempt to commit the robbery.

The Commission use this example to express their belief that D should be criminalised for assisting P to commit robbery.⁶²⁷ D's act of lending the van has clearly assisted P, and most people would agree that such an act (combined with the intention that the offence be committed) should suffice for liability. However, consider this variation of the facts:

Example 3: D, who usually keeps his van in a locked garage, leaves it outside his house so that he can take it to P early in the morning. D intends to offer the van to P to be used in a robbery. P, who happens to be driving past in the night, decides to take D's van without asking so that he can use it to rob V. The police arrest P in connection with another matter before P can even attempt to commit the robbery.

In example 3, D has done an act (leaving the car out) that is *capable* of assisting P to commit robbery. Further, at the time the act was undertaken, D intended that P should commit robbery. However, D's act does not seem as intuitively criminal as it did in example 2: although D intended to assist P to commit robbery, he did not intend that it was that particular act (leaving the van out) that would provide the assistance.

Without the requirement of at least recklessness in relation to the circumstance element,⁶²⁸ requiring D to recognise the risk that his or her act is capable of assisting or encouraging the

⁶²⁷ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [1.3-1.4].

⁶²⁸ It may be that a requirement of knowledge would be more appropriate.

principal offence, we have a risk that the point of D's criminality will move unacceptably far from the point of harm. For example, D will commit the offence as soon as he or she writes a letter of encouragement if it is possible that the letter could reach P before D intends. Equally, D will commit the offence as soon as he or she buys equipment with the intention of lending it for the purposes of crime. In each case, although D has to complete further acts in order to assist or encourage in the manner he or she has intended, the law will be able to find an offence.

Another area of interest, exposed by the use of element analysis, involves the actus reus (as opposed to the mens rea discussed above) of the circumstance element. Within the Law Commission's draft Bill, this element required that D's act should be 'capable of encouraging or assisting the doing of a criminal act in relation to a principal offence.'⁶²⁹ For the Serious Crime Act, this was (arguably) broadened slightly to a requirement that D's act should be 'capable of encouraging or assisting the *commission* of an offence.'⁶³⁰ However, in neither case is the formulation sufficient to encompass each of the problem cases that the Commission wished to target.

Consider the following example:⁶³¹

Example 4: D surreptitiously 'laces' P's drink with alcohol. He does so intending that P should later commit the offence of driving with excess alcohol. P, however, notices what D is doing and takes a taxi home.

⁶²⁹ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) Cl 1(1)(a).

⁶³⁰ Serious Crime Act 2007, s44(1)(a). (emphasis added)

⁶³¹ Adapted from Example 5H within the Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.25].

In example 4, D's act of lacing P's drink does not assist or encourage P to complete the act element of driving with excess alcohol.⁶³² the bodily movement required to drive. Rather, it provides the circumstance (excess alcohol) necessary for the principal offence to be committed. Therefore, if the circumstance element of assisting crime is interpreted as the Commission recommends, a standard reading of the clause would exonerate D from the offence.

In order to avoid this unattractive conclusion, the Commission are forced to create a major exception to their general policy, stating that in these 'rare' occasions "criminal act" will need to be interpreted to mean a composite act comprising a combination of conduct and circumstance elements.⁶³³ However, this approach is problematic. It is unfortunate that having set out an already complex policy, we are now told (and in the Report alone⁶³⁴) that *sometimes* this policy will have to be interpreted to mean something entirely different. An exception that we could perhaps accept, were it not also the case that this rare exception is so difficult to identify. In relation to the drink spiking example where P does not go on to complete the principal offence, we are told that:

[t]he essence of the wrongdoing targeted by the offence of driving with excess alcohol is not the driving but driving *in excess of the prescribed limit*. In [the example] it is that

⁶³² Contrary to the Road Traffic Act 1988, s5(1).

⁶³³ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.26].

⁶³⁴ Without guidance within the legislation, it is difficult to predict whether the courts will apply the exception in the manner envisaged by the Commission.

circumstance that D is intending to bring about. D's conduct is highly culpable and, in principle, he or she ought to be criminally liable.⁶³⁵

Therefore, the Commission seem to be indicating that although D's assisting and encouraging will usually have to focus on the act element of the principal offence alone, this is because most offences (for example, murder and criminal damage) are built upon a culpable act element. However, in exceptional cases such as the one above, where P's wrongdoing can only be understood as a composite of act (driving) and circumstance (being over the prescribed limit), the assisting or encouraging of either element will suffice for this part of D's actus reus.

The problem with the Commission's method of separation, however, is that it risks allowing many more offences (including fault based offences) within this exceptional category than would be intended. The Commission are likely to accept the inclusion of most driving and other regulatory style offences. However, many core criminal offences also include potentially innocent act elements. For example, sexual penetration within the offence of rape is not a prima facie wrong; it's wrong is constituted by the circumstance of V's lack of consent.⁶³⁶ Likewise, the act element of theft (D's taking of property) is only wrong because that property does not belong to D. In fact, it is even possible to contend that murder does not *necessarily* contain a prima facie wrong *within the act element*. The act of shooting (which can constitute the act element of murder), for example, is not necessarily harmful and may be a perfectly acceptable hobby. Thus, if D intentionally shoots and kills V, it is not

⁶³⁵ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006) [5.26].

⁶³⁶ For an alternative view, see Herring and Dempsey, 'Why Sexual Penetration Requires Justification' (2007) *Oxford Journal of Legal Studies*, 467.

the act of shooting alone that establishes the wrong, it is the act of shooting *a human being* (circumstance element). Therefore, the Commission's previously rare example now becomes very common indeed, potentially including every offence with a circumstance element. D will come within the inchoate offences whenever he or she completes an act capable of assisting or encouraging the act or circumstance elements of any principal offence – a result vastly beyond the Commission's intentions.

It is interesting to note that this problem has not been translated into the Law Commission's recommendations concerning complicity.⁶³⁷ In this more recent Report, instead of maintaining the pretence that D's actions assist or encourage P in the drink spiking example, the Commission recommend the creation of a separate offence of causing a no-fault offence.⁶³⁸ Indeed, they go so far as to say that 'it is inappropriate to describe D's conduct in causing P to commit a no-fault offence as encouraging or assisting P to commit the offence.'⁶³⁹ As the problems set out above demonstrate, they are quite right in this comment. However, in making it, the Commission are undermining their policy on inchoate assisting and encouraging and the Serious Crime Act; if it is inappropriate to label D's actions as assisting or encouraging then there can be no application of those inchoate offences.

Following this somewhat complicated plot, we are left with two possible conclusions (neither one desirable). Either there *is* inchoate liability for the drink spiker under the Serious Crime Act, but this is achieved at the expense of the coherence of those offences, or

⁶³⁷ Law Commission, *Participating in Crime* (Law Com No 305, 2007). The recommendations in this report have not yet been taken forward by the Government.

⁶³⁸ *Ibid*, Part 4 and cl 5 of the draft Bill appended.

⁶³⁹ *Ibid*, [4.29].

there is *no* inchoate liability, and we must wait to see if the principal offence is committed before penalising D.⁶⁴⁰

Whether or not these two observations are accepted in full, they clearly demonstrate the utility of element analysis as an analytical tool. In both cases, the separation and individual analysis of offence elements has exposed potential problems, problems that have the potential to cause significant difficulties within the development of these offences.

Conspiracy

For the offence of conspiracy (and attempt in the next section) we move from an analysis of the current law to the reforms recommended by the Law Commission.⁶⁴¹ Like the offences of assisting and encouraging, these (recommended) offences also explicitly rely on the use of element analysis.

The Commission's recommendations for a reformed offence of conspiracy have received a generally positive reaction from academic commentators.⁶⁴² However, it may still be the case that the use of the preferred method of element analysis can provide further benefits and insights. First, as above, we will set out the offence of conspiracy using the preferred method in order to expose clearly its constituent parts. Secondly, we will explore whether

⁶⁴⁰ For further discussion of this point, see Child, 'The differences between attempted complicity and inchoate assisting and encouraging – a reply to Professor Bohlander' *Criminal Law Review* (2010) *Forthcoming*.

⁶⁴¹ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

⁶⁴² See the consultees responses within Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009). See also, Editorial, 'Revising conspiracy' *Criminal Law Review* 2 (2008) 89.

the preferred method exposes any problems or inconsistencies within the Commission's recommendations.

<i>Conspiracy</i>	Act Element	Circumstance Element	Result Element
Actus Reus	D's Bodily movement	1) That the agreement is to commit the principal offence 2) That P also satisfies the ulterior fault requirements of D	Agreement
Mens Rea	Intention	None	None

<i>Ulterior Fault Element</i>	P's Act Element	P's Circumstance Element	P's Result Element	P's Ulterior Fault Element
D's fault in relation to the Actus Reus of principal offence	Intention that P (or another) will complete the act	(Where required) Same mens rea as required by principal offence Or Where less than recklessness is required by principal offence, subjective recklessness must be demonstrated	(Where required) Intention for the act to bring about the necessary results	
D's fault in relation to the Mens Rea of principal offence	Intention that P will act with the requisite fault	(Where required) Intention that P will have the requisite fault in relation to the relevant circumstances	(Where required) Intention that P will have the requisite fault in relation to bringing about the relevant results	(Where required) Intention that P will have the requisite ulterior fault

As with our discussion of assisting and encouraging above, it is useful to begin our analysis by focusing on potential gaps that have been exposed by the preferred model. In relation conspiracy, as the chart demonstrates, we have not starred any boxes to indicate that there has been an omission made. However, with regard to the clarity of the Commission's

recommendations, it should be noted that the report provides no express comment at all in regard to D's mens rea requirements relating first, to his or her actus reus, and secondly, to D's mens rea requirements relating to the mens rea of P.⁶⁴³

In relation to the first of these, the mens rea relating to D's actus reus, it is likely (as reflected within the chart) that the omission indicates that no fault is required. Thus, although D must form an agreement with P to commit the principal offence, a charge of conspiracy does not require D to recognise that this is what amounts from his or her actions. However, if this is the case, surely the policy would be made clearer to everyone if reference was made to this within the report, if not within the appended draft Bill.

For the second, the mens rea relating to the mens rea of P, the absence of discussion is perhaps even more surprising. Despite the express treatment of these elements in relation to assisting and encouraging,⁶⁴⁴ for conspiracy we must rely upon the vagaries of Section 1(1) of the Criminal Law Act 1977, which states that:

... if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in *accordance with their intentions*, either

(a) will *necessarily amount to or involve the commission of any offence* or offences by one or more of the parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

⁶⁴³ The only exception to this is a brief comment regarding D's mens rea requirements in relation to the ulterior fault of P. This will be discussed below, p246.

⁶⁴⁴ The Serious Crime Act 2007, s47(5)(a).

he is guilty of conspiracy to commit the offence or offences in question.

Left intact by the Commission's recommendations,⁶⁴⁵ the italicised parts of this subsection indicate that the fault requirements of P that are necessary for the principal offence will have to form part of D's intention. However, again, surely for the sake of clarity such requirements warrant (at least) an express mention within the Commission's report.

The only exception to this absence of discussion is the issue of D's fault in relation to a potential ulterior fault requirement within P's offence. However, rather than clarifying the policy in this area, the Commission appear to mischaracterise the role of this element and (potentially) mislead their reader. Referring to offences that require the perpetrator to have acted 'dishonestly' or 'corruptly', the Commission states that:

Our recommendations do not affect the need to prove that D possessed the [ulterior] fault element, when that is part of the offence. This is because, under the existing law, it is only when the agreement, if carried out in accordance with the conspirators' intentions, amounts to or involves a criminal offence that the conspirators can be found guilty. It will only amount to such an offence, when it includes a [ulterior] fault element, if it is proved that the conspirators possessed that element.⁶⁴⁶

The problem with this analysis, as the chart setting out the preferred method clearly demonstrates, is that a charge of conspiracy will never require D or P to be acting dishonestly or corruptly when forming an agreement to commit an offence. Rather, where

⁶⁴⁵ The only changes recommended by the Commission to this subsection relate to non-pertinent matters of terminology.

⁶⁴⁶ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.166].

such ulterior fault is required for a principal offence, the issue for conspiracy is what fault we require of D in relation to the presence of that ulterior fault at the time the principal offence is committed. Therefore, although we may, employing Section 1(1) of the Criminal Law Act, conclude that what is required is that D must intend that P should act with the required ulterior fault, the Commission's analysis has the potential to mislead.

In this manner, the advantages of the preferred method of element analysis and the chart based method of its construction are readily apparent. Highlighting a lack of clarity within areas of the Commission's recommendations, the preferred method is able to set out the offence of conspiracy in a clear and practically useful manner. Again, the quantity of boxes and the form of the chart based system may appear daunting, but as long as the content of each box is understood, then it can provide a straightforward aid for a court or commentator.

Attempt

As with the offences of assisting and encouraging and the offence of conspiracy, the law of attempt has also proven to be a complex and challenging area of law. Particularly in relation to the requirements of mens rea, Ormerod has commented for example, that:

... the precise nature of the relevant *mens rea* is far from easy to specify.⁶⁴⁷

⁶⁴⁷ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 383.

Within the Law Commission report *Conspiracy and Attempts*,⁶⁴⁸ the Commission's central task was therefore to provide much needed clarification. Abandoning their previous recommendations,⁶⁴⁹ the Commission does so by explicitly incorporating element analysis in order to distinguish the fault requirements of D in relation to the circumstance element of the principal offence.

Setting out the Law Commission's recommendations in the form of the preferred method of element analysis allows this policy to be viewed clearly.

<i>Attempt</i>	Act Element	Circumstance Element	Result Element
Actus Reus	D's bodily movement	That D's act goes beyond mere preparation towards the commission of the principal offence	None
Mens Rea	Intention	None	None

⁶⁴⁸ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

⁶⁴⁹ Law Commission, *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980). The Commission's recommendations in this report formed the basis of the Criminal Attempts Act 1981.

<i>Ulterior Fault Element</i>	Act Element	Circumstance Element	Result Element	Ulterior Fault Element
D's fault in relation to the Actus Reus of principal offence	Intention to go on to complete the necessary bodily movement	(Where required) Same mens rea as required by principal offence Or Where less than recklessness is required by principal offence, subjective recklessness must be demonstrated	(Where required) Intention for the act to bring about the necessary results	
D's fault in relation to the Mens Rea of principal offence	None	None	None	*None*

Having set out the Law Commission's policy for attempt using the preferred method, it is immediately apparent (in a way it may not be from the Commission's report⁶⁵⁰) how differently the law of attempts is structured from the other general inchoate offences.

Principally, this difference relates to the lack of ulterior fault requirements with respect to the mens rea of the principal offence. This is because, unlike the offences of assisting and

⁶⁵⁰ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

encouraging and the offence of conspiracy, the law of attempt only involves a single party. When D foresees a future offence to be committed by P, it is necessary to consider whether he or she requires fault in relation to both P's future acts and as to whether those acts will be completed with the fault required by the principal offence. However, where D is foreseeing an offence that he or she is in the process of attempting to complete, the requirement to intend future acts and results (for example) makes any requirement to foresee that they will be *intentionally* completed irrelevant: if D is intending an act then he or she is intending to complete the act intentionally. This is a logical position. However, the problem here in terms of clarity is that this position is not articulated at any point in either the Commission's report or the appended draft Bill. Therefore, in the absence of the preferred method to draw out the question directly, it is possible that this difference would either remain hidden and/or cause unnecessary confusion.

