Criminal Law and Criminal Justice

An Introduction

Noel Cross

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Noel Cross

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Part One

General principles of criminal law

1 Introduction

Chapter Overview

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Chapter Aims

After reading Chapter 1 you should be able to understand:

- The basic principles of criminal law
- The basic principles of criminal justice
- The key theories which try to explain what the criminal law does
- The key theories which try to explain what criminal justice does
- Which individuals and groups of people play a role in criminal justice
- How crime is socially constructed, and what this means

Introduction and rationale: why study criminal law if you're a criminology or criminal justice student?

This book is about criminal law in England and Wales, and the difference between the criminal law as it is defined in law books, and the criminal law as it is used by agencies in the criminal justice process. It is designed to show not only how the current law defines criminal behaviour, but also how people and organisations working in criminal justice use and interpret that law in the approaches they take to responding to crime in practice.

One answer to the question in the section title above is simple – without criminal law there would be no crime and no criminology (Nelken 1987)! It is

the criminal law which 'labels' certain kinds of behaviour as being unlawful, and sets out the rules for deciding when a crime has been committed. The organisations who have responsibility for responding to crime use these rules as guidelines for using the state's power to respond to crime.

The question then is: to what extent do the criminal justice organisations stick to the rules set out by the criminal law? Some criminologists have argued (e.g. McBarnet 1981) that the police and other criminal justice organisations use their own power, discretion and 'working rules' far more than they use the criminal law itself. It is this gap between the 'law in the books' and 'the law in action' (Packer 1968) which is the main subject of this book. To understand criminology and criminal justice fully, it is necessary to compare the criminal law with criminal justice practice. In other words, this book aims to bridge the gap between criminal law and criminal justice, to provide a better understanding of both subject areas.

The next section of this chapter introduces criminal law in England and Wales.

Criminal law: what is it?

DEFINITION BOX 1.1

CRIMINAL LAW

Law which defines certain types of behaviour as being criminal, and allows those types of behaviour to be punished in some way by the state.

Substantive criminal law is the part of the law that deals with behaviour which is defined as criminal, and results in punishment by the state when a person is found to be guilty of breaking the law. It is separate from what Uglow (2005: 448) calls procedural criminal law, which defines and regulates the powers of criminal justice agencies to investigate, prosecute and punish crime. Substantive criminal law is also separate from civil law, which deals with other forms of behaviour that result in some form of compensation (often payment of money) after a finding of guilt. A key difference between substantive criminal law and civil law lies in the standard of proof needed to find guilt in each case. For criminal law, guilt is proved by evidence of guilt beyond reasonable doubt. For civil law, guilt is proved by evidence of guilt on the balance of probabilities, which requires a lower standard of proof, and therefore less evidence indicating guilt, than proof beyond reasonable doubt. Linked to this is the idea of the burden of proof being on the prosecution (*Woolmington v DPP* [1935] AC 462). This means that the defendant in a criminal case (defendants will be referred to from now on in the book as 'D') is innocent until the police and prosecutors have enough evidence to prove beyond reasonable doubt in court that D is guilty of all the different elements of the criminal charge(s) brought

against them. Traditionally, this means that they will have to prove the guilty conduct (*actus reus*) specified by the definition of the offence, and also the guilty state of mind (*mens rea*) which is specified. The principle is the foundation of the adversarial system of criminal justice that has been established in England and Wales, where the prosecution and defence compete against each other to persuade the courts that their evidence is more convincing than the other side's.

Related to the rule regarding the burden of proof is the principle of the rule of law, which is equally fundamental to understanding criminal law and criminal justice in England and Wales. Under the rule of law, no one can be punished unless they have breached the law as it is clearly and currently defined, and they have been warned that the conduct they have been accused of is criminal (*Rimmington* [2006] 1 AC 459); the breach is proved in a court of law; and everyone (including those who make the law) is subject to the rule of law, unless special status is given by the law itself (Simester and Sullivan 2007: chapter 2).

