1) **NATURE OF CRIMINAL LAW + CLASSIC MODEL**

*The Nature of Criminal Law and Criminal Responsibility:*

**What is a Crime?** There are two thought pools about “what is a crime?”

1) That criminal law is not necessarily linked to central morals of society (positivists view) therefore a crime is a crime because the law makers say it is. In an neutral and uncontroversial tone, the criminal law just sets standards of behaviour, and backs these standards with threat of state force. OR;

2) Criminal law is necessarily linked to the deep-underlying morals or views of the community – especially with regards to more serious crimes. The criminal law maintains its legitimacy by reflecting broadly-agreed community views of what is right and wrong. This element of morality may serve as the limit to state power. Things that are not immoral by community standards should not be proscribed by criminal law.

*Criminalisation and the limits of criminal law with supporting notes from bestiality essay:*

**When are criminal laws adequate?** Traditionally a criminal law is necessary and adequate if it is tailored to a combination of the classic model of criminal responsibility and the established “liberty-limiting”\(^1\) principals for criminal law, such that it justifies the punishment of the offender.

Devlin v Hart addressed the issue of whether criminal law should police sexual morality – whether it should expand beyond the public sector and over into the private division. Devlin believed that society is bound together by common thought and that criminal law should be based upon a perceived standard of behaviour and morals central to the community. Devlin believed that the law should have no limits, if conduct offended central morals, it should be an offence. The principal of legal moralism and the public offense contemplation were best expressed by Lord Devlin who believed that the law should expand beyond the public sector and into the private division if conduct offended the reasonable man.\(^2\) Devlin believed that if this view was not upheld and such repulsive acts were able to occur, society would be subject to disintegration. Hart believed that the criminal law should only act on the bare minimum and that it should not extend into the private realm. It shouldn’t make us behave responsibly to ourselves, only make us responsible for the safety and security of others.

J.S. Mill brought forth the harm principle, whereby he believed that the only reason power should be exercised over any member of a civilised community, against their will is to prevent harm to others. ‘Over himself, over his own body and over his mind, the individual is sovereign’, therefore the only reason power should be implemented over an individual is to prevent harm to other individuals.

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Different interpretations of harm could be drawn from Mill’s principle. One being, any actual harm to the person involved, or secondly and more closely related to the moralistic paternalism principle, the moral harm to the communal interest and the offender. The harm principle entails that if conduct has the possibility of putting some at serious risk of harm, or does harm them, then it ‘could’ be characterised as criminal. If no harm were to arise from the conduct then it should not be placed within the realm of criminalisation. In general, the harm principle authorises criminal punishment, but does not require it.

Even though it may be argued that the conduct involved causes no harm or offence to any individual, criminalisation may be argued to be necessary as the offence is so inherently immoral in a developed culture that if it was not outlawed it would cause harm to society. This is a valid reason for the State to interfere in the private actions of citizens, limiting their liberty and hence a valid submission for the retention of an offence.

The case for abolition of an offence is bolstered by the belief that there must be a transfer of the burden to the advocates of criminalisation to show that any case for individual liberty is superseded by a substantial motive otherwise. This motive cannot be established for this offence. There ought to be a presumption of liberty, that it is the norm and to limit it would stifle not only individual’s abilities but also society’s flexibility and innovativeness.

A good case for the abolition of the law stems from H.L.A. Hart’s arguments supporting Mill’s harm principle.

The law must act only upon bare minimums; it should not be used to enact social morality nor should it be created in the absence of harm. Diversity would not be conceivable if laws were managed by a purely orthodox society. There is no reason why people who privately enjoy participation in abnormal activities should be subject to criminal laws which burden their liberal wealth.

While certain acts may be an affront to dignity and social integrity, in an emerging liberal society in which diversity is cherished it should not be criminalised. Despite the credible case for the retention of the law, I find these moral and social principles of criminalisation to be dated and tyrannical. Rather, this law should be abolished for the conservation of a liberal community and the expansion of the individual’s private realm. In such a balancing act as this, autonomy should always be triumphant.

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4 Ibid.
5 [The Wolfenden Report].
**The Responsible subject:** Only those responsible for their actions deserve punishment and blame. It is wrong to punish someone who couldn’t help doing what they did *(Hart).* Moral culpability is the touchstone of legal liability – *Michael Moore.*

Those who we don’t blame: But we always start with presumption of competence (SA CLCA 269D).

