

INTRODUCTION TO CRIMINAL LAW

I Overview of Criminal Law

A Introduction

The study of criminal law is concerned with the attribution of criminal responsibility by legal institutions. This process is governed by three main factors:

- 1 *Enterprise of general principles*
 - Abstract concepts
 - The basic axioms of legal definitions
 - Definitions addressed to legal professionals
- 2 *Social context, cultural values*
 - Constructions
 - Circumstances
 - Convention
- 3 *Language of criminal law*
 - Arguments governed by language
 - Criminal law rests upon a linguistic way of thinking

These factors construct a kind of 'normative skeleton' able to define and classify crimes and apply and give meaning to general legal principles via a particular fact situation.

B A System of Criminal Law

Modern criminal law is composed of three component parts:

- 1 *Substantive law* (the criminal law itself)
 - General principles of criminal responsibility (ie, *actus non facit reum nisi mens sit rea*)
 - Definitions of specific types of crime (eg, murder, theft)
 - Definitions of specific defences to accusations of crime (eg, provocation, self-defence)
 - Other methods by which to attribute liability (eg, strict and absolute liability, complicity)
- 2 *Criminal procedure*
 - Prescribes permissible methods of subjecting an individual to courts of criminal jurisdiction
 - Pre-trial procedures (eg, arrest, evidence gathering)
 - Trial and appeal procedures
 - Practices related to sentencing and punishment
- 3 *Criminal evidence*
 - Establishes proof by which criminal responsibility is attributed

- Two criteria: *credibility* (reliability of evidence/facts) and *relevance* (relationship between the evidence/facts and the definition of the crime)

These components interact to produce a tradition of criminal law informed by several sources:

1 *Common law*

- Judicial interpretation of precedent
- Creation of new precedent by expanding body of case law

2 *Criminal statutes*

- Judicial interpretation of criminal statutes (eg, *Crimes Act 1958* (Vic))
- Federal criminal law (eg, *Crimes Act 1914* (Cth))

3 *International legal norms*

4 *Model Criminal Code*

Criminal law has a *large scope*, drawing on a variety of legal and sociological sources and adjudicating important human conduct. The jurisdiction of criminal law encompasses *heterogeneous* value systems and self-representations; the law, and individual perceptions thereof, vary widely.

The general principles of criminal responsibility act as rational deterrents by targeting the mentality of individuals, which in turn control their behaviour; criminal law deters by intimidating the mentality of the general populace.

The retributive aspect of criminal law targets the bodies of individuals.

C *Attraction of Criminal Law*

Stephen:

- Criminal law is of moral significance since it is concerned with how 'men...torment their fellow-creatures'¹

Kenny:

- Criminal law is of particular interest because of its bloodthirsty rationality and ability to inflict serious punitive measures
- It is the cause of '[f]orcible interferences with property and liberty, with person and life'²

Marx:

- Criminal law is a product of the criminal
- The criminal 'renders a "service" by arousing the moral and aesthetic feelings of the public'³ and preventing monotony and stagnation
- The criminal 'gives stimulus to the productive forces',⁴ for example by necessitating the creation of police and judiciary

¹ Stephen, James Fitzjames (1863), *A General View of the Criminal Law of England*, vi.

² Kenny, C S (1902), *Outlines of Criminal Law*, 3.

³ Marx, Karl (1963), *Theories of Surplus Value, Part 1*, 387.

⁴ *Ibid.*

Rush:

- The meaning of criminal law lies within the dichotomy between rational thought and physical action. The crimes (and the sanctions to which they give rise) are essentially physical, but the thought processes used to adjudicate are intellectual abstractions
- '[T]he meaning of criminal law can be read as emerging between the two warm flesh of the literal event and the cold skin of the concept, between the deeds of criminal law and the words of criminal law'⁵

When studying 'criminal law', it is important to remember that what is being studied is actually a *representation* – a set of values and principles, some explicit, some implicit – of authority supported by legal jurisdiction.

D *Historical Development*

1 *Systematisation of criminal law*

Historical analysis reveals a contrast between common law crime and the enterprise of general principles underpinning contemporary criminal law.