Criminal law in England and Wales, under the rule of law, comes from three main sources. The first is known as common law. This is law which is made and developed by judges when they decide cases, in line with the rules on precedent. Precedent means that a particular court has to follow an earlier court's decision which is based on the same law and the same facts as the case it is currently deciding, and which was made at a higher court level or (usually) at the same level as itself, but it does not have to follow decisions made at lower levels. Figure 1.1 shows how court decisions are appealed to higher courts in England and Wales, and how precedent works.

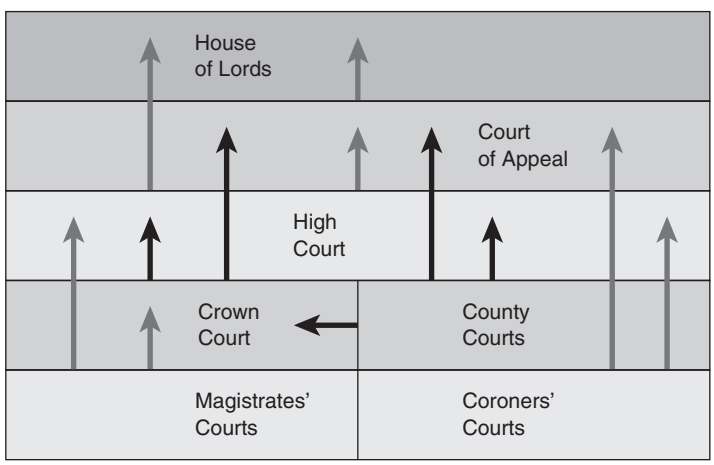

Figure 1.1 The court appeal system in England and Wales

The second source of criminal law is known as statute law. This is law which is created by Parliament, and implemented in the form of Acts of Parliament, or statutes. Statute law is often used to decriminalise old offences, create new

offences, redefine or change criminal offences which already exist, or bring together old pieces of legislation on the same topic. All new criminal offences must now be created by statute law, not by the courts through the common law (*Jones and Milling* [2007] 1 AC 136), although courts used to be able to use common law to create offences, and some offences are still defined by common law today, such as murder. However, even where a criminal offence has been defined by statute, courts will often decide the details of that offence through their own case-by-case decisions, especially where there is some confusion over what a statute (or part of a statute) means in practice.

The third source of law is law which is developed from the obligation of substantive criminal law to comply with European human rights law as contained in the European Convention on Human Rights ('ECHR' from now on in this book). Since Parliament passed the Human Rights Act 1998, individuals have the right to complain to courts in England and Wales where they feel that their human rights have been breached by substantive criminal law. The occurrence of miscarriages of justice, for example, where a person is convicted and punished for a criminal offence which they did not commit, involves serious breaches of human rights (e.g. Walker and Starmer 1999). As a result of the Human Rights Act, courts must interpret statute law in a way which is compatible with human rights legislation (s. 3). If this cannot be done, the courts must make a declaration of incompatibility regarding the piece of law being challenged, and pass the issue on to Parliament so that it can redefine the law in a compatible way (Buxton 2000). Section 6 of the Human Rights Act requires public authorities, including the police, the Crown Prosecution Service and the courts (see below), to act in a way which is compatible with the ECHR, and also allows common law to be changed in line with the ECHR (*H* [2002] 1 Cr App Rep 59).

STUDY EXERCISE 1.1

List three features of the substantive criminal law as it operates in England and Wales.