The only (potential) exception to this lack of fault requirements relates to the ulterior fault needed by D in relation to an ulterior fault requirement within the principal offence. This element has been starred within the chart above because, although the Commission do not expressly provide for a fault requirement (they do not discuss the issue at all), it is contended this is an oversight rather than a policy choice. If D attempts an offence with an ulterior fault requirement, for example the intention to permanently deprive in theft, a conviction would be inappropriate unless D held that intention⁶⁵¹ at the point of the attempt.

⁶⁵¹ Or, alternatively for incomplete attempts, knew that he or she would hold that intention at the relevant time.

As with the case of conspiracy, it is possible to interpret the unamended sections of the relevant statute to require intention. Section 1(1) of the Criminal Attempts Act 1981 states that:

If, with *intent to commit* an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

Focusing on the italicised prerequisite of intention, it is possible to conclude that this requires D to intend every element of the principal offence (including the ulterior fault element) that is not specifically dealt with elsewhere. However, although this would seem to relieve our immediate concerns, it would also require D to intend that he or she will have each of the fault requirements necessary for the principal offence: a requirement within the law of attempts that we have just described as unnecessary and potentially confusing.

As before, the point being made is not that the law is unworkable, or will be unworkable under the Commission's recommendations. It is simply that, if the offence of attempt is to be fully clarified, the preferred model of element analysis presents the most comprehensive approach. With the role of each element clearly separated, even a highly complex offence can be set out in a straightforward and easily comprehensible manner.

Before moving on, it remains necessary to make a brief comment relating to the separation of D's *actus reus* into offence elements. As we noted in relation to the other general inchoate offences above, it is again the case that the Law Commission fails to distinguish the

elements of D's actus reus (as opposed to the actus reus of the principal offence): a task that is presumably vital to the operation of double inchoate liability.⁶⁵² However, it should be noted that where such a separation has been mooted among academics, it has not always led to the separation set out in the chart above.

Moore, for example, contends that the requirement that D's conduct is 'more than merely preparatory to the commission of the offence' (or a substantial step towards it) should be considered as a result element of D's offence as opposed to a circumstance element.⁶⁵³ Discussing an example where Fromme (D) attempts to shoot President Ford (V), Moore states that:

... Fromme's movement must have caused a further state ... in order to be an attempt. The state is one of dangerous proximity to (or substantial step towards) Ford's death. Ford ... must have been caused to have a 'near-death-experience' by Fromme's moving before that moving can be called an attempt. True, Ford's *state* of being near death is not an event, like a trigger moving; it is a relational state, but it is no less an *effect* for that.⁶⁵⁴

There is obviously some merit to this argument. If 'more than merely preparatory' is a state that is *caused* to exist by D's act element then it is logical to characterise it as a result element. However, such an interpretation would be highly problematic. This is because, in reality, the conception of the *state* in this context is hollow. What we are dealing with is not

⁶⁵² In the context of double or infinite liability, D's future inchoate offence (like any other principal offence) will have to be separated into elements in order to ascertain what fault is required.

⁶⁵³ Moore, *Act and Crime* (1993) 213-225.

⁶⁵⁴ Moore, *Act and Crime* (1993) 219.

a set moment in time where a particular relational state is created, but rather an objective description of an ongoing process. The conception of what amounts to 'more than merely preparatory' is a pre-existing fact within society that is applied within the offence of attempt in order to appraise D's actions. As such, it is better perceived as a circumstance element of the offence.

CONCLUSION

Although the inchoate offences will remain a highly complex area of law, it seems that the preferred method of element analysis represents the best vehicle through which to incorporate the Law Commission's recommendations and move forward with the law. Despite the sophistication of the Commission's approach, without the overview created by the preferred method, certain elements remain uncommented-upon and others unclear. However, having set out the overview, the questions within each element are clarified. It is then for the commentator to focus on each in turn in order to construct a logical and comprehensive offence definition. It is then for the court to lead a jury through each element in order to reach an appropriate verdict without having to comprehend the vagaries of full complex offences.⁶⁵⁵ And it is then that the academic community can focus their comment

⁶⁵⁵ The New Zealand Crimes Consultative Committee rejected the use of element analysis in 1991 partly because of the perceived difficulty of explaining it to a jury. Crimes Consultative Committee, *Report on 1989 Crimes Bill* (New Zealand, 1991) 35.

However, as long as the questions within each of the elements remain straightforward, it does not seem that this point holds. It would be unnecessary, for example, for the jury to understand the complex debates surrounding the conception of element analysis. The only part that would need to be explained would be that certain things are required for D to be liable, and that therefore the jury will be expected to examine each one in turn.

on individual elements or comparisons of elements in order to facilitate a detailed critique.⁶⁵⁶

⁶⁵⁶ With the Law Commission stressing their desire to provide consistency between the (often overlapping) general inchoate offences, the ability to compare the individual elements of each offence may well prove to be especially useful.

CHAPTER 11

ULTERIOR CLARIFICATIONS

Within the previous chapter's discussion of general inchoate liability, the role of the ulterior fault element (introduced in chapter 9) was able to be fully explored. In light of this exploration, we are now in a position to highlight two further benefits of the preferred model of element analysis. Arising from the context of the general inchoate offences, but with potential application far beyond them, these benefits relate to fault terminology and law reform respectively.

Clarifying role and fault terminology

In the absence of a criminal code, the fault terminology within the English criminal law has remained uncoded. However, where efforts have been made to ensure consistency through common definitions, we will invariably witness the use of element analysis.⁶⁵⁷ There are two principal reasons for this. First, certain fault terms, for example 'knowledge', cannot apply to every offence element. D can know of the existence of a certain circumstance for example, but he or she cannot *know* that a certain result will come about in the future.⁶⁵⁸ Secondly, it is not uncommon for the same fault term to operate differently depending upon which offence element it is applied to. Where this is the case, the explicit use of element

⁶⁵⁷ See the draft Criminal Codes in 1985 and 1989. For a discussion of the problems caused by a lack of codification in this area, see, Law Commission, *Report on the Mental Element in Crime* (Law Com No 89, 1978).

⁶⁵⁸ Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 116-117.

analysis is able to avoid confusion by setting out the varying definitions clearly. For example, within the Australian Model Criminal Code,⁶⁵⁹ 'intention' is defined in the following terms:

- (1) A person has intention with respect to [the act element] if he or she means to engage in that [act].
- (2) A person has intention with respect to a circumstance if he or she believes it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.⁶⁶⁰

As we can see, there is a considerable difference between each of the three definitions.

As a result of these advantages, the role of element analysis has become almost uniform in areas where the fault terms are being discussed. In those jurisdictions like Australia that have produced criminal codes, this has come about through the formal definitions of fault terms in relation to each of the offence elements.⁶⁶¹ However, even within this jurisdiction, we can see the use of element analysis to define fault terminology within leading criminal law textbooks.⁶⁶² Beyond this, whenever the Law Commission has attempted to initiate the codification of the fault terms they too have consistently⁶⁶³ employed element analysis in

⁶⁵⁹ Australian Model Criminal Code (1992).

⁶⁶⁰ Australian Model Criminal Code (1992) Div 5.2.

⁶⁶¹ See, for example, the Australian Model Criminal Code (1992) Div 5 and the US MPC (1962) §2.02(2).

⁶⁶² See, for example, Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 97-123 and Simester and Sullivan, *Criminal law: Theory and Doctrine* (3rd Ed, Hart Publishing, Oxford 2007) 119-158.

⁶⁶³ For a discussion of the Commission's generally more *inconsistent* support for element analysis in other contexts, see chapter 3, pp52-72.

order to do so.⁶⁶⁴ The use of element analysis attempts to draw the complexities of the fault terms to the surface, aiming at, as Gainer states,

... simplifying the law with regard to mental elements, while substantially increasing the level of sophistication.⁶⁶⁵

Problems emerge with the use of element analysis, however, where commentators have attempted to employ it in this context without accepting its use more generally. For example, at various stages the Law Commission have rejected the use of element analysis within the reform of general inchoate offences because of (what they believed was) an inability to separate the elements of all offences objectively.⁶⁶⁶ However, even during these periods, the Commission still continued to employ element analysis when defining the fault terms.⁶⁶⁷ When the fault terms were not defined in such a way as to vary their meaning between elements, such an approach may seem ill-advised,⁶⁶⁸ but it is not necessarily contradictory.⁶⁶⁹ When fault terms are defined differently depending upon which element they are applying to, however, the position is rather different.

⁶⁶⁴ See, Law Commission, *The Mental Element in Crime* (Consultation No 31, 1970), Law Commission, *Report on the Mental Element in Crime* (Law Com No 89, 1978) and Law Commission, *A Criminal Code for England and Wales* (2 vols) (Law Com No 177, 1989) cl 8.

⁶⁶⁵ Gainer, 'The culpability provisions of the MPC' (1987) 19 *Rutgers Law Journal* 575, 588.

⁶⁶⁶ See discussion in chapter 3, pp52-72.

⁶⁶⁷ See, for example, Law Commission, *Report on the Mental Element in Crime* (Law Com No 89, 1978) and Law Commission, *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980).

⁶⁶⁸ It is ill-advised because, if one cannot distinguish the elements of an offence, how can it be useful to define the fault terms in relation to elements that will never be of relevance?

⁶⁶⁹ This is the position in, for example, in Law Commission, *Report on the Mental Element in Crime* (Law Com No 89, 1978). In this Report, having defined the fault terms in relation to the various offence elements, the Commission state that recklessness as to circumstances and recklessness as to results should be defined in the same way because of the difficulty of separating the two elements in practice [61].

The most prominent example of this contradiction can be found in relation to the definition of intention. For those that reject the use of element analysis within the reform of the general inchoate offences, the most popular alternative has been to require D to intend every element of the principal offence. As Smith has pointed out,⁶⁷⁰ however, if offences like attempt were to require D to intend every element of the principal offence, it would be very difficult to demonstrate that D *intended* the circumstance element. For example, if D set out to receive goods that he or she knew or believed were stolen, it is very unlikely that D would be unduly disappointed if he or she were to discover that the goods were not in fact stolen.⁶⁷¹ Therefore, the temptation is to interpret intention as to circumstances widely to include knowledge as well as purpose. However, if this definition is in variance to the definition of intention as to results, then this will re-open the requirement of distinguishing between the circumstance element and the result element of the principal offence.⁶⁷²

In the Law Commission's 1980 report on attempts,⁶⁷³ the report that led to the 1981 Criminal Attempts Act, the Commission fall victim to the contradiction. Having expressly rejected the use of element analysis,⁶⁷⁴ the Commission state that attempts liability should require D to intend every element of the principal offence in order (partly) to avoid having to separate its elements. However, the Commission then go on to define intention as to circumstances to include "knowledge of the factual circumstances"⁶⁷⁵ whilst stating in relation to results, that "there is no room for the broader concept of intent which... we

⁶⁷⁰ Smith, 'Rape – R v Pigg' (1982) *Criminal Law Review* 446.

⁶⁷¹ The motivation behind D's choice to handle the goods is likely to relate to payment or profit rather than a desire to break the law.

⁶⁷² Smith, 'Rape – R v Pigg' (1982) *Criminal Law Review* 446, 449.

⁶⁷³ Law Commission, *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980).

⁶⁷⁴ *Ibid*, [2.12].

⁶⁷⁵ *Ibid*, [2.15].

describe as having no substantial doubt as to the results of the conduct.”⁶⁷⁶ In this manner, the Commission at once confirm their rejection of element analysis and (through its use to define the fault terms) make its use essential in order to operate their desired policy.

The preferred method of element analysis, by separating and clarifying the role of the ulterior fault element, can also provide benefits in this area. This is because, even where element analysis has been used to help define the fault terms, commentators rarely seem to consider the general inchoate offences and ulterior fault in general. The problem with this is that, if only choate offences are considered, a narrower range of fault terms will potentially apply to each offence element. For example, within the US Model Penal Code, only ‘purposely’⁶⁷⁷ and ‘knowingly’⁶⁷⁸ are defined in relation to the act element, with the fault terms ‘recklessly’⁶⁷⁹ and ‘negligently’⁶⁸⁰ defined solely in relation to circumstances and results.⁶⁸¹ And for Simons, even this seems excessive. Preferring that the act element should only have relevance in relation to ‘voluntariness’ and not apply to the other fault terms, Simons contends that:

... it is normally unduly confusing, and not analytically helpful, to retain this category.⁶⁸²

⁶⁷⁶ Law Commission, *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980), [2.17].

⁶⁷⁷ US MPC §2.02(2)(a)(i).

⁶⁷⁸ US MPC §2.02(2)(b)(i).

⁶⁷⁹ US MPC §2.02(2)(c).

⁶⁸⁰ US MPC §2.02(2)(d).

⁶⁸¹ For a useful chart setting out the various fault definitions in the MPC, see, Robinson and Grall, ‘Element analysis in defining liability: The Model Penal Code and beyond’ (1983) 35 *Stanford Law Review*, 681, 697.

⁶⁸² Simons, ‘Should the Model Penal Code’s mens rea provisions be amended?’ (2003) 1 *Ohio Journal of Criminal Law*, 179, 183.

Such a position is perfectly reasonable if we only consider D's fault in relation to an act that he or she has already completed: D must always move his or her body intentionally/voluntarily in order to come within the criminal law.⁶⁸³ However, where D is foreseeing a future event and the future bodily movement of (potentially) another individual, it is quite possible to apply the other fault terms. For example, the offence of conspiracy could be redefined to convict D that agrees with P to commit a future offence, reckless as to whether P will go on to commit the act element of that offence.⁶⁸⁴ A failure to define the fault terms with the possibility of ulterior fault in mind is, therefore, a failure that either unnecessarily limits the legislature or unnecessarily complicates the law.⁶⁸⁵

An example of how this approach can add further complexity to the law can be found within the Law Commission's recent report on Intoxication.⁶⁸⁶ In this report, the Commission define the fault applicable to the act element in terms of 'volition',⁶⁸⁷ a term that ties them to the narrow approach to fault cautioned above.⁶⁸⁸ The Commission seems to prefer the term volition because, having stated that voluntary intoxication can only replace a state of

⁶⁸³ Several commentators agree with Simons on this point. See, for example, Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 723 and Smith, 'Two problems in criminal attempts' (1956) 70 *Harvard Law Review*, 422, 426.

⁶⁸⁴ Although such a policy has not been suggested within the field of general inchoate offences currently under discussion, recklessness as to the act element of the principal offence currently suffices for joint criminal venture liability. See Law Commission, *Participating in Crime* (Law Com No 305, 2007).

⁶⁸⁵ For discussion of this point in relation to the US MPC, see Robinson, 'A functional analysis of the criminal law' (1994) *Northwestern University Law Review*, 857, 865 and Robinson, 'Should the criminal law abandon the actus reus – mens rea distinction?' in Shute, Gardner and Horder (eds) *Action and value in criminal law* (Clarendon Press, 1993), 187, 205.

⁶⁸⁶ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009).

⁶⁸⁷ *Ibid*, [1.11] fn16.