- Common law: central practice is judgments in criminal trials
 - Judgments had authority by virtue of tradition, and the experience of the presiding judge
 - Coke CJ: regarded as the traditional origin of many common law principles
 - Judgments were submerged under the authority of common law tradition or, later, statute
- General principles: emerging from the end of the 18th century to the present
 - Concern for systematic explanations by means of general principles
 - Systematisation of the common law into a small number of conceptual structures capable of universal application

A stark contrast exists between traditional common law crime and the general principles employed by contemporary courts. This contrast gave rise to a fundamental change in the way crime was perceived and punished. At common law, crimes were 'public wrongs' (cf today: 'crimes').

2 *Common law tradition*

Common law judgments derived their authority from two sources: long-standing legal tradition, and the experience of the judge. Common law judgments were submerged under the authority of the common law tradition or the governing statute.

Coke CJ is typically regarded as the origin of the original definition of crime at common law; later judgments would frequently refer to his definition.

Towards the end of the 18th century, a new set of general principles began to take form. With the transition from specific categories of common law crimes to a broad set of general principles, there were also changes in the fundamental construction of criminal activity itself: what were previously known as 'public wrongs' became known as 'crimes'.

During the 19th century, judges (and, later, academics) were concerned to provide systematic explanations of the law such that they could give rise to general principles. This led to the systematisation of the common law.

The common law falls into two parts:

⁵ Peter Rush, *Criminal Law and Procedure: An Introductory Essay and Overview* (2004) 7.

- a) *Formal rules* (logical, formal reasoning; principles, definitions)
- b) *Bureaucratic institutions* (trial, police, prison)

Previously, the trial was the pinnacle of the criminal process, and controlled both the other major parts of the criminal process. Police were under the direction of the judge or magistrate, and the prison authorities were called upon according to the details of the sentence.

With the rise of general principles, the trial became *secondary* to the police and prison authorities, which became increasingly important and unregulated by the judiciary. The trial is now subordinate to external processes and prosecutorial discretions, so that general principles are relevant only in the courtroom.

3 *Changes in the criminal object*

At common law, the object of crime was its *modus operandi*. The manner of acting was the major determinant of criminal liability. Thus the circumstances in which the accused acted and the qualitative characteristics of their behaviour determined liability (eg, poison or pitchfork?).

Thus, the object of crime was an event: *how* did s/he act, and what did they *do*? The manner of acting played a large role in determining guilt or innocence. Circumstantial or qualitative characteristics determined liability.

Today, criminal liability is determined by the *consequences* (results) of acting, and the *mental state* (purpose) of the accused.

As a consequence of this transition, definitions of crimes became increasingly general; abstractions with wider scope for application to fact scenarios were adopted.

4 *Division of the common law*

The common law falls into two parts:

- a) *Formal rules*
Logic, formal reason, principles, definitions
- b) *Bureaucratic institutions*
Trial process, police, prisons

Prior to the development of general principles, the trial was seen as the pinnacle of the bureaucratic process, with the police and prison systems subordinate in their investigation and housing of the accused/convicted.

With the rise of general principles, the trial became secondary to the police and prisons, which were now both more important than and less regulated by the judiciary. General principles were seen as being relevant only to the courtroom.

5 *Contemporary criminal law*

Today, it is the *consequence* of an action, in combination with a purpose or mental state, which determines guilt or innocence. Results, such as the killing of a human being are more important than, eg, the weapon with which it was brought about.

Definitions of crimes become increasingly general, abstract, and capable of subsequent application to a wider range of fact scenarios.

General principles operate as deterrents by targeting the *mentality* of individuals; in theory, the law should control the minds of individuals, which in turn controls their behaviour. Thus, by intimidating the mentalities of the general populace according to rational processes and common knowledge, criminal law sought to prevent the committal of crime.

This contrasts with the common law approach of *restitution*, which targeted the *bodies* of perpetrators.

An act is not guilty unless the mental state with which it is done is also guilty.

E Definition of Criminal Law

In order to determine the scope of criminal law and the limits within which crime and law interact, it is necessary first to define crime.

Williams' practical definition has been highly influential, and – though criticised as circular – emphasises the *procedural nature* of the law (a positivist?):

*A crime is an act capable of being followed by criminal proceedings having a criminal outcome.... Criminal law is that branch of law which deals with conduct... by prosecution in the criminal courts.*⁶

Blackstone's 18th century definition, on the other hand, focuses upon the public harm suffered as a result of criminal conduct:

A crime or misdemeanour is an act committed, or omitted, in violation of a public law, either forbidding or commanding it ... public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community...