Substantive criminal law, in all its forms, is developed by the decisions of individuals and organisations. Therefore, what counts as 'crime' can and does change over time. The criminal law-making policy of the New Labour government since 1997 illustrates this very clearly. By September 2008, New Labour had created 3,605 new criminal offences – one for almost every day the government had been in power (Morris 2008). The criminalising of hunting wild mammals with dogs, under the Hunting Act 2004, is just one high-profile (and controversial) example of a crime created by New Labour. On the other hand, there are types of behaviour which used to be crimes, but which no longer are – such as the Sexual Offences Act 1967, which partially decriminalised homosexual behaviour

between adult men. From these examples it can be seen that crime itself is a 'social construct' (Muncie 2001). No behaviour is criminal until an individual or group of people decides to make it criminal (Christie 2004). As a result, the boundaries of criminal behaviour have changed constantly over time, in line with changes in public opinion, political parties' views, and social and economic conditions (Lacey 1995). This has often caused confusion and inconsistency in the criminal law.

STUDY EXERCISE 1.2

Using Internet resources and statute books, find three examples of offences which have been decriminalised, and three examples of offences which have been created since 1997 by the New Labour government. Why do you think each of these offences has been criminalised or decriminalised? Do you agree with the decision to criminalise or decriminalise each one?

This book is about criminal law and criminal justice in England and Wales, but it is important to note that Scotland has its own, separate criminal law framework, which differs from the one in England and Wales. Scottish criminal law has the same basic sources as the criminal law in England and Wales, but relies more on common law, and less on statutory law, than the law in England and Wales. Scottish common criminal law also relies more on using the underlying principle justifying a law as a precedent, and less on using previous 'example' cases, than English and Welsh law (Christie 2003: 1–6). Not all statutory law that is implemented in England and Wales applies to Scotland – so that, for example, Scottish criminal law still has a common law definition of rape, rather than the statutory definition introduced in England and Wales as part of the Sexual Offences Act 2003, and a common law definition of theft rather the statutory English and Welsh definition under the Theft Act 1968 (McDiarmid 2006). Also, since the Scottish courts have developed their own common law principles, some criminal offences have different names, and different offence requirements, from their equivalents in England and Wales. For example, Scotland has an offence of culpable homicide instead of the offence of manslaughter, and has general offences of assault and aggravated assault, and theft and aggravated theft, rather than the more specific violent and property offences in the English and Welsh law (Jones and Christie 2008). Finally, it should be noted that the Scottish Parliament has the power, under the Scotland Act 1998, to implement its own criminal law legislation applying only to Scotland, and has implemented statute law of this kind since its creation (Hamilton and Harper 2008). Readers are directed towards the sources cited in this paragraph for more information on Scottish criminal law.

The next section introduces criminal justice in England and Wales.

Criminal justice: what is it?

DEFINITION BOX 1.2

CRIMINAL JUSTICE

The individuals, groups of individuals and organisations which have the authority to respond to crime in various ways, including the power to force people to do things (or not do things).

Davies et al. (2005: 8) state that 'the content of the criminal law provides the starting point of the criminal justice system by defining behaviour that is to be regulated through the use of the criminal law'. However, this statement by itself does not reflect the complex reality of criminal justice, as Davies et al. go on to argue, for a number of reasons. First, just as the criminal law itself is built and developed socially and politically, often in a more disjointed way than it first appears, so the criminal justice process of enforcing the law is not carried out equally for all crimes and all criminal offences. Critical criminologists have argued that some types of criminal behaviour are more likely to be investigated and prosecuted than others, and that this prioritising reflects the interests of powerful people in society, rather than the level of harm caused to society (e.g. Tombs 2005). Secondly, although criminal justice is sometimes referred to as a 'system', some have questioned whether it is organised and unified enough to be called a 'system' at all (e.g. Wilson 2004). Criminal justice is made up of a variety of agencies and organisations, each with its own responsibilities and areas of decision-making authority. Based on the analysis of Chapman and Niven (2000: 4), all of the following agencies have a role to play in the process of criminal justice:

- The police, who have the power to stop, search, arrest, interrogate and charge suspects;
- The Crown Prosecution Service, whose role it is to decide whether there is sufficient evidence and public interest to prosecute a suspect, and, if there is enough evidence, to prosecute the case in court;
- The magistrates' courts, who hear and sentence all summary offences, as well as some triable either way offences – in total magistrates deal with 98% of all cases which come before the courts (Ministry of Justice 2007a: 160);
- The Crown Courts, who hear and sentence all indictable only offences as well as some triable either way offences;
- And agencies who deal with those who have been sentenced by the courts, such as Youth Offending Teams (who work with offenders aged between 10 and 17), the National Probation Service, and HM Prison Service.