- The very young <10 *(s5 Young Offenders Act).* The presumption of competence is reversed. Between 10-14 (why this age?), it is presumed that children do not know the difference between right and wrong and are incapable of forming the mental element of the offence. Children lack the cognitive element of understanding, and thus are not blamed the same as adults. They are consider non-accountable agents. This presumption is however rebuttable by the prosecution.
- The mentally insane (burden on defence to prove.) - A person must understand the nature of their actions and be able to exercise control over those actions to be blameworthy of them.
- Somewhat – intoxicated persons. *(Part 8)*
- Automatism – sleep walking or under medication side effects – actions are involuntary
- When duress or necessity arises due to constrained choices. – actions are voluntary

**The Classic model of Criminal Responsibility:** Four element model which is an example of a perfectly criminally punishable act, such that it justifies punishing the actor.

1) The Wrong:
   a. A deliberate harm to another to which they did not consent.
   b. If there is a broad agreement of wrongness (murder, theft, rape.)
   c. It is something the law says you cannot do.
2) The Actor:
   a. The actor must be responsible for their actions, thus;
   b. They must be a rational adult, of sound mind and full capability and faced with free choice.
   c. They cannot be intoxicated, mentally impaired, threatened, a child etc.
   d. They must be responsible for their actions in a way that they deserve punishment.
3) The Act:
   a. It must be a free-willed and voluntary action.
   b. Involuntary conduct is not criminally punishable.
   c. Spider in car analogy – is still in control of actions, thus still voluntary and thus still punishable if he lost control.
4) A State of Mind:
   a. The mens rea.
   b. The actor must have a culpable or blameworthy state of mind.
   c. The classic mental element is intention.
d. Strict liability and absolute liability crimes do not require a state of mind (but SL does carry reasonable and honest mistake as defence.) – This is because SL and AL crimes usually carry lesser punishment and are mainly regulatory (i.e. fines for speeding).

e. There must be contemporaneity between the act and the state of mind (i.e. the wrongful conduct (killing) and the wrongful mental state (intention to kill) must occur at the same time.)

The basic questions to be asked when looking at a new law are:

- Who is the law targeting (i.e. rapists, murderers, thieves)?
- What is the harm involved with the conduct?
- What are the characteristics of the person (are they a responsible person? Or are they insane etc.?)
- Is there a fault element (where is the mental element? State of mind?) or strict liability?
- Are there any defences? (Provocation is only a partial defence to murder.)
2) Elements, Proof and He Kaw Teh Analysis

Sources, Elements and Proof:

Sources of criminal law:

- Common law jurisdictions: SA, VIC & NSW retain a mixture of statute and common law. Code Jurisdictions: The other states have codified the criminal law in statute.

Elements of criminal law:

Each crime is comprised of various elements, and every one of these elements must be present in order for the crime to have been committed. The prosecution must prove every element of this crime beyond reasonable doubt, to convict the defendant.

The constituent parts of a criminal offence:


Crimes may include both the physical and mental elements (i.e. receiving stolen goods (physical element) with the knowledge they were stolen (mental element). Or they may only include the physical element (i.e if caught speeding, you cannot say you did not intend to speed). SL and AL elements of offences do not require proof of fault (mental element) for one or more of the physical elements. In detail these elements:

1. Voluntariness:
   a. Howard’s Criminal Law formulates the principle very simply: ‘The principle of voluntariness requires that before D be convicted of any criminal offence he be proved to have had at the relevant time the ability to control his conduct’: B Fisse, Howard's Criminal Law 5th ed (1990) 421.
   b. There is no criminal liability for an involuntary act.
   c. Voluntariness is associated with the physical elements.
   d. There are three ways in which an act may be considered involuntary:
      i. When the criminal act was accidental (without intention, recklessness or criminal negligence.)
      ii. When the criminal act was caused by reflex action (must be an act founded upon an external cause not intention (Ryan v The Queen (1967)), or;
      iii. When the conduct was performed while the accused was in a state of ‘impaired consciousness.’
2. Physical Elements – *actus reus*:
   a. These are the acts, omissions or events that took place.
   b. They are external to the accused’s thoughts or intentions and are described as the following types:
      i. **Conduct**: An act or omission.
      ii. **Circumstance**: Specified conduct may not be a crime unless it is performed in specific circumstances (i.e. rape. The conduct (sexual penetration) without the other person’s consent (specific circumstance)).
      iii. **Result**: The consequences of the conduct, not the conduct itself. (i.e. murder. The conduct that is prohibited in the crime of murder is not the conduct itself, but the resulting death. It does not matter what the conduct was, just that the eventual result of the conduct was the death of the victim is enough to establish the physical element of murder.)