Heterodox approaches to contemporary criminal law are generally discouraged, as they tend towards fragmentation of previously unified bodies of law and dissolution of principle. Pragmatic approaches are favoured, particularly where they serve to improve the perception of criminal law as a single, self-coherent, and rational entity.

F Application of Criminal Law

Substantive criminal law encompasses numerous semantic layers:

- Constructions of criminal responsibility
- Interpretation of definitional elements
- Classification of crimes
- Legal definition of specific types of crime
- Constructions of the 'facts' of the case

As such, particular attention should be paid to the way in which judicial interpretation proceeds (eg, in defining the crime and treating evidence) and the values that underlie it and other legal reasoning and rhetoric.

⁶ Williams, Glanville (1955), 'The Definition of Crime', 8 *Current Legal Problems* 107, 130.

II **General Principles of Criminal Law**

A **Doctrines of the Crime**

A crime is composed of two parts:

- 1 **Actus reus**
An external, behavioural element; and
- 2 **Mens rea**
A mental, fault-based element.

Generally, in order to commit a crime an actor must possess both actus reus and mens rea. That is, an act is not guilty unless the mental state by which it was commissioned is also guilty. The crime is the combination of both, and is a single unity.

Modern definitions of crimes construct the attribution of criminal responsibility around prohibited mentalities as to prohibited consequences. Note, however, that this can cause problems in crimes which are structured around a mentality as to a *circumstance* (eg, rape).

Definitions of specific legal crimes (eg, assault, murder) are generated by reference to these two components. Note that each legal type of crime has its own forms of mens rea (per Stephen J in *Tolson*).

For criminal liability to be attached to a person, three elements are necessary:

- 1 **Act** (must be voluntary and a legal cause of the prohibited consequence)
 - (a) Acts that are not willed are not legal acts (voluntariness)
 - (b) Omissions arguments are often claims that the act should have been done
- 2 **Mental state** (intent or purpose of the accused)
 - (a) Intention: oldest mental state
 - (i) attached to consequences
 - (ii) purpose of the actual accused (subjective); eg, killing vs scaring when carrying loaded shotgun
 - (b) Recklessness: foresee prohibited consequence as a 'possible or probable result' of conduct
 - (i) Irrespective of intention, but has subjective element
 - (c) Negligence: objective standard (that of the ordinary reasonable person)
- 3 **Defence** (there must be a lack of valid legal defences)
 - (a) Automatism: used as a defence to negative voluntariness
 - (b) Intoxication: used as a defence to negative voluntariness, intention, or both
 - (c) Temporal coincidence: to prevent unintended coincidences, both actus reus and mens rea must occur contemporaneously

B **Doctrines of Defence**

Doctrines of **defence** specify the legal requirements for employment of defences, and set limits on their use.

In order for a crime to exist according to law, it requires both external and internal elements to be present *as well* as the absence of available defences that would negative them.

1 Types

There are two main types of defences:

- (a) Can the actus reus or mens rea of the offence be proven?
 - (i) The defence operates by denying the elements of the crime
 - (ii) Arises as a consequence of the burden of proof, the onus of which lies with the prosecution
- (b) Systematisation of common arguments
 - (i) Legally recognised defences with their own definitions, derived from general principles (eg, provocation)
 - (ii) These have legally distinct, precise definitions

Of the specific legal defences, there exist two types of defence based on the extent to which they negative or limit criminal liability:

- Partial defences: the accused is still guilty, but the defence changes the type of crime with which they are charged; and
- Complete defences: the prosecution must *disprove* the defence; if they fail, a verdict of not guilty is entered and the accused is acquitted.

2 Mens rea defences

Many defences are concerned with mens rea issues, such as provocation, where the argument of the accused is that a different mental state should apply, since they only brought about the prohibited consequence as a result of failing to exercise self-control.

Other mens rea defences:

- Duress: eg, a gun is put to the head of B, and A is told to kill C, or B will be killed
- Necessity: an objectively-determined circumstance
- Self-defence: reasonable belief

Note that the availability of these defences depends upon the nature of the crime. The exception is insanity, which is available for *any* crime.