Even this is not a complete list of those involved in criminal justice. There are also agencies which assist the victims of crime during their case's progression through the process, such as Victim Support (Maguire and Corbett 1987).

Defence solicitors and barristers represent defendants in courts, and present arguments in favour of the defendant being found not guilty of the charges brought against them. The government has a great deal of influence over criminal justice policy, which in turn influences criminal justice practice day to day in various ways (Newburn 2003). The government controls policy directly, through government departments which are responsible for different parts of criminal justice (like the Ministry of Justice and the Home Office), and also indirectly, through organisations which are linked to government (such as the National Youth Justice Board, which is responsible for directing youth justice policy in England and Wales). The media play a key part, not only in reporting on and shaping people's perceptions of criminal justice, but also in influencing the operation of criminal justice itself (Jewkes 2004).

The public also play a vital role in criminal justice, at every stage of the process. Most crimes come to the attention of the police through reports from the public, rather than investigation by the police themselves (Zedner 2004: 15). Members of the public can, since the Police Reform Act 2002, become community support officers, and in doing so use many of the powers that can normally only be used by full-time police officers (Crawford 2003: 157–8). They can also be Special Constables, who help the full-time police in their day-to-day work. The majority of magistrates sitting in the magistrates' court are lay magistrates – members of the public who, after receiving training, hear and sentence court cases (Department for Constitutional Affairs 2006). Crown Court juries are made up of 12 members of the public. The public also play a range of important roles in working with offenders after they have been sentenced in court – for example, in youth justice as mentors helping young people and volunteers monitoring the behaviour of young people who have been sentenced in court, or as prison visitors in the adult criminal justice process. The public can also be victims of, or witnesses to, crime – reporting crime to police, giving evidence in court, and taking part in restorative justice, which often aims to bring offenders and victims together as part of the offender's punishment after they have been convicted by the courts (Walklate 2007).

Just as Scotland has its own criminal law framework, separate from that in England and Wales (see above), so it also has its own criminal justice process, with some distinctive features, which are briefly summarised here. In England, a court reaches a decision on the basis of facts alleged and proved by prosecution and defence lawyers (see above). However, in the Scottish criminal justice process, it is entirely the responsibility of Advocate Deputes (in the High Court of Justiciary) and Procurators Fiscal (in the Sheriff Court), acting for the Lord Advocate's Department, to prove the case (McCallum et al. 2007a) – the Lord Advocate heads the Crown Office and Procurator Fiscal Service, which is the equivalent of the Crown Prosecution Service in England and Wales. Before a trial, when someone is suspected of committing a crime by the police, a file is passed to the local Procurator Fiscal, who decides whether or not the case should proceed. If the Procurator decides that there is a case, they investigate by taking

statements, known as precognitions. The decision to prosecute is independent – there is no right of private prosecution as in England and Wales, and no right of appeal against the Procurator's decision to prosecute or not to prosecute (ibid.). Therefore, no court costs are awarded against offenders as they are in England and Wales. If there is a case, the Procurator also decides what the charge should be, and which court the case should be heard in (see below). There is no right for the accused or magistrates to decide on hearing venue as there is in England and Wales (see Chapter 3).