⁶⁸⁸ D can move his or her body through volition, but D cannot relate to a future action (of either him or herself or another) in volitional terms.

fault which is lesser or equivalent to recklessness,⁶⁸⁹ they then go on to establish that it can replace a volitional action.⁶⁹⁰

There are two major problems with this, neither of which are expressly dealt with within the report. First, although the Commission have avoided the term intention in relation to the act element, it is difficult to see how a state of volition is any more likely come below a standard of recklessness. The second problem is that even if we accept that volition can rate alongside recklessness, D cannot relate to a *future* action (within the general inchoate offences) in volitional terms. Rather, in this context at least, surely the Commission should recognise a requirement of intention: a requirement that (if their policy is to be consistent) should be added to the list of integral elements which cannot be replaced by voluntary intoxication. Having expressly stated that the current list of integral elements is exhaustive⁶⁹¹ however, the Commission's recommendations (in this regard) provide a further layer complexity and inconsistency, a layer that could have been removed by the express consideration of future (ulterior) act elements.⁶⁹²

Clarifying role and legislating every element

The second area in which the express and separate consideration of ulterior fault may be of assistance is within the process of legislating for the general inchoate offences. Although a relatively basic point, it is nevertheless true to say that the construction of general inchoate

⁶⁸⁹ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) [3.32-3.41].

⁶⁹⁰ *Ibid*, [3.46] fn53.

⁶⁹¹ *Ibid*, [3.48].

⁶⁹² For a discussion of these issues, and other problems raised by the report, see Child, 'Drink, drugs and law reform: A review of Law Commission Report No.314' 7 (2009) *Criminal Law Review* 488.

offences is highly complex. As a result, even when expert bodies like the Law Commission are involved, it can be easy to leave an element (particularly within the mens rea) undefined.⁶⁹³ For example, as discussed above, although the use of element analysis within the recent Law Commission publications on the general inchoate offences has the potential to lead to much clearer offence definitions, there remains some doubt as to the fault requirements of D in relation to his or her own conduct as well as aspects of the ulterior fault.⁶⁹⁴ By separating the consideration of ulterior fault in the manner set out in the charts above, it is contended that such omissions (however slight) can be avoided: every box within the chart is relevant to D's potential liability and so we require a statement of policy to be inserted within each one.

Element analysis is therefore a useful tool through which to expose legislative gaps within the law. As discussed in chapter 2, this has the potential to improve the democratic control of Parliament: if gaps are exposed at a legislative phase then they can also be corrected at that stage rather than within the courts. However, it is important to note that the preferred method does not necessitate a greater Parliamentary role within the finer points of the law. Having exposed a gap, Parliament may well choose to either leave the issue to the discretion of the common law, or to fill the gap with such open textured language that *in practice* leaves much to the common law. Therefore, the advantage here is not necessarily based on Parliamentary input, so much as general clarity. If more gaps within the law are clearly defined, then the questions of whether and how they should be dealt with also become much more straightforward.

⁶⁹³ Undefined elements are also common within choate offences as well. See, Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 699-700.

⁶⁹⁴ See discussion of each general inchoate offence in Chapter 10.

Conclusion

The express use of element analysis within the latest Law Commission publications on the general inchoate offences (and Part Two of the Serious Crime Act 2007) almost inevitably dominate one's attention in this area. However, the brief discussions of fault and legislating above is intended to demonstrate that, even without the recent policies of the Commission, the use of the preferred method of element analysis should still play a leading role within the simplification and clarification of the law. For example, even if we decided for certain general inchoate offences that D should require the same level of fault in relation to every element of the offence, it will remain necessary to employ element analysis in order to inquire whether that fault term will apply in the same manner to each element. Likewise, if we wish to legislate effectively, element analysis presents an opportunity to lay out complex offences into a framework that will help to expose gaps and inconsistencies.

CHAPTER 12

SEPARATING THE ELEMENTS OF SECONDARY LIABILITY OFFENCES

The debate surrounding the potential usefulness of element analysis has traditionally focused, almost exclusively, on inchoate offences (and the general inchoate offences in particular). Indeed, despite the fact that the law of secondary liability also operates generally across the criminal law, it has largely remained absent from discussion.⁶⁹⁵ However, in the recent Law Commission report on secondary liability,⁶⁹⁶ the Commission has both expressly incorporated the use of element analysis within their discussion of complicity, and relied upon it to structure their recommended reforms. Although these recommendations have not yet been accepted or acted upon by the Government, they provide a useful indication of how element analysis may be able to facilitate a greater level of clarity and fairness. Therefore, the chart based dissection of secondary liability (below) will focus on the recommendations of the Commission as opposed to the current law.

In relation to the aims of Part III, focusing on the straightforwardness and usability of the technique, the use of element analysis within the law of secondary liability represents an ultimate challenge. This is because, not only does the structure of secondary liability include fault requirements relating to a principal offence (replicating the challenges identified

⁶⁹⁵ For an interesting, though brief, exception to this lack of debate, see Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 732-744, analysing the potential role of element analysis within the US MPC complicity provisions.

⁶⁹⁶ Law Commission, *Participating in Crime* (Law Com No 305, 2007).

within the structuring of general inchoate offences in chapter 10), but it also includes the requirement that that principal offence should be completed before the secondary party becomes liable. As Smith has commented:

Anyone with even the most glancing and superficial acquaintance with English criminal law will have been struck by the sheer complexity of the rules relating to complicity.⁶⁹⁷

Setting out these rules within the charts below, we aim to demonstrate not only that the preferred method of element analysis will not add to this complexity, but rather that it has the potential to make a significant contribution in terms of simplification.

The Law Commission has recommended the creation of four separate offences to replace the current common law rules.⁶⁹⁸

1. Assisting and encouraging an offence (clause 1);
2. Participating in a joint criminal venture (clause 2);
3. Using an innocent agent (clause 4); and
4. Causing a no-fault offence (clause 5).

In order to demonstrate how the preferred method of element analysis can be employed, we will focus on the main complicity offence (clause 1). Clause 1 criminalises D that assists or encourages P to commit a principal offence where P goes on to commit that offence.

⁶⁹⁷ Smith K.J.M, 'The Law Commission Consultation Paper on complicity: Part 1: A blueprint for rationalism' (1994) *Criminal Law Review*, 239.

⁶⁹⁸ Law Commission, *Participating in Crime* (Law Com No 305, 2007) Appendix A, Participating in Crime Bill.

<i>Complicity</i>	Act Element	Circumstance Element	Result Element
Actus Reus	D's bodily movement	D's act must be capable of assisting or encouraging the act element of the principal offence	D's act must have assisted or encouraged P to complete the act element of the principal offence ⁶⁹⁹
Mens Rea	Intention	*None*	*None*

<i>Ulterior Fault</i>	P's Act	P's Circumstance	P's Result Element	P's Ulterior Fault
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⁶⁹⁹ Although actual assistance or encouragement will remain a requirement of complicity, it will be assumed unless there is evidence to the contrary. Law Commission, *Participating in Crime* (Law Com No 305, 2007) [3.24].

<i>Element</i>	Element	Element		Element
D's fault in relation to the Actus Reus of the principal offence	Intention that P should complete the act	(Where required) Belief that if the act is done, it will be done with the relevant circumstances	(Where required) Belief that if the act is done it will be done with the relevant results	
D's fault in relation to the Mens Rea of the principal offence	Intention that the act should be completed with the relevant fault	(Where required) Belief that P will have the requisite fault Or If D were to have done the act, he or she would have had the requisite fault	(Where required) Belief that P will have the requisite fault Or If D were to have done the act, he or she would have had the requisite fault	(Where required) Belief that P will have the fault required Or If D were to have done the act, he or she would have had the requisite fault

Beyond the rules relating to D, complicity liability requires that we must also demonstrate that a principal offence has been committed by P.

<i>P's Principal Offence</i>	Act Element	Circumstance	Result Element	Ultterior Fault
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		Element		Element
Actus Reus	Must be demonstrated	(Where required) Must be demonstrated	(Where required) Must be demonstrated	
Mens Rea	Must be demonstrated	(Where required) Must be demonstrated	(Where required) Must be demonstrated	(Where required) Must be demonstrated

THE BENEFITS OF THE PREFERRED MODEL

The main benefit of using element analysis as a structure for complicity is that it has allowed the Commission a greater variety of options for reform. We have already explored how these new options have been utilised in relation to the general inchoate offences, with the Commission choosing to differentiate the ulterior fault requirements of D in relation to the different elements of the principal offence.⁷⁰⁰ Likewise, the Commission's complicity recommendations also rely upon a similar distinction. Under the current law, D requires the ulterior fault of knowledge in relation to P's future offence.⁷⁰¹ However, as the above chart sets out, the Commission's recommendations distinguish between the act element of P's principal offence (that D must intend) and the other elements (that D must believe will

⁷⁰⁰ For example, for attempt and conspiracy, D is required to intend the act and result elements of the future offence, but he or she need only be reckless as to the circumstance element if that level of fault is also sufficient under the definition of the principal offence.

⁷⁰¹ *Johnson v Youden* [1950] 1 K.B. 544.

come about). It is the use of element analysis, as opposed of offence analysis, which makes this distinction possible.

The other major benefit of element analysis, and the preferred method of element analysis in particular, is the clarity that it brings to our understanding of the offence. This may seem like an odd statement. After all, if one looks at the complicity offence above, spread across three charts, it would be reasonable to be struck by an apparent complexity. However, the question is not whether complicity is made simple by element analysis, but rather whether the offence is made *more* straightforward than is currently the case.

Element analysis is able to separate and individuate the (many) requirements of complicity. However, although this set of requirements may seem complex, it should be remembered that the use of element analysis has not *created* them. To those that do not examine the offence of complicity closely, the broad brush strokes of the common law and offence analysis may beguile the reader from the true extent of its intricate nature. However, to those that explore the offence, those same broad strokes prove to be a frustration, undermining attempts to ensure certainty and consistency. As the charts above demonstrate, if we were to ask the simple offence analysis question of ‘what is the mens rea of complicity?’, any single answer is likely to be either ‘hopelessly inadequate’⁷⁰², or to be so complex and qualified as to lack any useful sense.

⁷⁰² This is Robinson’s description of the current definition of complicity (not employing element analysis) contained in the US MPC, §2.06(3). Robinson rightly observes that element analysis not only holds the key to exposing this inadequacy, but also to go much of the way towards remedying it. Robinson and Grall, ‘Element analysis in defining liability: The Model Penal Code and beyond’ (1983) 35 *Stanford Law Review*, 681, 733.

Rather than questioning the quality of the response however, the use of element analysis shows us that the problem lies with the question. Instead of asking what the mens rea of complicity is in general terms, we should instead identify the various elements that are required in order to satisfy that mens rea. As long as each of these individual requirements (questions) are sufficiently straightforward to understand and apply, and as long as the sum of these individual requirements constitutes the mens rea of the offence without further work, then the task of those understanding and applying the law will be significantly simplified. Indeed, it is an approach that is employed by the Law Commission very effectively in their report: although they separate their discussion of complicity broadly into actus reus and mens rea, they then further sub-divide that discussion in line with an element analysis approach.⁷⁰³

In this manner, the Law Commission's use of element analysis adds much needed clarity to their discussion of complicity. However, as was the case with our discussion of the general inchoate offences above, the preferred method of element analysis (as opposed to that employed by the Commission) is still able to expose problems with the Commission's approach.

First, we can again expose a lack of detail in relation to mens rea. Although the various elements of D's ulterior fault requirements are clearly set out in the report, the mens rea relating to D's acts of assisting or encouraging are barely mentioned. The result of this is that it does not appear that D must have any mens rea with regard to the assisting or

⁷⁰³ Significantly, this approach is employed both within the discussion of their recommendations (Part 3), and within their discussion of the current law (Part 2 and Appendix B). The use of element analysis within the latter further demonstrates its usefulness as an analytical tool independent of its potential as a model for law reform. Law Commission, *Participating in Crime* (Law Com No 305, 2007).

encouraging effects of his or her conduct.⁷⁰⁴ But surely this is not right. The Commission are not advocates of thought crime, where D is liable simply because he or she intends a crime to be committed. However, if the only (non-ulterior) mens rea required by D is that he or she intends to do the act of assisting or encouraging, without *any* appreciation of the fact that it will assist or encourage P, then their recommendations would not fall far short of a purely thought based offence. This is particularly true if one considers the Commission's broad interpretation of the range of acts that constitute assisting or encouraging.⁷⁰⁵ In this vein, it is much more likely that the Commission would prefer D to be at least reckless as to whether his or her conduct might assist or encourage P, thereby removing the inadvertent assister or encourager from liability. However, it is only through the use of the preferred method of element analysis that this potential problem is exposed, and it is only through its further use (specifying the exact mens rea requirements in this area) that it can be resolved with any degree of clarity.

The second problem with the Commission's approach is very different from the first, but potentially just as serious. This problem relates to the Commission's drafting of their clause 2 offence, joint criminal venture. Having discussed this offence in the report with a similar level of detail to clause 1 (assisting and encouraging), the Commission's appended draft Bill simply states that:

⁷⁰⁴ See the starred boxes in the chart.

⁷⁰⁵ See, Law Commission, *Participating in Crime* (Law Com No 305, 2007) [3.9-3.41].

- (1) This section applies where two or more persons participate in a joint criminal venture.
- (2) If one of them (P) commits an offence, another participant (D) is also guilty of the offence if P's criminal act falls within the scope of the venture.
- (3) The existence or scope of a joint criminal venture may be inferred from the conduct of the participants (whether or not there is an express agreement).
- (4) D does not escape liability under this section for an offence committed by P at a time when D is a participant in the venture merely because D is at that time.
 - (a) absent,
 - (b) against the venture's being carried out, or
 - (c) indifferent as to whether it is carried out.⁷⁰⁶

Thus, clause 2 tells us that D may be liable if he or she *participates in a joint criminal venture* with P and P goes on to commit an offence that *comes within the scope of that venture*. But what does this mean? Having employed element analysis to evaluate the current law and then to construct their recommended offence, the drafting of this clause represents a significant shift in priorities. Rather than setting out the detail of their recommendations in the draft Bill, the Commission opted for an open textured statement of the law that relies on the courts to read in the necessary detail.

The problem with this open textured approach is that it risks undermining any of the good use that the Commission had previously made of element analysis. The central advantage of element analysis is that it is able to clearly set out the detail of complex offences, both to the public and to the courts charged with applying the law. However, the drafting of clause

⁷⁰⁶ Law Commission, *Participating in Crime* (Law Com No 305, 2007), Appendix A, cl 2.

2 is at best imprecise, and at worst misleading. Sullivan, for example, who fundamentally disagrees with the Law Commission's approach in this area, has already highlighted the vagaries of clause 2 as an opportunity for the judiciary to interpret future legislation in a manner inconsistent with the Law Commission's approach.⁷⁰⁷ Thus, although the detailed discussion within the report makes the Commission's desired approach very clear, the draft clause does not protect that detail from (inadvertent or, in Sullivan's case, wilful) misinterpretation. So, why did the Commission chose this approach to the drafting of clause 2?

The answer to this question seems to be solely concerned with addressing the complexity criticism. As the Commission tells us in their explanatory notes to the draft Bill, the origins of this clause came from a competition between two rival drafts, one setting out the full detail of the offence and the other (the one currently under discussion) drafted more simply and relying on the court for interpretation.⁷⁰⁸ With the Commission's Advisory Group demonstrating a 'clear preference for the more open textured Bill'⁷⁰⁹, it was this that was preferred.