3 General approach

When considering a defence, three questions need be raised:

- 1 Is it partial or complete?
- 2 For what crimes is it available?
- 3 Are its definitional elements fulfilled?

Identify the crime first. Note its elements. Identify relevant items of proof. *Then* (and only then) look at possible defences.

4 Quasi-defences

Pseudo/quasi-defences deny the existence of an actus reus or mens rea but the onus of raising such defences rests upon the accused. For example:

- **Automatism**
Question of will; conduct was involuntary there can be no actus reus
- **Intoxication**
The accused was so drunk that there was no intention/purpose and/or voluntariness
- **Mistaken belief**
Intention predicated upon knowledge; if act committed innocently, this could undermine the basis of liability

It might be asked of these quasi-defences whether they are excuses or justifications for the conduct of the accused. Previously, they were treated as excuses; now, however, procedural changes have transformed them into justifications.

C *Doctrines of Strict and Absolute Liability*

Doctrines of strict and absolute liability are methods of *interpreting* statutory definitions of crime. Crimes which attract strict or absolute liability do not require the prosecution to prove the existence of a mens rea.

These doctrines influence the reading of a criminal statute (typically, not concerned with the *Crimes Act 1958* (Vic), but rather, eg, areas like environmental law).

- 1 Does the statute specify mens rea as a necessary element for the prosecution to prove?
 - When statutes began to overtake the common law, they began to use non-legal expression of mens rea
 - The judicial climate in which interpretation took place developed in response
- 2 Definition of honest and reasonable mistake of fact
 - This defence is unavailable in crimes of absolute liability

Another difference between the two types of crime relates to the defence of honest and reasonable mistake of fact (belief in a set of circumstances which, if true, would afford an excuse to the conduct of the accused), which is available for crimes of strict liability, but *not* crimes of absolute liability.

D *Doctrines of Complicity*

The doctrines of complicity extend the limits of criminal liability to groups. In this way, individuals may be personally liable for the criminal actions of others. The doctrines of complicity define a method for finding people liable where elements of the crime are lacking.

Where a group of people act in cohort to produce a prohibited consequence, and each has knowledge of the circumstances in which they act, all members may be found guilty of the crime as though they themselves had produced the result as an individual. Generally, knowledge is an essential element.

E *Doctrines of Inchoate Crimes*

Doctrines of inchoate crimes attach criminal liability to agreeing, planning, or promoting the commission of a crime (eg, attempted murder). Like doctrines of complicity, they *extend criminal liability* beyond the normal conception of a crime.

There are two main types of inchoate offences:

- 1 **Attempts**
An individual acts, but doesn't achieve the desired results
- 2 **Incitement**
A incites B to commit a crime; though no criminal act is performed by A, they are liable as an accessory

Inchoate is Latin for 'incomplete'.

III **Elements of a Crime**

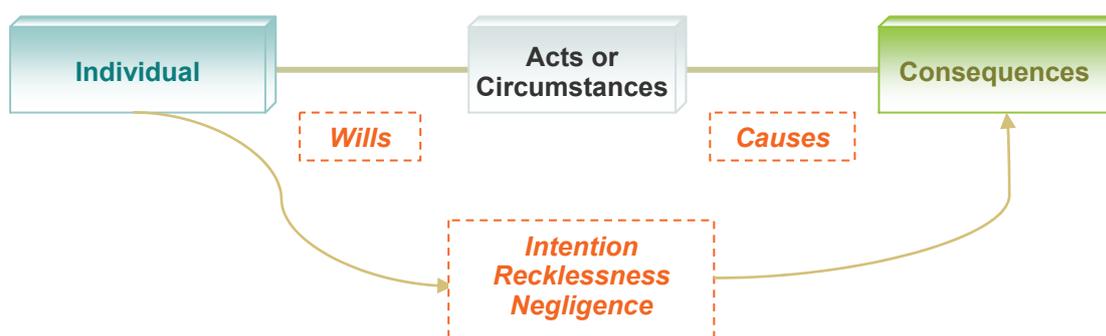
A **Actus Reus**

The actus reus typically comprises three sub-elements:

- 1 **Conduct**
Acts or behaviours
- 2 **Circumstances**
Situation within which conduct takes place
- 3 **Consequences**
Results of conduct

These elements are unified by the principles of **voluntariness** and **causation**. They are necessary for liability, and form a 'grammar of criminal responsibility'.