Scotland also has its own three-tier criminal court system. The High Court of Justiciary is the highest court in Scotland, and there is no right of appeal from it to the House of Lords as there is in England and Wales. The Court itself acts as an Appeal Court, and deals with serious crime generally, but has to deal with a small group of very serious offences, such as murder and rape. The second-tier Sheriff Court is presided over by a district Sheriff, who is a qualified judge. The Sheriff Court has two procedures, solemn and summary. In solemn procedure, the case is heard by a 15-person jury, while in summary procedure, only the Sheriff hears cases. The sentencing powers of a Sheriff are limited, so less serious crimes are heard before this court. Finally, there are the District Courts (currently being replaced by Justice of the Peace Courts under the Criminal Proceedings etc. (Reform) (Scotland) Act 2007), which deal with the least serious offences, such as speeding and breach of the peace, and where cases are heard by either a panel of lay magistrates or one stipendiary magistrate. Judges and juries in Scotland can give three verdicts – guilty and not guilty (as in England and Wales), but also not proven, which allows the defendant to be acquitted in the same way as a not guilty verdict (McCallum et al. 2007b).

The law of evidence is also different in Scotland, in the sense that the principle of corroboration applies generally there – in other words, all evidence has to be backed up by at least one other source (Duff 2004). This is different from the system in England and Wales, where there is no need for corroboration, for example with confession evidence and the recent changes in the rules on hearsay (see Chapter 3).

This section has explained what criminal justice is, and who plays a direct part in how it works. However, this discussion can only be a starting point in understanding criminal justice, for two reasons. First, it does not show exactly how each group of people plays its role within criminal justice, and fits in with the other groups involved. For example, victims play several key roles in the criminal justice process, as shown above, but how satisfied are victims by their treatment in that process (e.g. Christie 1977)? Secondly, to understand whether there are differences between what should happen in criminal law and criminal justice, and what actually does happen in them (and if so, what those differences are), it is important to think about different theories which try to explain what criminal law and criminal justice do. These theories will be introduced next.

STUDY EXERCISE 1.3

Draw a flowchart illustrating the different stages of the criminal justice process, including the individuals and agencies that you think have a say at each stage.

DEFINITION BOX 1.3

MODELS AND THEORIES OF CRIMINAL LAW AND CRIMINAL JUSTICE

Explanations for what criminal law and criminal justice do (or should do) in society, in terms of their priorities and values.

What is the criminal law there for?

Clarkson (2005: 254–67) summarises the key theoretical approaches to the purposes of the criminal law, as follows:

- The 'law and economics' approach, which states that the criminal law is there to deter 'economically inefficient' acts which do not help the economy (e.g. stealing a car rather than buying one), and regulate such behaviour, given that individual offenders choose to commit crime of their own free will;
- The 'enforcement of morality' approach, which states that the criminal law is there to criminalise behaviour which is against the common moral values of society (see Devlin 1965; cf. Hart 1963);
- The 'paternalistic' approach, which states that the criminal law is there to prevent behaviour which causes harm either to offenders themselves, or to others;
- The 'liberal' approach, which states that the criminal law is there only to prevent harm caused by offenders to others (see Feinberg 1984);
- The 'radical' approach, which states that the criminal law is there to protect the interests of the powerful in society, and hide social conflict (e.g. Carlen 1980);
- The 'risk management' approach, which states that the criminal law is there to manage the risk to the public created by dangerous situations or behaviour (Feeley and Simon 1994).

As Clarkson (2005) goes on to explain, these principles offer reasons for allowing different kinds of behaviour to be criminalised which compete with each other. As a result, a criminologist analysing the criminal law must consider the possibility that more than one theoretical approach is capable of explaining the criminal law. One way for criminologists to choose between them is considering what the criminal law should do as well as what it actually does. An approach which considers what the criminal law should do can be added to Clarkson's list:

- The 'rights based' approach – law has to uphold and balance the human rights of individuals and society as a whole, in line with relevant human rights legislation (the European Convention on Human Rights) which is part of the law in England and Wales (s. 3 of the Human Rights Act). Key ECHR provisions which are relevant to criminal law include Article 2 (the right to life), Article 3 (the right not to be subjected to torture or inhuman and degrading treatment), Article 5 (the right to liberty), Article 6 (the right to a fair legal hearing and the presumption of innocence), Article 7 (the right to know exactly what the offence someone is accused of involves in terms of criminal behaviour, and the right not to be convicted under law which was not in effect when the act being punished was done), Article 8 (the right to respect for private life), Article 10 (the right to freedom of expression) and Article 11 (the right to freedom of assembly and association).