It is a preference that should be regretted. The idea that the simple language of clause 2 represents the answer to the complexity criticism is far from evident. It is true that any complexity will be hidden from the face of the legislation, but since the Commission still wishes the legislation to be interpreted in line with the report, that complexity must re-emerge for the offence to function.

⁷⁰⁷ Sullivan, 'Participating in crime: Law Com No. 305 – joint criminal ventures' (2008) *Criminal Law Review*, 19, 26.

⁷⁰⁸ Law Commission, *Participating in Crime* (Law Com No 305, 2007), [A14-A31].

⁷⁰⁹ *Ibid*, [A16].

With this in mind, we can legitimately question *who* is benefitting from the Commission's simply worded Bill? For legal professionals and the judiciary, it is possible that the simplicity of clause 2 will actually make this area *more* complex. With so much of the vital offence definition outside of the legislation, a heavy reliance will inevitably be placed on the contents of the report. However, with a report lacking any of the binding effects of primary legislation, the potential for inconsistency of use and interpretation will inevitably be increased. The authors of the Commission's report may criticise Sullivan's contentions about the possible reinterpretation of clause 2, after all, it is the job of the court to examine the context of open textured legislation rather than to view it in a vacuum.⁷¹⁰ However, even a glimpse at the recent history of criminal attempts, for example, can show us that the courts will not always follow this mould.⁷¹¹ Therefore, as the number relevant sources increase (potentially including inconsistent case law) so the definition of the offence becomes harder to identify. Even in relation to the non-expert, it is doubted that the simply wording of clause 2 provides any real benefit. It is simple, but it lacks the information required to guide behaviour. What is a joint criminal venture? Does it require both parties to agree to commit an offence? Does it require them to intend that the other should commit the offence?

The idea that the complexity criticism can be undermined by the beguiling language of this kind of legislation must be misguided. It is for this reason that chapters within Part III have

⁷¹⁰ See, Horder and Hughes, 'Joint criminal ventures and murder: The prospects of law reform' (2009) 20 *Kings Law Journal*, 379, 389. Professor Jeremy Horder and Mr David Hughes were Commissioner and Team Leader respectively for the Law Commission on the complicity project.

⁷¹¹ Despite the Law Commission report leading to the Criminal Attempts Act 1981 clearly stating a policy in which D is required to intend every element of the principal offence, recent cases have utilised the open texture of the legislation to allow for liability where D merely foresees the circumstance element. See discussion in chapter 3 generally.

looked beyond the use of simple language. As we identified in the discussion of general inchoate offences,⁷¹² it seems that much of the complexity criticism is based upon the Commission's conflating of mens rea relating to D's actus reus and D's ulterior mens rea. By clearly separating ulterior mens rea into a new element, the preferred method of element analysis may still appear complex at first glance, but upon closer inspection represents the most straightforward and practical option.

A PROBLEM UNIQUE TO COMPLICITY

Complicity offences are unique within the criminal law. In a similar manner to the general inchoate offences, complicity requires D to have a certain ulterior mens rea in relation to the various elements of P's principal offence.⁷¹³ However, in addition to this ulterior mens rea, complicity also includes the requirement that the principal offence should have actually been completed. The problem with this additional requirement is that it includes a further qualification that is very difficult to place within an element analysis structure: the principal offence committed by P must be sufficiently similar to that anticipated by D to justify his or her liability as a secondary party.⁷¹⁴

The first problem with this qualification, as indicated, is its placement within the separation of elements. As the external comparison between D's ulterior mens rea and a separate event (the principal offence), we are clearly not dealing with a mens rea requirement.

⁷¹² See Chapter 10.

⁷¹³ See chart above.

⁷¹⁴ Although this qualification is generally only discussed in the context of joint criminal ventures and collateral offence, it is likely that it also applies across all complicity offences. For recognition of this point, see, Law Commission, *Participating in Crime* (Law Com No 305, 2007), [3.165].

However, looking to the elements of D's actus reus, the qualification is neither something that D must physically do (act element) or cause to be done⁷¹⁵ (result element). Therefore, one might conclude that it should be part of D's circumstance element requirements. However, as requirements within the circumstance element must be satisfied at the same time the act element is performed, this will not be possible: D's act of assistance or encouragement is necessarily prior to the completion of the principal offence. Therefore, although we can state what the qualification is, uniquely within the criminal law, we cannot place it within the elements of element analysis.

The second problem is that, without a clear place within the structure of element analysis, we are left unsure how the qualification should be applied in practice. Under the current law, we are told that D will be liable as a secondary party as long as P's offence is not 'fundamentally different' from that anticipated by D.⁷¹⁶ Employing offence analysis, this question is clearly intended to apply broadly, comparing D's intentions with what actually happened. However, having separated the elements of both D's ulterior mens rea and the elements of the principal offence, one may question whether the Law Commission are assuming a similar approach to be taken to the comparison between them. For example, rather than comparing the mens rea of D and the principal offence in general terms, perhaps the Commission would prefer us to compare each element separately, asking whether the act element of P's offence is sufficiently similar to that intended by D and so on.

⁷¹⁵ As the chart indicates, the only causal requirement within complicity relates to D's causing of the act element of P's offence.

⁷¹⁶ *Powell and Daniels, English* [1999] 1 A.C. 1.

Regrettably, the Commission's report and draft Bill are both silent on this issue. However, drawing upon the more detailed draft Bill (eventually discarded by the Commission), there is some indication that they would prefer an approach that examined each element separately.⁷¹⁷ In this manner, if any one element of P's principal offence were to go 'far beyond' what was intended or foreseen by D, then D will not be liable as a secondary party.⁷¹⁸ The problem with this approach, however, is where a single element of P's offence may be very different from what D anticipated, but the offence as a whole is still sufficiently similar to warrant the imposition of liability. It is a potential problem that is exacerbated by the preferred model of element analysis. For example, let us imagine a situation in which D encourages P to damage V's new car, foreseeing that P will do so through the use of a hammer. If P does damage the car, but instead of the hammer he or she chooses to do so by kicking the car instead, we would not like to see D escape conviction for encouraging criminal damage. However, the act element (defined as bodily movement) anticipated by D, and the actual movement of P used to complete the offence, are entirely dissimilar. With this in mind, it seems clear that the only way to avoid unfairness is to abandon the use of element analysis in this area. We must still compare the ulterior mens rea of D with the principal offence completed by P, but this should be done in general terms.

⁷¹⁷ Horder and Hughes, 'Joint criminal ventures and murder: The prospects of law reform' (2009) 20 *Kings Law Journal*, 379, 392.

⁷¹⁸ *Ibid*, 383.

CONCLUSION

It is clear that the use of element analysis generally, and the use of the preferred method of element analysis in particular, can have a positive impact in the reform and operation of complicity offences.

The unique problems identified above are troubling, and involve concessions to the use of element analysis not tolerated in any other area of the criminal law. However, their importance should not be exaggerated. The preferred method of element analysis is still able to guide us through the majority of the complexity within the offences. It is only at the end of this process, when we have established that D satisfies both the mens rea and the actus reus of the offence, that a comparison is made between P's offence and that anticipated by D. It is only at this stage that we are forced from the specific inquiry of element analysis, and must instead look at the relationship between the ulterior mens rea and the reality more broadly.

It is a concern that these potential problems have not been identified either by the Commission in their report, or by the academic community following the publication of the recommendations. Without explicit recognition of the unique challenges in this area, they would certainly have led to confusion and perhaps infected a similar uncertainty into other areas of the offence definition. However, having clearly identified these potential problems, we are not only able to isolate their effects, but also provide guidance on their management. These are essential steps towards the simplification of the law.

CHAPTER 13

THE ROLE OF DEFENCES

The use of element analysis in order to examine the role of criminal defences is another area, along with secondary liability discussed in chapter 12, that has not attracted considerable academic attention. One of the few commentators to have done so in detail, however, is Robinson.

For Robinson, rather than viewing defences as a distinct concern to follow on from the analysis of the elements of an offence, certain defences should rather be viewed as part of the offence itself.⁷¹⁹ In this vein, element analysis provides a useful vehicle through which to demonstrate the role. On a very general level, for example, one could contend that within every offence there is a circumstance element to the effect that what is done is done without a valid defence. The advantage of this approach, particularly in relation to justificatory defences is that, rather than the law saying that D *committed an offence and is then exonerated on the basis of a defence*, it could say that D *has not committed an offence at all*. For Robinson, this taps into one of his major aims in terms of the codification of the law: rather than traditional divisions, we should instead focus on separating aspects of criminal law depending upon their role in rule articulation, offence liability etc. Under this method, certain defences will form part of (usually) the circumstance element of an offence and others will follow the analysis of the offence in the traditional manner.⁷²⁰

⁷¹⁹ See, Robinson, *Structure and Function in Criminal Law* (Clarendon Press, Oxford 1997) 137-142.

⁷²⁰ *Ibid*, 139.

Although Robinson's approach is an interesting and potentially valuable one, its ambitions stand firmly outside of the confines of this thesis. We may point out, in support of element analysis, that the novelty of Robinson's approach (to the extent that it appeals) could not be achieved without the express use of element analysis. However, in relation to this project, we must view it with a note of caution. As Smith and Hogan have pointed out:

... the enumeration of the elements of an offence becomes impossibly cumbersome if it has to include all conceivable defences.⁷²¹

It is on this basis that the preferred method of element analysis, as set out in this thesis, will opt for the traditional approach to defences. When attempting to separate the elements of already very complex offences, the added dimension of defences within the offence elements would represent a considerable and largely unnecessary complicating factor. Of course, if an approach similar to that of Robinson's one were to prove so desirable as to outweigh this concern, then the preferred method would allow for its incorporation. However, for the time being, we opt for the more straightforward approach.

⁷²¹ Smith and Hogan, *Criminal law* (6th Ed, Butterworths, London 1988) 36.

PART IV

THE FUTURE OF (AND ALTERNATIVES TO) ELEMENT ANALYSIS

As discussed in Part III, when exploring the usability of a technique like element analysis, which proposes to reconceive the internal structuring of offences without amending their substantive content, there will always be a natural reluctance on the part of those within the criminal law. However, the preferred method of element analysis promises to deliver a host of much coveted benefits. To those working to reform the most complex offences, the preferred method shines a bright light into each element of the offence, demanding comment or explicit avoidance at each stage. For legal academics and law students, the preferred technique again offers comprehensibility, but also the opportunity to focus comment and analysis on individual areas of an offence in a clear and straightforward manner. And finally, for lay people both within the community and within juries, the break down allows otherwise complex offences to be understood in their bite sized portions. As Robinson has commented:

Such precise and clear offence definitions provide fair notice of the scope of the prohibition, [potentially] eliminate the need for judicial construction that may expand or reduce that scope, and delineate the scope so as to limit the arbitrary administration and application of criminal laws.⁷²²

⁷²² Robinson and Grall, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681, 703-704.

Having established the objectivity of the preferred method in chapters within Part II, the chapters within Part III have demonstrated its ability to separate the elements of a range of the most complex criminal offences in a straightforward and logical manner. We are therefore in the position to reject the second major criticism of element analysis that it is too complex to be practically useful. Left only with a natural reluctance to change, we may look to the words of Jeremy Bentham when he stated that:

[A]s grammar is taught by sentences thrown on purpose out of regime, and geography by dissecting maps, in a like manner might the art of legislation, particularly what might be styled the mechanical branch of it, be taught by means of shapeless laws, to be taken to pieces and put together again after the manner of the model.⁷²³

In this manner, we may look beyond the criminal law as a traditional relic, and perceive it rather as an evolving tool of society. The preferred method will not change the content of the law directly, but it promises benefits no less dramatic.

The concern however, is that this *promise* of future benefits may never be realised. Despite undermining the two central criticisms of element analysis, we are still not yet in a place to recommend its use without further investigation. This is because, faced with the inadequacies of the current law, particularly in relation to the general inchoate offences, academics that do not support the use of element analysis have developed alternative approaches. In Part IV, we now move on to compare the use of the preferred method of element analysis to these alternatives.

⁷²³ Bentham, *Of laws in general* (Athlone Press, 1970) 245.

CHAPTER 14

THE ALTERNATIVES TO ELEMENT ANALYSIS

The preceding chapters have focused on the reformulation of element analysis. Drawing upon its historical and international development, we have questioned whether it is possible to avoid the criticisms of element analysis that have threatened to undermine it, whilst preserving its potential benefits. Despite a number of isolated complications,⁷²⁴ we have now concluded this process with a degree of optimism. Through the chapters within Part II, we have demonstrated how the preferred method of element analysis is able to facilitate the objective separation of offence elements without increasing its vulnerability to criticism within action theory. And equally, in the chapters within Part III, the preferred method is shown not simply to have avoided the complexity criticism, but potentially to aid the straightforward application and analysis of complex offences. Beyond this, the potential benefits of element analysis in terms of increased reform options and legal analysis, introduced in chapter 2 and then developed further in the chapters within Part III, are importantly maintained.

Despite these many potential benefits, however, the future challenges for the advocate of element analysis (even the preferred method of element analysis) remain formidable. This is because, although it has been shown that the two major criticisms of element analysis can be overcome, the future success of the technique relies (to some extent) upon its almost universal acceptance within the criminal law. The preferred method of element analysis

⁷²⁴ See, for example, parts of the discussion about secondary liability in Chapter 12.

makes it *possible* to separate the elements of every offence, as is required for the new assisting and encouraging provisions and any similarly structured reforms in the future.⁷²⁵ Objective separation also makes it *possible* for academics to individuate and discuss aspects of complex offences with a greater degree of precision. However, unless offences are designed with this separation in mind, and unless element analysis becomes a common language within criminal law academia, such benefits will remain qualified. After all, if new offences are created without any consideration of how they would be separated in the context of inchoate liability for example, then not only are disagreements about separation more likely to persist, but the aim for Parliament to be gaining greater control over the operation of these offences will be lost.⁷²⁶ Also, if academics are to employ element analysis usefully within their discussion of complex or any kind of offences, then it must become a common language. If scholars are expected to set out how element analysis works, and to defend their own conception of it within every paper, then it will risk becoming simply another complex and unnecessary point of contention.

With this in mind, our current examination of element analysis can only take us so far. Although this thesis has constructed a model of element analysis that has the potential to offer a range of benefits within the law, we have only briefly considered how the model is likely to be taken forward.

In the United States, for example, one of the few jurisdictions to have fully incorporated a form of element analysis, promulgation of the technique was facilitated by its acceptance

⁷²⁵ This also (potentially) includes the defining of fault terms. See discussion in Chapter 11.