An event has acts (conduct or circumstances) and consequences. Acts that are not willed (ie, voluntary) are not legal acts.



An act must cause the prohibited consequence.

The harm prohibited by modern criminal law is *consequential* in nature (rather than prohibited acts, their *modus operandi*, or acting in particular *circumstances*).

B *Mens Rea*

Mens rea describes a mentality or cognitive state under which the accused acts or omits to act. Today, three such psychological states are legally recognised as giving rise to criminal liability, as well as two additional elements.

The mentality of the accused is the *primary determinant* of criminal responsibility. The accused *must* possess a prohibited mental state.

1 *Intention*

Criminal intention is the purpose of the accused to bring about or achieve a legally prohibited consequence.

Intention is a desire, will, or purpose to achieve a *particular consequence* (cf voluntariness, which is the desire or will to do an *act*).

Intention is the most serious mental state created and prohibited by criminal law.

2 *Recklessness*

Recklessness is behaving with foresight of the probability (or possibility, depending on the crime) that the prohibited harm will take place, and a willingness to take the risk that the prohibited harm will mature into actuality.

Recklessness is a subjective standard (though it emerged out of the historically objective standard of negligence).

Depending on the crime being defined, either foresight of probability (eg, murder) or foresight of possibility (eg, assault, though uncertain) is required.

Foresight is typically defined as foresight of legally prohibited *consequences*, though there are definitions in which foresight of prohibited *circumstances* that will probably or possibly exist at the time of acting is prohibited. Foresight of one's own *actions* is never required.

The foresight of prohibited harm taking place is what makes the mentality criminal, and not the unreasonableness of the risk taken. Willingness to take a risk simply satisfies the voluntariness requirement.

3 *Negligence*

Negligence is a fully objective standard of mentality. The actual subjective state of mind of the accused is ignored; instead, his or her behaviour is assessed by reference to the standard of the reasonable person.

Negligence is statutorily defined as follows:

*A person is negligent with respect to a physical element when his or her conduct involves such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances and such a high risk that the element exists or will exist that the conduct merits criminal punishment for the offence in issue.*⁷

The reasonable person acts to avoid harmful or prohibited consequences by foreseeing the results of their behaviour.

⁷ *Criminal Code Act* (Cth), s 203(4).

The *consequences of negligence* are what are prohibited, as opposed to the specific acts of the accused.

4 Knowledge

The basic mentality of criminal law is knowledge.

Proof of mens rea can be difficult where the subjective state of mind of the accused must be determined. The following sources are typically examined to produce an inference of the existence of non-existence of the required mentality:

- (a) Circumstantial evidence (observation of behaviour)
- (b) Confessions of the accused
- (c) Judicial value systems (increasingly difficult to discern)

The way in which judges go about construing the 'facts' of the case is difficult to examine impartially, since observers are often subject to the same presumptions and biases.

5 Wilful blindness

Wilful blindness describes the deliberate maintenance of a state of ignorance by the accused as to the prohibition of a consequence of their actions. A finding of wilful blindness may be used as evidence to support an inference of intention and/or recklessness.

Wilful blindness is not part of the definition of mens rea (*Crabbe*), and hence not a requirement for its establishment. Neither is wilful blindness equivalent to intention or recklessness. It is merely evidence to support such a finding; in Australia, it remains at the level of proof and not definition.

6 Summary

Mental State	Definition	Requirements	Severity
Intention	Subjective	Purpose to effect prohibited consequences	1 st
Recklessness	Subjective but ignores intention	Foresight of 'possible or probable' prohibited result	2 nd , default
Negligence	Objective	Breach of standard of the ordinary reasonable person	3 rd
Knowledge	Subjective	Awareness of relevant facts or circumstances	-
Wilful blindness	Objective?	Deliberate ignorance as to state of affairs	Proof only

C Temporal Coincidence

Actus reus and mens rea must occur in conjunction with one another in order for criminal responsibility to arise. Consequently, the actus reus must be performed by the accused at the same time as the accused possesses the mens rea. Occasionally, this can cause problems relating to the allowable time frame within which the actus reus and mens rea must be combined. A temporal coincidence is similar to an unintended coincidence.