Another way for criminologists to understand the different theoretical approaches to the criminal law is to compare them to theoretical approaches to criminal justice itself. These are introduced in the next section.

What is criminal justice there for?

King (1981: 12–31) outlines the key theoretical approaches to the purpose of criminal justice, and the typical features which these theories would produce in practice if they were applied:

- The 'due process' model, shown by equality between the defence and the prosecution in the process, rules protecting the defendant against error or abuse of power, and the presumption of defendants' innocence until they are proven guilty;
- The 'crime control' model, shown by disregard of legal controls, implicit presumption of guilt, support for the police, and a high conviction rate (Packer 1968);
- The 'medical' model, shown by individualised responses to crime (so that each offender receives an intervention package tailored to meet their needs and circumstances), treatment of the social causes behind offending rather than punishment of the offence, and discretion and expertise of decision-makers (Garland 1985);
- The 'bureaucratic' model, shown by the promotion of speed and efficiency, the minimisation of conflict between people working in criminal justice and of money spent on the process, and the importance of and acceptance of records;
- The 'status passage' model, shown by the public shaming of the defendant, court values which reflect (or claim to reflect) community values, and criminal justice agents' control over the process;
- The 'power' model, shown by the reinforcement of class values through criminal justice, the deliberate alienation and suppression of the defendant, the presence of paradoxes and contradictions between the rhetoric and the performance of criminal justice, and the ignorance of social harm caused by inequality in society (e.g. Sim et al. 1987).

In addition to these six models, Davies et al. (2005: 27) add a further two:

- The 'just deserts' model, shown by offenders being punished according to the blameworthiness and harmfulness of their actions, the recognition of offenders' basic human rights, the need for establishment of the offender's blameworthiness before punishment, and the recognition of the right of society to punish those who have offended;
- The 'risk management' model, shown by the monitoring and control of offenders based on the risk they pose to society and their previous offending history, the use of surveillance and supervision to reduce crime and change offending behaviour, and the use of longer sentences for offenders who are seen as being particularly dangerous (e.g. Kemshall 2003).

As previously stated, looking for links between theories explaining the criminal law and theories explaining criminal justice leads to an enhanced understanding of both of these social institutions. It is vital to examine and understand both sets of theories critically because criminal law and criminal justice cannot exist meaningfully without each other. Without criminal justice, criminal law cannot be enforced in practice – but without criminal law, criminal justice has nothing to enforce.

STUDY EXERCISE 1.4

Do any of the law and criminal justice models listed above fit together in your view? If so, which ones, and why do you think this is the case?

Conclusions: a guide to the structure of the book

This introductory chapter has introduced criminal law and criminal justice in England and Wales in terms of what they are, and in terms of different ideas about the functions which they have in society. The rest of this book will use these ideas as a platform for comparing criminal law with its implementation, in the form of criminal justice, in practice in England and Wales. The book aims to answer the following questions through this analysis: what differences are there (if any) between the criminal law in the books and its enforcement, via criminal justice, in practice? Whose interests are protected by the criminal law and by criminal justice? On what theoretical basis (if any) can the approaches taken by criminal law and criminal justice be justified? On what theoretical basis should criminal law and criminal justice be based in the future?

The rest of the book is split into two main parts. The first part (Chapters 2–5) considers general principles of liability in criminal law, and examines how they are implemented in criminal justice practice by using different groups of people within the criminal justice process as examples of how well criminal law and criminal justice values fit together. The second part (Chapters 6–9) considers specific types of criminal offence, again discussing how they are implemented in criminal justice practice. Each of these chapters will be split into two parts: the

first part explaining what the criminal law is on a particular issue, and the second part building on this analysis by considering how the law is used in criminal justice practice. The final chapter then returns to the questions raised here, and places the analysis in the context of theoretical approaches to criminal law and criminal justice.