⁷²⁶ For a discussion of the potential democratic benefits of element analysis, see Chapter 2, pp23-26.

first within the Model Penal Code, and then later within individual State Codes.⁷²⁷ In this manner, element analysis could be formally and explicitly incorporated into all aspects of the criminal law, from the definition of fault terms to the drafting of offences. Further, although we may criticise aspects of the US MPC,⁷²⁸ the opportunity to set out the definitions of offence elements within the General Part is also a significant advantage both in terms of further dissemination and in terms of consistency in application. Therefore, the potential adoption of the preferred model of element analysis within a criminal code appears to be the best option in order to realise the techniques full range of benefits. However, the history of criminal law codification within England and Wales sadly makes this route for element analysis extremely unlikely. Following a succession of costly attempts to produce and implement a criminal code,⁷²⁹ even the Law Commission has finally (and formally) shifted its ambitions away from grand-scale codification.⁷³⁰

Rather than coming through the reform or creation of a criminal code, the central driving force behind element analysis in this jurisdiction has been the reform of general inchoate offences.⁷³¹ By facilitating new and attractive reform options, element analysis has begun to take a grip within English law. Further, as it is being used to structure *general* offences of this kind, the effects are being felt across the criminal law. Already adopted within the new assisting and encouraging provisions, if similar reforms are accepted in relation to attempts,

⁷²⁷ For discussion, see Robinson, 'Element analysis in defining liability: The Model Penal Code and beyond' (1983) 35 *Stanford Law Review*, 681.

⁷²⁸ See discussion in Chapter 3, pp79-82.

⁷²⁹ The most recent attempt took place in 1989. See, Law Commission, *A Criminal Code for England and Wales* (2 vols) (Law Com No 177, 1989).

⁷³⁰ See, Law Commission, *10th Program of Law Reform* (Law Com No. 311, 2008) and Editorial, 'RIP: The Criminal Code (1968-2008)' (2009) *Criminal Law Review*, 1.

⁷³¹ See discussion in Chapter 2, pp32-41.

conspiracy and complicity,⁷³² the de facto position of element analysis is likely to be equivalent to that of a formal codified role. At very least, the centrality of element analysis within such a large part of the criminal law will lead to the sort of general awareness identified above as a requirement for the technique's success: awareness within the legislature, the courts, and the academic community. However, despite this likely line of trajectory, in the absence of a criminal code to cement the technique within the criminal law, the progress of element analysis along this route remains somewhat precarious.

Most importantly, this relates to the general criticisms of element analysis that have formed the basis of this thesis. However, beyond this, the preferred model is also vulnerable to rival techniques that may not claim to offer benefits in terms of legal analysis, but do claim to provide superior models for the reform of the general inchoate offences. In the absence of a code which has the potential to realise all of the potential benefits of element analysis at once, this competition has the potential to undermine element analysis in its weakest formative stages.

The next section takes a brief look beyond the viability of element analysis to compare the preferred model with its main rivals for the construction of general inchoate offences.

ALTERNATIVE MODELS TO GENERAL INCHOATE LIABILITY

⁷³² See Part III generally.

In order to begin our search for the alternatives to element analysis, we must first return to ground already covered. As discussed in chapter 2,⁷³³ within a succession of Law Commission papers aimed at reforming the mens rea requirements of inchoate liability, element analysis has come to represent a unique middle ground between two equally unattractive extremes.

The first of these extremes, a technique never garnering much support,⁷³⁴ would require D to have the same mens rea as he or she would be required to have for the principal offence. Let us consider an example of criminal attempt: attempted criminal damage.⁷³⁵

D picks up a stone. Just as he motions to throw the stone, X, realising that it might hit and damage V's window, prevents D from doing so.

Within this example, to be liable for attempted criminal damage, D would therefore have to possess the mens rea required for the full offence of criminal damage. The advantage of this approach is that it recognises the moral equivalence of D that completes the offence and D that, though no choice of his or her own, is prevented from completing the offence. If the conduct of each defendant is morally equivalent, then surely the mens rea requirements should be the same.

⁷³³ See pp32-41.

⁷³⁴ For a rare exception, see Loftis, 'Criminal law: Requiring the same intent for prosecution of criminal attempt and the consummated crime' (1984) 36 *University of Florida Law Review*, 545.

⁷³⁵ Although we are using a criminal attempt example, it is important to remember that these alternatives would work in the same way across each of the general inchoate offences.

However, although initially attractive, this approach has the potential to be considerably overinclusive. Let us imagine that D above is attempting to throw the stone, not in order to damage V's window, but in order gain V's attention. If D were to foresee that the stone *might* damage V's window, and upon throwing the stone it did in fact do so, then we can accept his or her liability for criminal damage: D may not be acting maliciously, but he or she did recklessly cause the damage.⁷³⁶ However, if D forees the risk of damage but damage is not caused, either because the stone is thrown sufficiently lightly or even (as above) because D is prevented from throwing it, prosecuting D for *attempting* to commit criminal damage seems harsh and inappropriate. D may have gone beyond mere preparation towards an act that he or she recognised might cause damage, satisfying the mens rea of the full offence, but damage was not intended and damage did not result.

Indeed, similarly unsatisfactory outcomes would be reached across the criminal law. For example, if D's actions cause the death of V, the law of murder does not require D to have intended death to result.⁷³⁷ However, if D attacked V causing injury but not death, it would surely be inappropriate to lable this as 'attempted murder' unless death formed part of D's intentions. In this manner, we recognise that the actus reus of attempts, along with the other general inchoate offences, are not simply the moral equilenences of their corresponding full offence. The absance of resulting harm is not irrelevant, but rather leads to a greater focus on the mind of D. If D intended to cause the harm, then the fact it did not result does not undermine our condemnation of his or her actions. However, if D did not

⁷³⁶ For the mens rea of the offence of criminal damage, D need only be reckless as to the possibility of damage being caused by his or her actions. Criminal Damage Act 1971 s1(1).

⁷³⁷ D must have, however, at least intended to cause V grievous bodily harm (*Cunningham* [1982] AC 566).

intend the harm, as in the examples above, then although we may still disapprove of the risk taken, this is qualified by a *shared* relief that the harm did not come about.

The recognition that the general inchoate offences should be grounded with a requirement of intention in every case therefore leads to the rejection of the first alternative. However, not yet accepting the use of element analysis, it is a recognition that seemed to leave only one other realistic option for reform. This (second) alternative, accepted for conspiracy within the Criminal Law Act 1977 and for attempts within the Criminal Attempts Act 1981, requires D to intend the completion of every part of the principal offence regardless of that offences' mens rea. Thus, within the attempted criminal damage example above, although the offence of criminal damage does not require intention, D would not be liable for the attempt unless he or she knew the window belonged to another and intended to cause damage to it. The offence is no longer overinclusive because if D is merely trying to get V's attention with the stone and not to cause damage, he or she will not be liable for attempted criminal damage. Equally, D will only be liable for attempted murder if he or she intends to cause death.

However, although this option seems to avoid the problem of overinclusivity, it has attracted considerable criticism for going too far the other way. This criticism is most clearly demonstrated through the use of another attempts based example: attempted rape.

D and P go out to find a woman (V) with whom to have sex with. Without caring whether V consents or not, but recognising the likelihood that she will not, both D and P attempt penetration. Only P succeeds in his attempt.

In this example, P has committed the offence of rape.⁷³⁸ P commits rape because he does not reasonably believe, at the time of penetration, that V is consenting. However, if the law of attempt were to operate in line with the second alternative currently under discussion, D would not be liable for attempted rape. This is because, although recklessness as to consent is sufficient mens rea for the full offence,⁷³⁹ if attempts liability were to require intention as to every element of that offence, then clearly the requirement of intention would not be satisfied. D intends to sexually penetrate V, but he does not intend (as he must) for V not to consent. Therefore, although this option represents (to some extent⁷⁴⁰) the position of the current law,⁷⁴¹ its strict application would lead to a serious problem of under-inclusivity.

One of the central attractions of element analysis therefore, has been its potential to forge a mid-way course between these unattractive extremes. By separating the elements of a principal offence, the inchoate form of liability can still require intention as to certain elements of the offence, thereby avoiding the over-inclusiveness of the first option. However, by isolating other elements of the offence (for example the circumstance element) to allow lower standards of fault, a policy can be constructed that also avoids the under-inclusiveness of the second option.

⁷³⁸ Contrary to the Sexual Offences Act 2003, s1. We are assuming that V does not consent to sexual intercourse and that P does not have a valid defence.

⁷³⁹ In fact, the offence of rape simply requires D not to have a reasonable belief in the presence of consent. Sexual Offences Act 2003, s1.

⁷⁴⁰ For a discussion of how the courts have attempted to reinterpret the law in this area to avoid problems of under-inclusivity, see discussion in Chapter 2, pp32-41, and *Khan* [1990] 1 WLR 813.

⁷⁴¹ The Criminal Attempts Act 1981, s1(1).

The critics of element analysis have therefore been placed in a rather difficult position. Although they have highlighted the problems with element analysis and doubted its ability to operate in the manner required, these two alternatives do not provide an attractive fall-back. Therefore, in the two decades since the Law Commission first identified element analysis as a viable option for reform, there have been considerable efforts made to develop an alternative mid-way course that does not rely on the controversial technique. It is these alternatives that are potentially most damaging to the future of element analysis, and it is to these alternatives that we now turn.

An alternative mid-way course

In this section we explore three options that have been propounded as specific alternatives to the use of element analysis. These alternatives are most closely associated with Williams, Stannard and Duff respectively. However, before we discuss each in detail, it is important to first set them in the context of the thesis. This is because, although each of these academics has attempted to construct a model to rival the position and use of element analysis, this has invariably arisen from the premise that element analysis does not work.⁷⁴² Working from this base, against a non-functioning technique, the measure for success becomes much easier to satisfy: the challenge is not to compete with element analysis at all, but rather to construct the viable (or more viable) mid-way course that element analysis has failed to provide.

⁷⁴² See, for example, Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120, 120-121 and Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 10-14. To some extent Stannard represents an exception to this, see discussion below, pp301-305.

However, this thesis has set out a model of element analysis that is able to answer its critics, and therefore to provide a viable structure for the mid-way course outlined above. With this in mind, our discussion of the alternatives to element analysis must be recast, and a considerably higher measure for success must be set. As we explore each of the alternatives below, we are not simply looking for a method to dissect the unattractive extremes of the previous discussion; we are looking for a viable method that is able to provide benefits greater than those offered by the preferred model of element analysis.

Option 1: Alternative or conditional intention

The use of alternative or conditional intention as an alternative to element analysis has been variously mooted by a number of academics;⁷⁴³ however, it is probably most closely associated with the work Glanville Williams.⁷⁴⁴

Speaking broadly, alternative intents can be categorised into two separate classes. The first class involves a form of alternative intention, very common within general inchoate offences, which will not affect D's potential liability. For example, if D intends to rob a bank *if the coast is clear*, then we can describe his or her intention as conditional: if the coast is not clear then he or she will not rob the bank. However, this is still classed as a valid form of intention within the criminal law. This is because, although D's intention includes a condition, that condition does not undermine the criminal nature of the first part of his or

⁷⁴³ Interestingly, it is the only option of the three currently under discussion that the Law Commission chose to explicitly address in their recent report on Conspiracy and Attempt. Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.99-2.128].

⁷⁴⁴ See, most notably, Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120.

her ambition. D may intend to murder V only if he or she is aggravated by V; if V inherits some money; if the sun is shining; if D's football team loses, but in law, D's intention can be simply and accurately described as an intention to murder V.⁷⁴⁵

The second class of alternative or conditional intention, however, will undermine a finding of intention within the criminal law. This is where D intends X (where X has the potential to lead to criminal liability), but only if X does not include all aspects required to be criminal. For example, if D intends to chop down a tree, then this has the potential to be an intention to cause criminal damage.⁷⁴⁶ However, if D intends to chop down the tree *only if it is discovered that he or she owns the tree*, then the intention can only be innocent. In common with the first class of conditional intent we again have an intention that is qualified by an external event. However, unlike that first class, here the condition is sufficient to undermine the criminal potential of that intention.⁷⁴⁷

In order to understand how Williams has employed conditional intention as an alternative to element analysis, it is useful to return to the prior example of attempted rape.

⁷⁴⁵ The only time in which this form of conditional intention may provide a cause to doubt the validity of D's intention is where the conditions required to bring about the offence are extremely unlikely. For example, if D1 and D2 conspire to kill V if they win the lottery three times in a row, although this has the potential to be a perfectly valid form of intention, the extreme unlikelihood of the conditions arising may lead a jury to doubt whether D1 and D2 ever honestly intended to fulfil their agreement. See, Alexander and Kessler, 'Mens Rea and Inchoate Crimes' (1997) 87 *Journal of Criminal Law and Criminology*, 1138.

⁷⁴⁶ Contrary to the Criminal Damage Act 1971, s1.

⁷⁴⁷ It may be possible to re-interpret this second class of conditional intention as simply the intention to bring about certain but not all elements of the principal offence. For example, in the example above, D intends the act and result elements of criminal damage (bodily movements that cause damage), but he or she does not intend the circumstance element (that the property damaged must belong to another). However, this form of alternative analysis is not relevant to our present task.

D and P go out to find a woman (V) with whom to have sex with. Without caring whether V consents or not, but recognising the likelihood that she will not, both D and P attempt penetration. Only P succeeds in his attempt.

Focusing on the potential liability of D for attempted rape, it is clear that within D's broad intention to penetrate V, there resides an alternative or conditional event relating to the presence or absence of consent. Indeed, it is upon this basis that we rejected the intention for all formulation to criminal attempts outlined above: if D is required to intend there to be a lack of consent then it seems he will avoid liability. However, rather than presenting D as *intending to have sex* and being *reckless as to consent*, Williams employs alternative intention to contend that D does in fact intend both to have sex with V and to do so with an absence of consent. Williams does this by recasting D's intention as an alternative intention to have sex with V if she does consent, or, to have sex with her if she does not.

His intention may be analysed as being an intention to copulate with the woman *nolens* or to copulate with her *volens* – to commit rape, or to enjoy consensual sex – as matters may turn out. He does not care which.⁷⁴⁸

In this manner, Williams has taken an example that seemed to belong to the second class of alternative intents (undermining criminal intention), and demonstrated how it can be placed into the first class (not undermining criminal intention). Like D that will only rob a bank *if the coast is clear*, D in the present example intends to commit rape *if V does not consent*. In each case D intends to commit an offence if certain circumstances arise, and in each case we

⁷⁴⁸ Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120, 121-122.

can therefore conclude that D intends (rather than is simply reckless) to commit an offence. As a result of this, without amendment to the Criminal Attempts Act 1981, Williams is able to accept the requirement of attempts that D should intend the principal offence, and to convict D of attempted rape. Element analysis is not required.

Beyond criminal attempts, Williams' alternative can also operate across the general inchoate offences. For example, in the case of *Saik*,⁷⁴⁹ D was charged with conspiracy to convert the proceeds of crime⁷⁵⁰ at his bureau de change. However, despite D's suspicions relating to the money's criminal origin, because he did not know or intend it to be the proceeds of crime, he was eventually acquitted of conspiracy by the House of Lords. Employing element analysis, the Law Commission have recommended that the law of conspiracy should be reformed to allow for conviction in cases such as this where D is reckless as to the presence of a circumstance.⁷⁵¹ However, employing Williams' conception of alternative intention, it is possible to maintain that D *did* intend to convert the proceeds of crime. This is because, as D intended to convert the money whatever its origin, we can conclude that he intended to convert it if it was the proceeds of crime and intended to convert it if it was not. Indeed, Baroness Hale's dissenting judgement in *Saik* would have followed this line exactly:

If, in our example, the conspirator agrees to launder the money even if at the time he does so he is told that it is in fact the proceeds of crime, then he does indeed intend

⁷⁴⁹ *Saik* [2007] 1 A.C. 18.