D Presumption of Mens Rea

If a consequence is prohibited, conviction of an accused requires the prosecution to prove a mens rea on the part of the accused to produce that consequence. Mens rea controls our bodily conduct, so without it, actions cannot be said to be truly voluntary. Hence it is essential for a crime to be committed.

E *Criticisms of the Legal Structure of Crime*

- 1 It reduces all human action to legal categories rather than embracing the experiences themselves;
- 2 Definitions are framed in terms of legal culture and grammar, rendering them inaccessible to laypeople;
- 3 The meaning of crimes can be radically changed by subtle changes in the meaning assigned to specific words;

The main advantage of this structure of criminal law is that it provides an ordered, universal way to attribute criminal responsibility for a variety of crimes, resulting in easier comprehension of specifically legal structures.

IV **Criminal Procedure**

A *Court Hierarchies*

[See diagram 'Flow Diagram of the Processes and Institutions of Criminal Procedure' of 4 March, 2004]

V **Judicial Approaches: He Kaw Teh**

A *Preliminaries*

Question: does s 233(1) (b), (c) of the *Customs Act* require the prosecution to prove knowledge by the defendant as a mental element?

B *Judgment Structure*

The structure of Brennan J's judgment proceeds as follows:

- Presumption of *mens rea* [at 5, 6]
 - Acts are only criminal if there is a prohibited mental state attached to them
- Contents of the *mens rea* category [at 6-8]
- General discussion of mens rea in the context of importation and possession offences [at 8-9]
- Summary of general principles in relation to importation and possession offences [at 13]
- Application of general principles to statutory sections [13-17]

C Facts

Changing police procedure during the early 1980s gave rise to interesting questions of legal responsibility, such as where an accused was prevented by law enforcement authorities from actually succeeding in a criminal offence (eg, by confiscating prohibited imports at customs) but, to their knowledge, believes they have succeeded.

Such was the case for the applicant in *He Kaw Teh*: he was arrested after heroin was found by customs officials in a false-bottom within his suitcase. The drug was seized prior to the luggage entering the country (ie, before they were 'imported').

D Reasoning

1 *Presumption of mens rea: acts/omissions and circumstances*

The foundation of criminal liability is acts (or omissions) bringing about prohibited states of affairs.

However, states of affairs in and of themselves may also be criminal. For example:

- Being in possession of a prohibited substance (as in *He Kaw Teh*)
- Being an illegal alien
- Being drunk and disorderly

Common to each of these exceptions is the fact that no single act or omission may be identified as the source of the individual's criminal liability. Rather, they are states of affairs brought into existence as a result of an individual's conduct *generally*.

Brennan J draws a distinction between acts/omissions and states of affairs to generate an anomaly in certain fact situations. This is the typical course of legal reasoning (distinction → anomaly → for whom? → for what enterprise?).

2 *Content of mens rea: normative elements*

The law creates a hierarchy of culpability by distinguishing between mental states. In this sense, one cannot separate legal from moral reasoning. (Note, however, that it is incorrect to say 'that is (simply) a moral question' – as distinct from a legal one. Moral reasoning is not isolated from legal reasoning in the same way that legal reasoning does not proceed in a normative vacuum. Rather, it is emersed in legal language and structures.

Consequently, every criminal exercise is a fundamentally normative exercise; *ought* the defendant be found guilty?

3 *Mens rea in importation offences*

Mens rea protects the individual from false accusations and incursions by the state. To be considered criminal, importing (an act) must consist of prohibited imports (a circumstance; ie, the particular import being prohibited). Brennan J argues that the act and circumstance are, in this situation, combined.

Must one know that an item is prohibited or is it an offence just to bring it into the country? Yes, knowledge is necessary. (This differs from the previous position.)

VI Institutional Approaches: Dieber & Whiteside

A Criminal Processes

Question: what governs the decision at each stage of a criminal proceeding?

It is important to remember that 'fact' is only a representation (evidence) of what happened (the truth). During a trial, a factual construction will be influenced not only by what is said and done during the course of the trial, but also by external factors (consider media influence in *Whiteside*).

One way to think about criminal procedure is the civil liberties perspective. Intrinsic to criminal procedure is that it will entail deprivation of liberty (eg, arrest, summons, jail).