FURTHER READING

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2
Actus reus

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Chapter Aims

After reading Chapter 2 you should be able to understand:

- The basic meaning of *actus reus*
- The key criminal law principles which are included within *actus reus*
- The meaning of factual and legal causation in the criminal law
- How *actus reus* is represented in crime statistics
- How the police use *actus reus* in criminal justice practice
- How the CPS use *actus reus* in criminal justice practice
- How victims of crime who report *actus reus* are treated by the police and CPS
- How the evidence on *actus reus* in the criminal law and criminal justice fits in with the theoretical models introduced in Chapter 1

Introduction

In this chapter, the concept of *actus reus*, or the 'guilty act', will be explained and analysed. In Chapter 1, it was stated that the term '*actus reus*' meant 'guilty act' – 'it identifies the conduct which the criminal law considers harmful' (Herring 2006: 86).

But *actus reus* is not as straightforward as this. The first part of this chapter uses case law and statute law to explain the rules of *actus reus* in more detail. The second part of the chapter discusses the ways in which the concept of *actus reus* is used by criminal justice – using the police and the Crown Prosecution Service (CPS) as examples, as well as considering crime victims' relationship with these agencies.

Actus Reus: The Law

Making sense of *actus reus*

DEFINITION BOX 2.1

ACTUS REUS

The external behaviour or conduct which is prohibited by the criminal law.

Actus reus means more than just 'guilty acts'. It also includes a range of other behaviour requirements, defined in each criminal offence. For example, the *actus reus* of theft is taking someone else's property, and the *actus reus* of murder is unlawfully killing another person. But, as these two examples show, the types of illegal behaviour vary greatly between different types of offence. Clarkson (2005: 13–14) splits *actus reus* up into two types of offence. First, there are conduct crimes, which involve doing or being something illegal – for example, possessing illegal drugs. Secondly, there are result crimes, which involve causing a result which is illegal – for example, causing someone's unlawful death as part of a murder or manslaughter offence. Herring (2006: 85), meanwhile, distinguishes between four different *actus reus* requirements – the 'four Cs':

- *Conduct*. Here, the *actus reus* involves illegal behaviour – for example, perjury, a crime which involves lying when giving evidence in court.
- *Circumstances*. Here, the *actus reus* involves behaviour done in a particular scenario which makes it illegal. For example, the crime of criminal damage involves damaging or destroying property *belonging to someone else*, so the key circumstance here is that the property does not belong to you.
- *Context*. Here, it is an internal or 'state of mind' element which makes the behaviour a criminal offence. For example, the crime of rape involves sexual intercourse, but done without the victim's (from now on referred to by the letter 'V') consent, which makes it illegal. Here, V's consent is not something which can be 'seen'. It is their state of mind that counts.
- *Consequences*. Here, the *actus reus* involves producing an illegal result through behaviour – for example, murder, where conduct causes the unlawful death of someone else. If the consequence was not caused by D's behaviour, the offence is not proved (e.g. *White* [1910] 2 KB 124).

Since the term '*actus reus*' covers so many different types of criminal behaviour in the criminal law, most criminal offences will only have some of the 'four Cs', not all of them. For example, context is not relevant to the crime of murder – D would still be guilty of murder even if V asked, or even begged, D to kill them, as long as all of the *actus reus* and *mens rea* requirements were present.

STUDY EXERCISE 2.1

Using an Internet statute database, find one example of an offence containing a 'conduct' element as part of the *actus reus*, one example of a 'circumstances' offence, one example of a 'context' offence, and one example of a 'consequences' offence.

The next part of this chapter considers some of the key principles of *actus reus* as it operates in practice.