⁷⁵⁰ Contrary to the Criminal Law Act 1977, s1(1), the relevant substantive offence being contained in the Criminal Justice Act 1988, s93C(2).

⁷⁵¹ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) Part 2.

that fact to be the case when he does the deed. The fact that he is equally happy to convert the money even if it is not the proceeds of crime makes no difference.⁷⁵²

In this manner, although the general inchoate offences would be formulated to require intention as to every element of the principal offence, Williams' conception of alternative intentions transforms this into a mid-way approach.

However, although Williams' alternative analysis of intention broadens the scope of liability, it has been criticised for not being able to go far enough. It is able to encompass D whose intention includes a 'shopping list'⁷⁵³ of options: D intends rape if he intends to have sex with V nolens or to have sex with V volens, D intends murder if he or she plants a bomb intending it to kill or seriously injure V,⁷⁵⁴ and so on. However, if D's intention is not spread across options, but is rather perused at the known risk of an *unwanted* circumstance or result, then Williams cannot classify that unwanted aspect to be part of D's intention. To employ an example used by Williams, if D throws a stone at a window intending it to break the window and foreseeing the unwanted possibility that it might also injure V, he or she will be liable for assault if V is injured.⁷⁵⁵ However, if V is not injured, D will not be liable for an attempted assault (under Williams' conception) because 'an attempt requires intention, and here [D] does not intend to assault a person, even as an alternative intention.'⁷⁵⁶ D does not intend alternatively to either damage the window and/or injure V, but rather, D intends

⁷⁵² *Saik* [2007] 1 A.C. 18, 57.

⁷⁵³ Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120, 124.

⁷⁵⁴ *Ibid.*, 124. This is also a useful example of how Williams' conception of intention will affect results as well as circumstances.

⁷⁵⁵ Assault can be committed intentionally or recklessly.

⁷⁵⁶ Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120, 124.

only to damage the window. D foresees the possibility of injuring V, is willing to risk that possibility, but hopes that it will not come about.

In the context of the stone thrower, the conclusion that he or she has not committed attempted assault (where V is unhurt) may seem to be perfectly acceptable. However, as Duff has highlighted, when this same policy is applied to other examples it soon becomes more troubling. For example, if D attempts to have sex with V, aware of the possibility of non-consent, but willing to run that risk in the hope that V will consent, then surely his intention is similar to that of the stone thrower.⁷⁵⁷ But should he be acquitted of attempted rape? If V was not consenting and D achieved penetration in these circumstances, he would be straightforwardly guilty of rape. Therefore, it would surely be unacceptable to acquit D when 'part of Williams' aim [in constructing a mid-way course] is precisely to show how we can convict such a man of attempted rape.'⁷⁵⁸

The problems then, for Williams and his conception of alternative intention, are twofold. First, if we do wish to convict D of attempted rape in the example above, then it is clear that Williams' mid-way course is not suitable as an alternative to element analysis: having reached the limits of Williams' conception of intention we are still unable to convict D. Secondly, and more interestingly from the perspective of element analysis, even if we could stretch the limits of alternative intention to convict D of attempted rape in the above example, it is unlikely that we would want to. This is because, if we convict D of attempted rape on the basis that he continued to act with foresight of an unwanted risk, then we must also convict the stone thrower and others that we agree should be acquitted.

⁷⁵⁷ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 15.

⁷⁵⁸ *Ibid*, 16.

This much is also observed by Duff.⁷⁵⁹ However, it is not so much the dilemma that this causes for Williams that is interesting, so much as the obvious solution offered by element analysis. When we explore examples relating to consent in attempted rape, or the origin of money in conspiracies to convert the proceeds of crime, we are discussing circumstance elements of the principal offence. Whereas, when we explore examples such as the causing of injury in attempted assault, we are discussing result elements. By separating these elements through the use of element analysis, it is possible to require a lower standard of mens rea for one (for example, the circumstances) and a higher for the other (for example, the results). In this manner, we can distinguish the examples, acquitting D of attempted assault in the former⁷⁶⁰ and convicting D of attempted rape in the latter.⁷⁶¹ It is this flexibility, as much as anything else, which is lacking from Williams' alternative.

Providing further bolster to the criticisms levelled by Duff, the Law Commission has also provided specific criticisms of the Williams approach. Employing a more practical analysis, the Commission has pointed out that even in the scenario where D intends to act whether or not a certain criminal aspect were to arise (Williams' alternative intention), it would be very easy for D to claim the opposite in the event of criminal proceedings.⁷⁶² For example, commenting specifically upon the conspiracy case of *Saik*, the Commission observes that this approach:

⁷⁵⁹ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 16, and Duff, 'Recklessness in attempts (again)' (1995) 15 *Oxford Journal of Legal Studies*, 309, 312-314.

⁷⁶⁰ This could be done by requiring that D must intend the result element of the principal offence in line with Law Commission recommendations. Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

⁷⁶¹ This could be done by lowering the mens rea required for the circumstance element of the principal offence to recklessness in line with Law Commission recommendations. Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

⁷⁶² Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009) [2.122-2.123].

... involves the jury speculating in a hypothetical way about what D would or would not have agreed to if he or she had known the truth at the time of the agreement. Answers to hypothetical questions may be particularly hard for the prosecution to persuade the jury to accept beyond reasonable doubt. It would be very easy for D to claim in almost any case of the sort under discussion that, "if I had known illegality of this kind was to be involved [without any doubt], I would not have gone ahead."

Therefore, as well as failing to include certain defendants within the definitions of our general inchoate offences, Williams' alternative also makes it more difficult to convict those that are included.

Williams' conception of alternative intention therefore succeeds in its attempt to construct a mid-way course that does not rely on element analysis, and is (arguably) preferable to the extremes of the previous approaches. However, in the light of its many critics, and more importantly, in the light of a functioning version of element analysis, it must be rejected.⁷⁶³

Option 2: Missing elements

The second alternative to element analysis is a novel technique developed by John Stannard in his article 'Making up for the missing element – a sideways look at attempts.'⁷⁶⁴ Stannard

⁷⁶³ For further criticism of Williams' approach, see Sullivan, 'Intent, subjective recklessness and culpability' (1992) 12 *Oxford Journal of Legal Studies*, 380.

⁷⁶⁴ Stannard, 'Making up for the missing element – a sideways look at attempts' (1987) 7 *Legal Studies*, 194.

agrees that attempts liability intuitively requires intention on the part of D. However, in line with the Law Commission, Stannard only believes that intention should be required for certain elements of the principal offence. Where he diverges from the Commission, is that rather than employing element analysis to separate the elements requiring intention, Stannard contends that intention should only be required for those elements of the actus reus that are not satisfied/completed by D within the attempt. When an element of the actus reus of the principal offence is satisfied, D's fault need only reach the standard required by the principal offence. For example, if D attempts to sexually penetrate V without V's consent, then the only missing element of the actus reus of rape is the lack of penetration. Therefore, while this missing element must be intended for D to be liable for the attempt (the penetration), there is no requirement of intending or knowing about V's non-consent. As V does not consent in fact (actus reus) then the only mens rea required of D in relation to this part of the actus reus is that required by the principal offence – the lack of a reasonable belief in consent.⁷⁶⁵

In this manner, Stannard creates an intuitively plausible and relatively straightforward option to compete with element analysis. As much of the mens rea requirements are able to mirror those of the principal offence, we avoid the under-inclusiveness that would acquit D in the previous example of attempted rape if he did not know of V's non consent. However, if D intentionally harms V in a manner that obviously risks but does not cause death, or if D intentionally throws a stone that risks but does not damage V's window, we are not forced to hold D liable for attempted murder and attempted criminal damage in every case. Rather, as death and damage are missing elements of the respective principal offences, we only

⁷⁶⁵ The Sexual Offences Act 2003, s1(d).

hold D liable if he or she intended to bring them about. Therefore, in a rather straightforward manner, arguably simpler than element analysis, this approach seems to lead to the 'correct' results.⁷⁶⁶

Despite the initial appeal of Stannard's alternative, however, a series of problems with the technique soon undermine its ability to compete with a functioning version of element analysis. In order to demonstrate these problems we will first set out three of the major criticisms. These three are particularly interesting because, although they do not all originate from Duff, it is possible to identify a clear progression within Duff's theory of attempts that may well have stemmed from the desire to answer these criticisms. Further criticisms of Stannard's alternative, which are not addressed sufficiently in Duff's work, will be explored in the section on Duff's theory below.

The first criticism of Stannard's alternative is that it leads to over-inclusiveness in relation to certain offences, such as those of strict liability. For example, if D has his or her drink spiked with alcohol by P and then drives in excess of the alcohol limit, he or she will commit an offence despite a lack of knowledge or even recklessness in relation to the presence of that alcohol.⁷⁶⁷ Although D is not exactly at fault, his or her liability is justified by the potential danger caused by D to other road users. However, if D were to be stopped by a third party just before driving, and warned of what P had done, it would surely be inappropriate to

⁷⁶⁶ The technique has also gained some measure of support from its use in the case of *Attorney-General's Reference (No 3 of 1992)* [1994] 1 WLR 409. However, as the authoritative value of this case has been largely superseded by the use of element analysis in *Khan* etc, that support is rather qualified.

⁷⁶⁷ Contrary to the Road Traffic Act 1988, s 5(1).

convict D of attempting to drive over the prescribed limit.⁷⁶⁸ Yet, as the only missing element of the principal offence is the driving, this will be the only element that will require D's intention. D did intend to drive, and although he or she was not aware of the alcohol at the point of the attempt, as this element of the actus reus was satisfied, no knowledge will be required for conviction.

The following two criticisms have both been specifically levelled by Duff. The first of these exposes a further area in which Stannard's alternative appears to be over-inclusive in its reach. This is where, rather than the missing element being a result of D's conduct (as is more usual with attempts), the missing element is a circumstance. The problem arises where D is reckless as to the present result and intends the absent circumstance.⁷⁶⁹ To employ Duff's most common example:

D borrows his neighbours drill to complete a DIY task because he fears that the job might damage the drill and does not want to risk his own. However, although the drill is damaged, it transpires that D had accidentally used his own (identical) drill by mistake.

According to Stannard's alternative, D in this example has attempted to commit criminal damage despite neither damaging his neighbours' property nor intending to do so. This is because, although intention is required for the missing element (the ownership of the drill in use), the resulting damage is not missing and is therefore able to reflect the lower fault

⁷⁶⁸ For further discussion of this, see, Enker, 'Mens Rea and Criminal Attempt' (1977) *American Bar Foundation Research Journal*, 845, 874.

⁷⁶⁹ For discussion of this see, Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 111-112; Duff, 'Recklessness in attempts (again)' (1995) 15 *Oxford Journal of Legal Studies*, 309, 311-312; and Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 14-15.

requirements of the principal offence. Yet, once more, convicting D of attempt in this case appears to be highly inappropriate. As already highlighted, D did not intend to damage his neighbour's property; he does not damage it and does not even (in fact) risk doing so.

The final criticism of Stannard's technique to be explored in this section begins as a potential riposte to the last one discussed. This is because, as Duff notes, it may be possible for Stannard to avoid the previous criticism by claiming that the missing element in the criminal damage example was not the presence of *another's property*, but *damage to another's property*. D intended the drill to belong to another (his or her neighbour), but he or she did not intend to damage property belonging to another, and therefore will not be liable for attempt.⁷⁷⁰ However, no sooner is the criticism deflected before Stannard is snared by its method of avoidance. If we are maintaining that *another's property* is not an element of criminal damage, but that *damage to another's property* is, on what basis are we doing so? Part of the justification for Stannard's technique, as an alternative to element analysis, is the premise that we cannot objectively separate the elements of an offence. If we are now told that we must do so, but we are not told how, any initial appeal is likely to fade very quickly.

It is again clear that, although Stannard has successfully constructed a midway course, it does not represent a viable alternative to the preferred method of element analysis. This is because the technique is either over-inclusive in a variety of cases or, if we are to avoid

⁷⁷⁰ For discussion of this see, Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 111-112; Duff, 'Recklessness in attempts (again)' (1995) 15 *Oxford Journal of Legal Studies*, 309, 311-312; and Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 14-15.

some of these cases, then it requires the same objective separation that it claims element analysis cannot achieve.

Option 3: Objectivist approach

The final option to be discussed in this chapter has been developed in an objectivist model by Anthony Duff.⁷⁷¹ Often using Stannard's alternative as a way into the discussion of his own,⁷⁷² Duff's model for the mens rea of attempts seeks to harness the intuitive appeal of Stannard's alternative, whilst being conscious to avoid its frailties.

As will be remembered from the discussion above, Stannard's model begins with the actus reus of D's attempted offence and then moves on to the mens rea. Having exposed the gaps in the actus reus, Stannard requires that D should have intended for them to come about in order to be liable for the attempt. Within Duff's alternative, this relationship is reversed. Beginning with D's mens rea, we must first discover what D was intending (trying⁷⁷³) to bring about. From here, looking to the actus reus of the offence, we ask if D had been successful in his or her ambitions, would he or she have *necessarily*⁷⁷⁴ satisfied the actus reus and mens rea requirements of the principal offence. If he or she would have necessarily completed the principal offence, then he or she will be liable for the attempt. In this manner, D's intentions are effectively able to reconstruct absent parts of the actus reus.

⁷⁷¹ For the most complete discussion of Duff's alternative approach, see, Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996).

⁷⁷² See, for example, Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 111-112.

⁷⁷³ Duff often prefers the use of the term 'trying.' This is likely to be the case because the term 'trying' better indicates his requirement of direct intention as opposed to foresight.

⁷⁷⁴ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 371.

In asking whether the agent would commit the complete offence if she succeeded in doing what she is trying to do, we must thus assume the existence of any facts which are part of what she is trying to do ... : but we take the other facts ... to be as they actually are.⁷⁷⁵

As with Stannard, Duff is therefore able to present a 'neat'⁷⁷⁶ and intuitive alternative to element analysis.⁷⁷⁷ Where D, in our previous example, attempts to have sex with V without V's consent, he will rightly be convicted of attempted rape. D intends to sexually penetrate V, and although he does not intend the lack of consent, as V does not consent in fact, D's recklessness is sufficient. This is because, as recklessness is sufficient fault for this part of the principal offence,⁷⁷⁸ if D had achieved his intention (to sexually penetrate V) he would have necessarily committed rape. On the other hand, Duff would not convict the reckless stone thrower of attempting to commit criminal damage if his intention was simply to attract V's attention. Here, D's intention is to throw the stone in the recognition that it will hit V's window, however, he or she does not intend for that window to be damaged. Although recklessness as to damage would be sufficient for the principal offence, as the window is not in fact damaged, it will not be sufficient for the attempt. It is possible that D could have achieved his or her intention (throwing the stone at V's window) without necessarily committing the principal offence, and therefore he or she will rightly avoid conviction.

⁷⁷⁵ Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 116.

⁷⁷⁶ Horder, 'Varieties of intention, criminal attempts and endangerment' (1994) 14 *Legal Studies*, 335, 336.

⁷⁷⁷ It must be noted, however, that this is not a universal position. Williams, for example, has cautioned that he 'cannot see a Deputy Recorder, or even a High Court judge, comfortably grappling with Duff's idea that you assume the existence of any facts that are part of what D was trying to do, but take the other facts to be as they actually are.' Williams, 'Intents in the alternative' (1991) 50(1) *Cambridge Law Journal*, 120, 125.