- Indictable offences are those prohibited by the *Crimes Act 1958* (Vic)
- Summary offences are those prohibited by the *Summary Offences Act 1958* (Vic) (eg, common assault; s 23), and which may – with the consent of the accused – be tried without a jury, before a Magistrate

B Differences in Reasoning

Central to the outcome of the case are the differences between Cummins J's construction of the facts and that of the Court of Appeal.

Differences:

- Intoxication
- Woman as provoking violence
- Gummow J cf Winneke J in regards to the beating of Cambell and Hibbins
- Blaming the victim (self-defence)
- Representation of heterosexuals and homosexuals
- Genre
 - Romance and chivalry?
 - Revenge? (Court of Appeal)
 - Tragedy? (Cummins J)

	Cummins J Supreme Court	Winneke P Court of Appeal	Brooking JA Court of Appeal
Drunkenness	<ul style="list-style-type: none"> • Distinguishes convicted persons from 'aggressive drunken sports followers' • Drank 'not much' at <i>Young and Jackson's</i> 	<ul style="list-style-type: none"> • Campbell 'could smell drink' • 'Slurred their words... looked as if they had been drinking' • Gives credence to Michelle Rogers' evidence • 'Intoxicated to the extent that normal controls on emotions and behaviour significantly weakened' 	<ul style="list-style-type: none"> • It was their choice to drink • This choice lead to violence, but they should still be held responsible for their conduct

	Cummins J Supreme Court	Winneke P Court of Appeal	Brooking JA Court of Appeal
Reasonableness of belief	<ul style="list-style-type: none"> Finding inseparable from factual description Belief implicitly reasonable; not justified But cf "false cry of rape" 		<ul style="list-style-type: none"> "Without reasonable grounds"
Act of bashing	<ul style="list-style-type: none"> Focus is on circumstances surrounding the crime (including mental state), not the conduct itself It is the "least culpable" category of manslaughter Downplays the specifics of the crime The act was committed not by forethought, but due to "an upsurge of emotion" 	<ul style="list-style-type: none"> Conducts a detailed examination of the coroner's report Emphasis is on act; less so on the characters of Dieber or Whiteside Consider's Campbell's description of the beating as authoritative 	<ul style="list-style-type: none"> Draws in additional evidence: "punching the crap out of him" Notes the extreme verbal abuse and threats No premeditation, but notes: <ul style="list-style-type: none"> repeated blows lengthy time of assault threat to kill intent to punish
Elapsed time	<ul style="list-style-type: none"> "All of this happened in a few minutes" 	<ul style="list-style-type: none"> "Although brief, did take some little time" Notes the three stages of the assault in more detail <ul style="list-style-type: none"> threat chase bashing 	
Deterrence	<ul style="list-style-type: none"> "mercy seasons justice" 	<ul style="list-style-type: none"> Statistical analysis of penalties Sentence should be consistent with aims of general deterrence; should match the severity of the crime 	

	Cummins J Supreme Court	Winneke P Court of Appeal	Brooking JA Court of Appeal
Sexual preference	<ul style="list-style-type: none"> • Homoosexuality of the victim is qualified with "peacable", as if necessary • Accused simply referred to as 'young men,' as opposed to "young heterosexual men" • Implicit contrast between homosexual and convicted persons 		
Subject	<ul style="list-style-type: none"> • Second person (common in sentencing) • Affects construction of victimhood • Fatherly tone, very sympathetic • Portrays accused as victims, and Hibbins' and Campbell's running away as though they "were the violators" • Guilt is attached to a convicted <i>person</i>, as an identity; Cummins J constructs this identity by reference to his reading of the facts as 'tragic' 	<ul style="list-style-type: none"> • Third person • Accused are seen as aggressors • Mention of Hibbins' family and relationship to partner • Consideration of victim impact statements • More rounded portrayal of victim • Less sympathetic view towards convicted persons 	