3. Fault elements – *mens rea*:
   a. These are the mental elements which are responsible for the physical elements of the offence which make the behaviour criminal.
   b. The most common fault elements of a crime are:
      i. **Intention**: That the defendant acted with the subjective intention of bringing about one or more of the results forbidden by the definition of the crime. More generally, a person intends to do something when they mean to do it.
      ii. **Recklessness**: The defendant acted (or omitted to act) with knowledge (or an awareness or foresight) that there was a possibility, or depending on the type of crime, a probability, that some or all of the results forbidden by the definition of the crime would result from his or their conduct’. The person subjectively appreciated and was aware of the risk their conduct posed, and yet still undertook that conduct.
      iii. **Knowledge**: The defendant acted knowingly on certain facts.
      iv. **Negligence**: If the accused’s conduct departed grossly from the reasonable standards of care.

   o The fault elements must coincide with the physical elements. i.e. there must be a concurrency of the two occurring together.
**Burdens and Standards of Proof:**

The burden (onus) of proof is relates to the duty placed on a party to prove facts. It is either the ‘persuasive legal burden of proof’ or the ‘evidential burden of proof.’

The prosecution bears the legal (persuasive burden) of every element of the charge, and must persuade the jury beyond reasonable doubt that the accused did actually commit the offence; by proving every element beyond reasonable doubt. If the defendant bears the evidential burden of raising a defence (i.e. self-defence) the prosecution still bears the persuasive burden to disprove (negative) that evidence beyond reasonable doubt. Against the general rule, in the case that the persuasive burden is shifted to the accused (proving mental impairment, self defence against damage to property, or trafficable quantity of prohibited drug was instead for personal use), the standard of proof is lesser (on the balance of probabilities) than the prosecutions standard (beyond reasonable doubt.)

The evidential burden does not require the party to prove the issue, it is up to the judge to decide whether the issue has the support of evidence to be considered by the jury. The prosecution bears the evidential burden in raising elements of the crime. The accused bears the evidential burden in raising defences.
Faultless Crimes – Strict and Absolute Liability:

Introductory Theory: Theorists such as Hart thought it would be inappropriate to hold someone criminally responsible if they did not intend (fault element) the wrongful action (physical element). What we are now introducing are offences that do not require proof of fault with respect to one or more of the physical elements. These are known as Strict Liability and Absolute Liability elements and offences. These extend criminal responsibility to those who had no intention to commit and wrong, and whom the classical theory would not consider blameworthy.

Strict liability – Prosecution does not need to prove intent (although knowledge must still be proven.) Strict liability extends criminal liability and responsibility to those who did not intend to do the wrong.

Example: Reynhoudt - Any person who assaults a police officer in the execution of their duty is guilty of an offence. Donald drinking at a bar, goes outside and sees two men tackling his friend to the ground, his friend calls for help and Donald punches the men before being subdued himself. The two men were plain clothed police officers — The court found that the prosecution need not prove that Donald knew or suspected that the victim was a police officer, but they must prove that his mistaken belief that his friend was the victim of an unlawful attack was unreasonable (therefore disproving RMF defence).

- Defence of Reasonable Mistake of Fact: (Proudman v Dayman) - The defence of honest and reasonable mistake only works if the mistake makes the conduct legal or innocent. The Defendant has the evidential burden to raise the defence. RMF has these components:
  - There must be a mistake and no mere ignorance;
  - The mistake must be of fact and not law;
  - The mistake must be honest and reasonable; and
  - The mistake must render the accused’s act innocent (Prince).
    - If the mistake makes the conduct illegal or not innocent, a conviction occurs and the more serious offence is still recorded:
      - (i.e. Someone caught with crystal meth, says they were mistaken and believed it was marijuana (which attracts a lesser charge) But this is still not legal and they are convicted on possession of crystal meth.).
      - Or a man at a political exhibition punched several protestors and when a plain clothed officer arrived, he punched him too without knowing he was an officer. This man cannot rely on the reasonable mistake defence in regard to the assault on the police officer because what he was doing and was mistaken to have been doing was committing assault which is illegal anyway. Thus he can be charged with assault on a police officer which is a much serious charge (aggravated).

- Other defences still apply: Involuntary conduct, intervening act, necessity, duress etc.