⁷⁷⁸ The Sexual Offences Act 2003, s1.

With Duff's alternative model of attempts adopting much of the same logic employed by Stannard, his response to the criticisms of Stannard's model above become very important. However, as will be discussed below, although Duff appears to dismiss the application of these criticisms to his own theory quite quickly,⁷⁷⁹ it is difficult to see how his approach is any better equipped than Stannard's to avoid their effects. Indeed, in certain cases Duff's approach may be even more vulnerable.

The first criticism outlined above relates to the potential for over-inclusiveness in relation to certain offences, such as no-fault offences. This criticism will apply equally to Duff's alternative. To employ the example above, if D has his or her drink spiked with alcohol by P and then drives in excess of the alcohol limit, he or she will commit an offence despite a lack of knowledge or even recklessness in relation to the presence of that alcohol.⁷⁸⁰ If he or she is stopped however, just before beginning to drive, it would seem inappropriate to convict him or her of attempting to drive over the prescribed limit. However, as was the case with Stannard's alternative, Duff is also forced to find liability. D intends to drive, and if he or she were to achieve that aim then he or she would necessarily complete the principal offence: D is over the prescribed limit in fact and the principal offence does not require fault in relation to this fact. It is interesting to note that Duff has acknowledged that these cases are problematic, and has even suggested that the application of the law of attempts should be tailored to avoid them; but he does not tell us how this could be done.⁷⁸¹

⁷⁷⁹ This is particularly surprising when we consider that Duff has been one of the leading critics of Stannard's approach. See discussion of Stannard's alternative above, pp301-305.

⁷⁸⁰ Contrary to the Road Traffic Act 1988, s 5(1).

⁷⁸¹ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 374-378.

More interesting still, is Duff's response to the second criticism explored above in relation to Stannard. A criticism employed by Duff in multiple sources to undermine Stannard's approach as a viable alternative to his own.⁷⁸²

This criticism, it will be remembered, relates to the potential liability of D that knowingly risks the damaging of his or her neighbours drill. The drill is damaged, but D realises that (inadvertently) he had used his own drill by mistake. Under Stannard's approach, as Duff highlights, we must convict D of attempting to commit criminal damage even though his neighbours drill was not damaged, and D did not intend to damage it.⁷⁸³ The task for Duff, then, is to demonstrate how his own alternative is able to acquit D in similar facts. He does this by focusing on the nature of D's intention:

I intend to use my neighbour's property, and to take the risk of damaging it; but it is quite conceivable that I should carry out that intention (using her drill to complete my DIY task) without damaging another's property.⁷⁸⁴

Therefore, because it is possible for D to achieve his intention without necessarily completing the principal offence (without damaging V's property) D will avoid liability.

The problem with Duff's explanation, however, is that it only seems to take account of the first stage of his alternative approach. As we outlined above, Duff's alternative begins by accepting (as if it were fact) what D is intending, but then goes on in its second stage to take

⁷⁸² See, Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 111-112; Duff, 'Recklessness in attempts (again)' (1995) 15 *Oxford Journal of Legal Studies*, 309, 311-312; and Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 14-15.

⁷⁸³ See discussion of Stannard's alternative above, pp301-305..

⁷⁸⁴ Duff, 'Recklessness in attempts (again)' (1995) 15 *Oxford Journal of Legal Studies*, 309, 318.

other facts as they 'actually are.'⁷⁸⁵ Therefore, having established D's intention that the drill belonged to V, surely we must accept the objective fact that damage was caused, and that D possessed the requisite mens rea in relation to that damage. If D achieved his intention and the drill did belong to V, then bearing in mind those surrounding facts, D would necessarily have committed criminal damage. D must, therefore, be liable for attempt under Duff's approach.

It is open to Duff to contend that certain facts (such as the breaking of the drill) should not be taken into account. However, this must be clearly and objectively reasoned. For example, if we accept Duff's response to the DIY example in isolation, that D is not liable because his intentions alone do not necessitate liability, this has the potential to lead Duff into even greater problems. Returning to our example of attempted rape above, here Duff accepts that D's only intention is to have sexual intercourse with V. This intention, of course, does not necessitate criminal liability; if V consents to the intercourse. However, once the objective fact of V's non-consent is included in our assessment, along with D's recklessness as to that lack of consent, we recognise that D's intention (sexual penetration), if carried out, will necessarily result in rape. Therefore, as both stages of Duff's alternative are required to convict D of attempted rape in this type of example, it is very difficult to see how Duff can reasonably avoid the application of both parts in every case.⁷⁸⁶

⁷⁸⁵ Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 116. See also the introduction to Duff's approach above, p305.

⁷⁸⁶ One possible difference between the attempted criminal damage example and the attempted rape example is that, in the former, we are dealing with a result element (damage), whereas in the latter, it is a circumstance (absence of consent). However, for Duff to embrace this as a vital distinction, he must also embrace a method of element analysis in order to separate the two varieties. This may be possible, but it undermines Duff's approach as an alternative to element analysis.

Although this problem is not acknowledged by Duff directly, it has emerged in his work in relation to another (similar) example.

D shoots at, and tries to kill, what he believes is a non-human animal. Upon missing the shot, D realises that (as he had feared) the animal was in fact a human.⁷⁸⁷

When Duff first analyses this example in an article in 1991, he acknowledges that it exposes a 'counter-intuitive implication'⁷⁸⁸ of his approach. This is because D's intention involves trying to *kill that thing*, believing it to be non-human, but reckless as to the possibility that it is human. Therefore, if D had succeeded in his or her intention to kill, bearing in mind that the *thing* was human, and bearing in mind D's recklessness, he or she would necessarily have committed involuntary manslaughter. However, not only does convicting D of attempted involuntary manslaughter seem like an overextension of liability, but the offence itself represents a contradiction in terms.⁷⁸⁹

When Duff eventually re-visits the example of attempted involuntary manslaughter in later articles,⁷⁹⁰ and in his monograph *Criminal Attempts*,⁷⁹¹ he does so using slightly adapted facts.

D shoots at what he believes to be a trespasser (V), intending to scare them, but realising that it might hit and kill them. The shot kills V. However, it turns out that V is a dog.

⁷⁸⁷ See, Duff, 'The circumstances of an attempt' (1991) 50(1) *Cambridge Law Journal*, 100, 117.

⁷⁸⁸ *Ibid*, 117.

⁷⁸⁹ See, Ormerod, *Smith and Hogan: Criminal law* (12th Ed, Oxford University Press, Oxford 2008) 397.

⁷⁹⁰ Duff, 'Recklessness in attempts (again)' (1995) 15 *Oxford Journal of Legal Studies*, 309, 318.

⁷⁹¹ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 23-24.

In relation to this example, Duff acknowledges that one might interpret his theory to convict D of attempted involuntary manslaughter: D intends that V should be human and causes death with the requisite fault. However, as before, Duff maintains that as D could have achieved his intention (to shoot at and scare V) without causing death, D would not be convicted under his alternative. The problem with this, again, is that it ignores the second part of Duff's approach that requires us to take account of objective facts outside of D's intentions. As death was caused (in fact), then surely the acceptance of D's intention that V should be human will lead to liability under this approach.

The result of this is that, despite using these examples to undermine Stannard's alternative, Duff is unable to deflect them from his own. In the example where D intentionally kills what he believes to be a non-human animal, no defence is offered: we are left with a counter-intuitive example and an offence (attempted involuntary manslaughter) that is logically impossible. In relation to the other two examples, where D's intention relates to a circumstance element rather than a result,⁷⁹² we are given a defence. However, this defence does not hold up to analysis, and if it were fully accepted, would lead to the acquittal of defendants that Duff specifically wishes to convict.⁷⁹³

⁷⁹² In both the DIY example and the case in which D shoots at a suspected trespasser, D's intention relates to the circumstance element (ownership of the drill and that the target is human respectively) and he or she is reckless as to the result (the damage and death respectively). However, in the example where Duff does not offer a defence (where D shoots to kill what he believes is a non-human animal), D's intention relates to the result (death) and he or she is reckless as to the circumstance (whether the animal is human). If this distinction is meaningful, its use by Duff will require an acceptance of some form of element analysis to separate the two varieties. It is therefore unavailable to an approach that claims to be an alternative to element analysis.

⁷⁹³ See the discussion above concerning the application of Duff's defence to an example of attempted rape at p305.

Moving on from the criticisms previously explored in relation to Stannard, there remains a number of criticisms that are relevant to both alternatives that have not yet been discussed. For present purposes, we will look at two of these. First, we will explore the ability of the two alternatives to operate outside of attempts in relation to the other general inchoate offences. Secondly, we will briefly discuss an area in which Duff particularly believes that his theory holds a key advantage over element analysis: impossible attempts.

It will not always be possible, or even desirable, for an entirely consistent approach to operate across the mens rea of each of the general inchoate offences. However, as the Law Commission has recently observed:

The closeness of the relationship between the different forms of wrongdoing in the 'general part' of the criminal law means that it is important that, in so far as is possible, there is a consistent approach to the key elements of their ingredients.⁷⁹⁴

Indeed, in a report written by JC Smith for the Preparatory Offences Group, a group formed to develop an approach to general inchoate offences for the 1989 Draft Criminal Code, Smith opens with a similar remark. Referring specifically to the mens rea requirements of each of the offences, Smith states that:

I assume that there is no need to argue that the same solution should apply to each of the three [general inchoate] offences.⁷⁹⁵

⁷⁹⁴ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

⁷⁹⁵ Smith, 'Draft Criminal Code Bill, Clauses 51-55', Preparatory Offences Scrutiny Group material (Pre-1989 Draft Code).

The logic behind this desire for consistency stems chiefly from the similar culpability demonstrated in the *actus reus* of each offence. For assisting and encouraging and conspiracy, this culpability stems from combining (or potential combining) of the criminal intentions of multiple agents. For attempt, although D is acting alone, equal culpability is apparent because of his or her temporal proximity to the completion of the principal offence. However, beyond this, there is also the issue of simplicity. Each of the general inchoate offences represents a complex challenge for the courts, and so if the same model for *mens rea* can be reemployed across each offence, this will hold considerable appeal.

In our discussion of the preferred model of element analysis in chapter 10, we have demonstrated that it is able to operate with equal effectiveness across each of the general inchoate offences. However, within our analysis of both Duff's and Stannard's alternatives above, we have not yet commented upon their use outside of criminal attempts. In view of a viable model of element analysis, the inability of these approaches to operate outside of attempts liability would represent a considerable weakness. Indeed, it is a weakness partially recognised by Duff in his consultation response to the Law Commission's paper on Conspiracy and Attempts when he comments that his 'specification applies most simply and neatly to attempts.'⁷⁹⁶

Duff does, however, contend that his approach (and presumably that of Stannard's) could operate more generally. In relation to conspiracy, for example, we could again look to the intentions of the conspirators to ask whether, if they achieved their intentions, would they necessarily have committed a principal offence? The problem with this, however, is that

⁷⁹⁶ Duff, 'Responses to Consultation Questions', responding to Law Commission, *Conspiracy and Attempts – A Consultation Paper* (Consultation No 183, 2007).

unless D intends every part of the principal offence, it will be very difficult to apply the second part of Duff's approach. This is because, if we are dealing with a conspiracy where D1 agrees with D2 to have sex with V for example, reckless as to non-consent, we cannot know definitively whether the circumstance of the actus reus (the non-consent) will be present in the future event or not.⁷⁹⁷ Therefore, despite D being arguably deserving of punishment, he will avoid liability.

For Duff, this result is acceptable. The scope of liability may be a little narrow, but if D has even an alternative intention to rape V then he will still be liable for the conspiracy. Duff's approach runs into problems, however, when he goes on in an attempt to distinguish this example from another where he would like to see a conviction for conspiracy:

D1 and D2 would probably still be guilty of conspiracy to commit criminal damage if the property they agree to destroy does belong to another person, and they are reckless as to that possibility (in the absence, we might add, of any reason to think that the owner will transfer the property to one of them before the planned destruction); but recklessness as to whether V will consent to intercourse would not by itself make them guilty of conspiracy to commit rape if it is not yet determinate whether V will consent or not.⁷⁹⁸

The obvious problem with this distinction is that in neither case do we know definitively whether the necessary circumstance (the ownership of the property and the lack of consent respectively) will be present or not. In *both* cases, there are factual scenarios which would

⁷⁹⁷ *Ibid.*

⁷⁹⁸ Duff, 'Responses to Consultation Questions', responding to Law Commission, *Conspiracy and Attempts – A Consultation Paper* (Consultation No 183, 2007).

lead us to think it very likely indeed that the circumstance will arise, but the idea that examples of this type can be distinguished on the basis of their subject matter is highly problematic. It would be obviously unacceptable, for example, for a court to conclude that we cannot tell whether a victim will consent to an unsolicited sexual approach from a number of defendants unconcerned about consent, and yet we can be certain that property will not be purchased by the defendants unless we have a good reason to think otherwise. As Duff accepts, in the context of conspiracy to rape, that it is inappropriate to attempt to predict the presence of future facts, so we must apply this logic to all other offences. However, with its correct application, it is clear that Duff's (and Stannard's) alternatives produce an unacceptably narrow form of liability.

In fact, taking this point to its natural conclusion, it may also be used as a criticism of Duff's and Stannard's approaches to certain criminal attempts. Where D is prevented from completing conduct that is necessary for an offence (incomplete attempts⁷⁹⁹), the point in time at which the offence would have come about will remain in the future. Therefore if, as Duff rightly points out, we should not attempt to predict future facts in relation to certain conspiracies, even if those facts are very likely to materialise, surely this should apply to attempts of this kind as well. Take the following example:⁸⁰⁰

P informs D that his wife (V) would like to have sex with him (D), but will pretend to resist. D is not sure if P is telling the truth, and is concerned that V might not

⁷⁹⁹ As opposed to complete attempts in which D completes all the actions that he or she believe are necessary to complete the offence. For example, where D shoots at V in an attempt to kill him or her, but misses.

⁸⁰⁰ This example is loosely based on the facts of *Cogan and Leak*, [1976] Q.B. 217.

consent, but agrees to have sex with V anyway. V is unaware of this discussion and has never indicated a willingness to have sex with D.

Bearing in mind Duff's comments above, it is very unlikely that his alternative would hold D liable for conspiracy to rape in this example. Although D intends to sexually penetrate V, he does not intend V not to consent and we do not know (definitively) if V would not consent in fact. Therefore, the realisation of D's intentions would not necessarily result in rape, and D will not be liable for conspiracy. However, if we move this example forward to the point of an attempt, assuming D still has the same mens rea, has anything really changed? If D is prevented from raping V by the fortunate intervention of a third party (the police perhaps), the factual background to D's conduct remains the same: it is extremely unlikely that V was about to consent to D's advances, but it is not factually impossible. Therefore, as with the conspiracy, the applications of Duff's and Stannard's alternatives seem to lead us to an acquittal in this case too. This is a result that neither would wish to accept.⁸⁰¹

At the very least, the under-inclusiveness of these alternatives where there is a gap between D's inchoate liability and the future principal offence would produce an artificial restraint on the expansion of attempts liability. Duff,⁸⁰² like the Law Commission,⁸⁰³ has recommended that the actus reus of attempts should be extended to allow for the intervention of police and other authorities at an earlier point. However, if prosecution is made contingent upon

⁸⁰¹ Duff claims that his alternative 'straightforwardly convicts of attempted rape a man who tries to have intercourse with a woman who in fact does not consent' because of her 'actual lack of consent' satisfies part of the actus reus. The problem however, that Duff does not acknowledge, is that it is satisfying part of the actus reus at the temporal point of the attempt, as opposed to the point at which the principal offence would be committed. Duff, 'Recklessness in attempts (again)' (1995) 15 *Oxford Journal of Legal Studies*, 309, 317.