Key *actus reus* principles

No mens rea *without* actus reus

Often, in the criminal law, a crime is committed when there is a combination of *actus reus* and *mens rea* (the guilty mind required for each criminal offence – see Chapter 3 for more details). The *actus reus* for each crime must be established. It is not enough that the *mens rea* for the crime was present, if the *actus reus* was not committed as well (*Hensler* (1870) 11 Cox CC 570; *Deller* (1952) 36 Cr App Rep 184). The main reason for this is that the criminal law in England and Wales, as Clarkson (2005: 20) explains, insists on some expression of someone's criminal thoughts through their actions before it will intervene to punish them.

Voluntary acts

Not all illegal acts count as *actus reus*. Acts must be voluntary before they can be considered as criminal behaviour. If D has no control over their physical actions for some reason, and commits a crime while 'out of control' in this way, then there is no *actus reus*. In *Hill v Baxter* [1958] 1 QB 277, the Court of Appeal stated that if D was attacked by a swarm of killer bees while driving, and the bees caused D to lose control of the car and hit a pedestrian crossing the road, D would not commit any *actus reus* because their actions were not voluntary.

In a situation like this, D is conscious, but has lost control over their physical actions. In other cases, though, D might be either partly or completely unconscious. For example, D may be sleepwalking, or suffering from various medical or psychological conditions, such as hypoglycaemia (Simester and Sullivan 2007). The 'voluntary act' principle can apply in these circumstances to remove the *actus reus*, just as it can where D is fully conscious.

Actus reus *and 'status offences'*

Actus reus does not have to be about doing something. It can also be about status – being something or somewhere that is prohibited by the criminal law, or possessing something that is prohibited. Examples include possession of a prohibited drug (Misuse of Drugs Act 1971 s. 5(1)). Occasionally, the lack of the requirement of voluntary action can lead to what seem to be very unfair convictions under status offences, where D appeared to have no control over the situation. Two good examples of this are *Larsonneur* (1933) 24 Cr App Rep 74 and *Winzar v Chief Constable of Kent* (1983), *The Times*, 28 March.

Actus reus *and omissions*

In a few situations, someone can be convicted and punished for *not* doing something, that is for an omission rather than an act. The courts have made people liable for omissions, where the omission has caused a crime, in the following situations:

- Where D has voluntarily agreed to take care of V, but has failed to take reasonable steps to do so (e.g. *Stone and Dobinson* [1977] QB 354);
- Where D, a parent, has failed to look after their child to a reasonable standard (e.g. *Downes* (1875) 13 Cox CC 111);
- Where it is D's duty to do something as part of their job contract, but D does not do it (e.g. *Pittwood* (1902) 19 TLR 37);
- Where D has duties as part of their public office (e.g. as a police officer), but does not carry them out (e.g. *Dytham* [1979] QB 722);
- Where D has created a dangerous situation accidentally or unknowingly, but then realises that it is dangerous and does not take steps to remove the danger (e.g. *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 438; *Miller* [1983] 2 AC 161; *Santana-Bermudez* [2004] Crim LR 471).

In some cases there seems to be very little difference between an act and an omission. For example, in *Speck* [1977] 2 All ER 859, D was guilty of gross indecency with a child because his failure to stop her doing what she did was an 'invitation to continue' the gross indecency. On the other hand, in *Airedale NHS Trust v Bland* [1993] AC 789, the House of Lords decided that a victim of the Hillsborough disaster who had been in a coma for three years and who had no chance of recovery should be allowed to die by doctors ceasing to feed and medicate him through tubes, and stated that this would be an omission (which would not lead to criminal liability for murder) rather than a deliberate act of killing by the doctors at the hospital (which would lead to liability).

STUDY EXERCISE 2.2

Compare and contrast the arguments of Ashworth (1989) and Hogan (1987) on how far liability for omissions should go in the criminal law. Which argument do you think is better, and why?