	Cummins J Supreme Court	Winneke P Court of Appeal	Brooking JA Court of Appeal
Genre	<ul style="list-style-type: none"> Aristotelean tragedy: <ul style="list-style-type: none"> misognition or mistaken belief at each stage emphasis is on characters (not their actions) Cummins J uses this construction (more than a mere literary device) to explain the facts a dramatic judgment, filled with short, impactful sentences and overt rhythmic contrasts “unfolding tragedy” “cruel facts of the case” “cruel, rare, and perverse” “under a malevolent star that Anzac night” Conflation of moral and legal terms (eg, 'cruel' and 'facts') Blames woman for inciting the whole affair Contrasts the actions of the accused to other, more serious, categories of manslaughter (eg, homosexual bashing) This has the effect of portraying the convicted persons in a positive light Emphasises good deeds <ul style="list-style-type: none"> Previous good character Employment, records Supplying correct information to police Remaining at the scene of the crime 	<ul style="list-style-type: none"> Though Cummins J seeks to blame various sources ('us'/society, the woman, the victim), Winneke P attaches significance to the voluntary conduct of the convicted persons – <i>they</i> are to blame Their conduct “smacks far more of a desire to avenge and punish by two persons disinhibited by liquor consumed than it does of misguided chivalry” Emphasis on the threat (“I'm going to ...kill you”) to Campbell The conduct of Whiteside and Dieber makes it clear that their choices are what results in the death of Hibbins, not fate or 'a malevolent star' 	<ul style="list-style-type: none"> Cummins J made a mistake by being concerned with chivalry and character Brooking JA strips away the rhetoric of the learned trial judge to find the “unadorned” facts (if such a thing is possible) The genre is that of <i>conduct</i>; the conduct was grave/serious, so the punishment should be commensurate in order to sufficiently deter others Notes age, size, and agility difference between Hibbins and Dieber / Whiteside – they could easily have apprehended, rather than punished, the victim (adds to seriousness, increases culpability)
	<ul style="list-style-type: none"> Excuses the fact that they “downplayed the extent of their aggressive behaviour” 		

C Stylistic Differences

1 Supreme Court

- Cummins J is writing a judgment he doesn't know he is writing
- He is not choosing to write a tragedy; rather, the style and genre of his judgment is a product of his cultural or other unconscious influences, which affect his construction of facts and determination of the law
- Cummins J's focus on character and chivalry is what places the convicted persons into the least culpable category
- The focus is on the manner in which their intoxication and aggression combines with various other factors, among them their good intent and the various misunderstandings, to produce the eventuation of the prohibited consequence (the victim's death)

2 Court of Criminal Appeal

- Where the Supreme Court was concerned with fate, the Court of Criminal Appeal adopts a more humanistic approach
- Circumstances are not as important as conduct
- Descriptions of the conduct are not passive or devoid of an agent, as were those of Cummins J; instead, they are active, explicit, and connected to the convicted persons

Whiteside & Dieber is illustrative of the importance of reading a text with regard to the styles and genres by which it is governed and into which it falls. Stories about criminal responsibility can only be told by reference to implicit cultural (and subconscious) values. A nuanced understanding of criminal law is more readily attained by having regard for the semiotic process which inform judicial (and extrajudicial) reasoning.

VII Legislative Approaches

A Crimes Act 1958

There are two basic styles of legislative prohibitions in criminal law:

- 1 Prohibiting *consequences*, to which a mens rea is attached (more common)
 - Eg, murder
- 2 Prohibiting the *manner of acting* (with mens rea), with an emphasis on circumstances
 - Eg, rape

Examples of each of these approaches may be seen in the following sections of the *Crimes Act 1958* (Vic):

s3 – Murder

- Prohibition (murder is a crime)
- Sentencing (available punishments)

s16 – Causing serious injury intentionally

- Specific definitional elements: intention of accused, serious injury of victim, causation thereof by accused
 - Mental state attached to consequence (embodies general principles)
- General principles implicit in definition: an *act*, “without lawful excuse” (reference to common law defences)

- Actus reus elements: conduct (the act), circumstances (without lawful excuse), and consequences (serious injury)

s38 – Rape

- Conduct (sexual penetration), and circumstances (no consent)
 - Mental state attached to circumstances
 - A “circumstance crime”

Statutory sections must be read in light of the general principles, which inform both the definitional elements of crimes and the judicial approaches in past cases.

B *Effect of He Kaw Teh*

Remember: High Court cases are *never* about the facts. They always hinge upon a fundamental legal issue of sufficient importance to warrant explanation by the Court.

The appeal in *He Kaw Teh* posed the following question:

Does s233 (b) [?] of the Customs Act import a requirement of mens rea?

The answer to this question is couched in terms of and by reference to the general principles of criminal law. This answer is:

Yes. The requirement is knowledge of the accused.