⁸⁰² For discussion, see, Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) Chapters 2 and 13.

⁸⁰³ See, Law Commission, *Conspiracy and Attempts – A Consultation Paper* (Consultation No 183, 2007) and Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2009).

the presence of certain circumstances, and if earlier intervention makes it more difficult to demonstrate that those circumstances would still be present at the time of the principal offence, then the expansion of liability may lead to a number of problems.

For our final point of discussion, we move from an area acknowledged to cause problems for Duff's alternative into one he presents as a principal benefit of his approach: impossible attempts. Impossible attempts involve conduct that D believes will result in a principal offence, but that due to a missing circumstance, cannot be completed. For example, if D attempts to commit criminal damage by breaking his or her rival's (V's) umbrella, but it turns out to have been D's own umbrella, then the attempt will have been impossible: D cannot commit criminal damage unless he or she damages the property of another. However, D will still be liable for attempted criminal damage.

Focusing solely on the umbrella breaking example above, it may seem perfectly acceptable to convict D for attempted criminal damage. Although the attempt was impossible in fact, it is nevertheless true that D had carried out conduct that he or she intended should amount to the commission of a principal offence. However, if we apply the attempts policy outlined in chapter 10 (based on element analysis), requiring intention as to the act and result elements of the principal offence but allowing recklessness as to the (absent) circumstance element, then the range of impossible attempts that will be caught by the law increases greatly. It is this expansion that Duff has highlighted as a criticism of attempts modelled on element analysis, and one that he believes his alternative holds the key to addressing.⁸⁰⁴ As will be remembered, although Duff's alternative also allows for recklessness as to a present

⁸⁰⁴ See, Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) Chapters 3 and 13.

circumstance element, when the element is absent, Duff (and Stannard⁸⁰⁵) will not convict D unless its presence was part of his or her intention.

Duff's contention in this regard is best understood through its application to examples. Thus, Duff would also convict D of attempted criminal damage in the umbrella breaking example above, because D had intended that the umbrella should belong to V. However, as we move to cases where D does not intend the missing circumstance, differences begin to emerge. For example, in the case of *Anderton v Ryan*,⁸⁰⁶ Ms Ryan (D) purchased a video recorder that she believed was stolen. However, following a police investigation initiated by D's confession, it could not be proven that the recorder was in fact stolen. Under the Commission's approach, D would be liable for attempting to handle stolen goods, however, for Duff, such a conviction would be inappropriate. Although D intends to buy a video recorder cheaply and believes that this is possible because the recorder is stolen, she does not intend it to be stolen. Therefore, as it was not stolen in fact, D's intention (to buy the recorder cheaply) will not necessarily end in a crime.⁸⁰⁷

Even if this result is preferred,⁸⁰⁸ however, it soon runs into problems. This is because, in a host of similar cases, Duff and others would like to see a conviction. A common example in this regard is the case of *Haughton v Smith*.⁸⁰⁹ Here, Smith (D) took possession of what he believed to be a delivery of stolen corned beef. The beef had, in fact, been intercepted by

⁸⁰⁵ See, Stannard, 'Making up for the missing element – a sideways look at attempts' (1987) 7 *Legal Studies*, 194, 202.

⁸⁰⁶ *Anderton v Ryan* [1985] 1 A.C. 560.

⁸⁰⁷ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 207-210.

⁸⁰⁸ For a discussion of why defendants such as Ms Ryan should not escape liability, see, Williams, 'Criminal Attempts – A reply' (1962) *Criminal Law Review*, 300.

⁸⁰⁹ *Haughton v Smith* [1975] A.C. 476.

the police and was therefore no longer stolen. The police allowed the beef to be transported to D and then arrested him for attempting to possess stolen goods. Again, under the Commission's approach, D would be straightforwardly liable. However, if we employ Duff's alternative in the same manner as we did in relation to Ms Ryan above, surely D will not have committed an offence. He intended to take possession of the corned beef cheaply, and believed that this was possible because the beef was stolen, but surely he would have been happy if the beef was not stolen at all. Therefore, he could have achieved his intention (gain possession of cheap corned beef) without necessarily committing the crime and he will not be liable for the attempt. In fact, unless D had some manner of strange desire to break the law, it is very unlikely to ever be his or her intention that such goods be stolen.

This is clearly a rather unsatisfactory conclusion, but it is one that has been largely accepted by both critics⁸¹⁰ and advocates of this style of approach. For the advocates, the problem has been how to deal with it. For Stannard, the acquittal of Smith in the case above is simply the necessary price for a positive result in relation to Ms Ryan.⁸¹¹ However, for Fletcher, another advocate of this approach, it represented a sufficient basis upon which to abandon the approach in relation to a host of examples. Despite commenting that the approach displayed 'considerable theoretical power', Fletcher was uncomfortable about the nature of the inquiry into D's individual motivations:

⁸¹⁰ For an overview of Williams' critique, see, Williams, 'Criminal Attempts – A reply' (1962) *Criminal Law Review*, 300.

⁸¹¹ Stannard, 'Making up for the missing element – a sideways look at attempts' (1987) 7 *Legal Studies*, 194, 202 (fn39).

This provides a tenuous ground for abstracting the analysis of attempting from the particular individual and his possibly idiosyncratic motives; yet the problem admittedly does not lend itself to a compelling solution.⁸¹²

For Duff, however, this compromise does not need to be made. He accepts, to an extent, that underlings in a criminal operation may avoid liability if their motivations (and therefore intentions) only extend to their next payment.⁸¹³ However, in many cases, including *Haughton v Smith*, Duff maintains that his approach would lead to a conviction. This is because, although Ms Ryan was only concerned with purchasing cheap goods, defendants like Mr Smith possess intentions that include elements of a criminal enterprise. Thus, responding to the observation that Smith only intended to avoid the police (and not that the goods should be stolen), Duff contends that:

But if it was part of Roger Smith's purpose that the beef should not have fallen into the hands of the police, then it was also part of his purpose that it should be 'stolen goods'. The 'stolenness' of the goods is a complex legal property: they must have been dishonestly appropriated from another person with the intention of depriving her of them permanently, and must not have 'been restored to the person from whom they were stolen or to other lawful custody or possession'.⁸¹⁴

This argument, however, is unconvincing. It is correct that if Smith had been informed that the goods he was about to receive (that he believed stolen) were being transported by the

⁸¹² Fletcher, *Rethinking the criminal law* (Toronto, 1978) 164. See also, Thornton, 'Attempting the impossible (again)' (1982) 25 *Criminal Law Quarterly*, 294.

⁸¹³ Duff, *Criminal Attempts* (Oxford University Press, Oxford 1996) 218.

⁸¹⁴ Duff, 'Attempts and the problem of the missing circumstance' (1991) 42(1) *Northern Ireland Legal Quarterly*, 87, 95.

police that he would not consider this a success. However, the same must also be true of Ms Ryan. If she was informed, for example, that the police were in possession of the video recorder and selling it to her in order to see if she was willing to attempt to handle stolen goods, then she would have the same response. In each case the parties intend to get cheap property believing it to be stolen, and in each case they would be happy if the property was not actually stolen. However, in neither case would that happiness extend to news that it was only not stolen because it had been seized by the police as part of an operation to test their criminal ambitions. Duff can manipulate his alternative to find liability in each case, or to acquit both, but the distinction does not hold up.

Finally, on a more practical note, tests of this kind are likely to cause significant problems for the courts charged with their application. It is very unlikely, for example, that a defendant would admit that he or she intended the presence of a missing circumstance even if (for whatever reason) they did. As Williams has stated:

No court would want to investigate the question whether a reckless cheat was such a dedicated knave that he would be disappointed if, having obtained money, he found that he had obtained it by a statement that happened to be true... Either we must say that recklessness as to a necessary circumstance is sufficient for an attempt, or we must say that knowledge or belief as to such circumstance is required; there is no possible middle course.⁸¹⁵

⁸¹⁵ Williams, 'The problem of reckless attempts' (1983) *Criminal Law Review*, 365, 374.

As was the case with Williams' own alternative, and that offered by Stannard, Duff is able to set out a plausible mid-way course. However, there are simply too many serious problems with his approach to see it as viable opposition for the preferred version of element analysis.

CONCLUSION

As we look forward to the role of element analysis within the criminal law, it is clear that its continued progress relies (in large part) on its continued use as a structure for the reform and operation of general inchoate offences. Without this role, the preferred method of element analysis will maintain its potential benefits, but it is unlikely to assume the kind of universal acceptance within the criminal law that is required to see that potential fully realised.

The alternative approaches to general inchoate liability explored in this chapter are therefore extremely important. Although they may not offer the full range of potential benefits explored in relation to element analysis, if they were to prove more attractive in this particular context then they might still undermine the progression of element analysis in its formative stages.

However, having compared the alternative approaches to the preferred method of element analysis developed within the preceding chapters of this thesis, we have found them to be lacking. Although preferable to a method of element analysis that cannot facilitate the

objective separation of elements, and although preferable to a method of element analysis that overcomplicates the law, they are not preferable to a method of element analysis that can avoid these problems. Therefore, *if* the preferred method of element analysis is taken forward within the reform of the general inchoate offences, adapting the method of element analysis current in use, we can be relatively confident of its future ability to establish a central role within the criminal law.

CHAPTER 15

CONCLUSION

The early chapters within Part I of this thesis plotted a brief history of element analysis. It was a story that began encouragingly. Element analysis has appealed to both legal academics and law reformers for many years, both as a tool for legal analysis and as a potential tool for law reform. Indeed, in relation to the general inchoate offences in particular, element analysis has offered new and interesting answers to what had previously appeared intractable problems; attracting considerable attention across the common law world.⁸¹⁶ The story, however, soon turns sour. Although the potential benefits of element analysis have ensured that it is rarely far from the debate, fundamental and hitherto uncontested criticisms of the technique had seemed to undermine its potential. Of these, two stand out. The first, attacking the very basis of element analysis, claims that individual offence elements cannot be objectively distinguished from one another. The second maintains that even if they could, the technique would introduce an unacceptable level of complexity.

Despite these criticisms however, with the Law Commission's recent report on inchoate assisting and encouraging,⁸¹⁷ and Parliament's acceptance of this within Part 2 of the Serious Crime Act 2007, the use of element analysis has made its way into legislation. For D to be liable for assisting or encouraging P to commit a principal offence, he or she must

⁸¹⁶ See discussion in Chapters 2 and 3.

⁸¹⁷ Law Commission, *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006).

either intend⁸¹⁸ or believe⁸¹⁹ that the act element of that offence will be completed by P, but need only be reckless as to whether it will come about within the proscribed circumstances and causing the criminal result.⁸²⁰ Thus, for the law to operate fairly and consistently, it must be possible to objectively distinguish between offence elements: if we were unable to identify part of an offence as either act element or result element for example, we would be equally unable to identify the mens rea required by D. It is also necessary for the technique to operate straightforwardly: as with the other general inchoate offences, this area of the criminal law is already highly complex. However, despite the damaging application of the two major criticisms, each one has remained unanswered.

Recognising the appeal of element analysis, yet also recognising the logical case made by its critics, this thesis has attempted to meet those criticisms head on. Thus, chapter 3 and the chapters within Part II have focused on how element analysis can be adapted in order to objectify the process of separating offence elements. The chapters within Part III then go on to discuss how this preferred model of element analysis can operate in-action, developing a usable and straightforward method. In each case, this is not done simply to prop up and justify particular policy choices made by the Law Commission, although it clearly facilitates their work. Rather, attempting where possible to avoid normative debates about what the law *should* be, we construct a model of element analysis that can be used to implement all manner of reform options.⁸²¹

⁸¹⁸ The Serious Crime Act 2007, s44.

⁸¹⁹ The Serious Crime Act 2007, s45.

⁸²⁰ The Serious Crime Act 2007, s47.

⁸²¹ See, for example, our discussion of reform based on 'intending every element of the actus reus' in chapter 2, pp36-37. It was contended there that, even if element analysis was not required to set out the offence definition, it would have been desirable in order to minimise the scope for misinterpretation.

The preferred method of element analysis can be set out in the following terms:

- **Act element:**
 - **Actus Reus:** The bodily movement (or omission) necessary for the offence.
 - **Mens Rea:** The corresponding fault.
- **Circumstance element:**
 - **Actus Reus:** The facts at the time of the act necessary for the offence.
 - **Mens Rea:** The corresponding fault.
- **Result element:**
 - **Actus Reus:** Those things caused by the act necessary for the offence.
 - **Mens Rea:** The corresponding fault.
- **Ulterior fault element:** Fault required by the offence that does not correspond to an element of the actus reus.

By developing a new method of element analysis that avoids the criticisms rightly levelled against its predecessors, the full benefits of the technique can finally be realised. In relation to the new assisting and encouraging provisions just mentioned, a clear and objective separation of acts, circumstances and results means that the offences can operate fairly and consistently. This would also apply across the range of other general inchoate offences and complicity, each of which has been targeted for reform by the Law Commission in a manner that relies upon such objective separation.⁸²² Beyond its use as a tool for law reform, the preferred method of element analysis also promises to have a simplifying effect in several complex areas of the law. As we discussed at various points within Part III, not only can the

⁸²² See discussion in Part III generally.

preferred model rebut the complexity criticism, but by separating and individuating elements of a crime, complex offences can be untangled to reveal a set of straightforward questions: a set of questions displayed in this thesis through the use of charts.

Finally in chapter 14, having constructed a best-practice model of element analysis, we looked to the future of the technique. It has been acknowledged at various points in the thesis that many of the potential benefits of element analysis rely on (or are vastly increased by) the technique gaining a wider acceptance within the criminal law world. In the absence of codification, we concluded that the widening of recognition and acceptance in this jurisdiction is likely to be driven by the use of element analysis to structure the general inchoate offences: offences that would potentially require element analysis to separate the elements of any criminal offence.

Recognising the important role to be played by the structuring of general inchoate offences, however, is also to recognise vulnerability. If an alternative technique (not based on element analysis) is preferred in this area, then despite the wider potential benefits of the model of element analysis constructed in this thesis, it may never gain sufficient exposure to allow that potential to be realised. It was on this basis that we conducted an evaluation of the five major alternative structures for the analysis and construction of general inchoate offences. We found that whilst some of these may have been preferable to a method of element analysis that failed to facilitate the objective separation of offence elements, or added to the complexity of the law, they did not offer advantages beyond those of the preferred method of element analysis. Indeed, although each alternative offered some

initial appeal, this appeal was soon undermined by the exposure of a number of serious problems.⁸²³

Reaching the end of our narrative, it may still be that the preferred method of element analysis does not represent a perfect solution. There is no magic formula. Indeed, our discussion of complicity in chapter 12 in particular has exposed several areas where improvement may still be required. However, as a simple response to a problem being debated across the common law world, we offer a plausible solution.

⁸²³ See, generally, Chapter 14.

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