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Julian R Murphy
Foley's List; Gorman Chambers

I. INTRODUCTORY MATTERS

Introduction

I would like to start by acknowledging the Wurunderji people, the traditional owners of the land from which I am speaking, and pay my respects to their Elders, past and present.

I would also like to open by thanking the Foley's team for putting this fantastic calendar of CPD presentations together, I am pleased to be a part of it.

My name is Julian Murphy and I am a barrister on Foley's List, practicing in criminal, administrative and other areas of public law.

I am also half way through a PhD at Melbourne Law School on the topic of statutory interpretation, and that is what I will be talking about today.

Structure

My presentation will be in three parts:

1. An introduction to the "modern approach" to statutory interpretation;
2. Principles and presumptions particular to criminal statutes;
3. Particular types of criminal provisions and how they should be interpreted.

Stakes

Before I proceed, however, I should perhaps make a case for why you should keep listening.

Why should you care about statutory interpretation, and particularly criminal statutory interpretation?

Is not criminal law all about the facts?

Yes, criminal law is often about the facts but rarely is it exclusively so.

From its start to finish, a criminal proceeding is governed by legislation – the *Crimes Act*, *Bail Act*, *Criminal Procedure Act*, *Evidence Act*, *Jury Directions Act* and the *Sentencing Act*.

Justice Weinberg has said that "anyone wanting to practice criminal law must have at least a good working knowledge of some 20 or so separate Acts of Parliament, State and Federal."[1]

Justice Weinberg lamented "there is little now left of the common law"[2] and Justice McHugh said that "[l]egislation is the cornerstone of the modern legal system".[3]

This "tsunami of legislation"[4] means that ours is properly described as "an age of statutes".[5]

Admittedly, much of the time the application of these statutes will be straightforward, but that is not always the case.

In fact, as the volume of legislation increases, criminal practitioners are frequently faced with situations in which it is necessary to interpret a statutory provision without any guiding case law.

It is this trend that caused a former Chief Justice of New South Wales, James Spigelman, to say: "The law of statutory interpretation has become the most important single aspect of legal practice."[6]

We might think, too, that Associate Professor Miriam Gani is right when she said that *criminal* statutory interpretation, as opposed to other fields of statutory interpretation deserves particularly careful treatment. This is because, on Gani's view, "in no area of law are issues of interpretation more significant than in the criminal sphere … [because] we are talking about legislation whereby the State metes out punishment to its citizens."[7]

Certainly, some universities are now teaching criminal law through the lens of statutory interpretation.[8]

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[1] Justice Mark Weinberg, 'Of Mozart, Modern Drafting and the Criminal Lawyers' Lament' (Victoria Law Foundation Law Oration, Melbourne, 21 July 2016) 7.
[2] Justice Mark Weinberg, 'Of Mozart, Modern Drafting and the Criminal Lawyers' Lament' (Victoria Law Foundation Law Oration, Melbourne, 21 July 2016) 7.
[3] Justice M H McHugh, 'The Growth of legislation and Litigation' (1995) 69 *Australian Law Journal* 37, 37.
[4] K Mason, "The Intent of Legislators: How Judges Discern It and What They Do if They Find It", in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 33, 44.
[5] Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, Cambridge, 1982) 1. See also *Buck v Comcare* (1996) 66 FCR 369, 364–5 (Finn J).
[6] JJ Spigelman, 'Principle of Legality as Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 769.
[7] Miriam Gani, 'Codifying the Criminal Law: Implications for Interpretation' (2005) *Criminal Law Journal* 264, 267.
[8] Jeremy Gans, 'Teaching criminal law as statutory interpretation' in Kris Gledhill and Ben Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017). Gans writes: "statutory interpretation is the core skill required to study contemporary criminal law."

With that in mind, I hope you are now convinced that it is at least worth your while to spend the next forty or so minutes with me on the topic of criminal statutory interpretation.

II. THE "MODERN APPROACH" TO STATUTORY INTERPRETATION

Before we get to that topic, however, it might be worth conducting a quick refresher on the general principles of statutory interpretation, because, for the most part, these principles apply to criminal statutes (albeit with some modification as explained later).

The most efficient way to explain this approach is by reference to the trilogy of guiding considerations: "the statutory text, context and purpose".[9]

Text

It is regularly said that the task of statutory interpretation must begin and end with the text of the statute.[10]

In one case, a majority of the High Court explained:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention."[11]

This does not mean, of course, that courts take a literal approach to interpretation.

What it means is that courts will, in most instances, place particular emphasis on the ordinary meaning of the statutory words.

As has been explained by five justices of the High Court:

> "'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and

[9] *Comcare v Martin* (2016) 258 CLR 467, 479 [42] (the Court).
[10] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[11] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ, French CJ agreeing at 30 [1]).

> extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text."[12]

It should be noted, however, that the ordinary meaning of statutory text is not always absolutely binding. After marking reference to the statement that statutory interpretation must begin and end with the text, Edelman J remarked:

> "That statement does not mean that the text of a statute must be interpreted only according to the range of semantic meanings of individual words. It means only that the interpretation of a statute, like any other legal instrument, is an interpretation of its words. Those words are interpreted in their context and in light of their purpose … context is … to be considered (simultaneously) together with the text. Context can give words an interpretation that is the opposite of their ordinary meaning and grammatical sense. Context can also permit a construction of words that excludes their application to matters that would have fallen within the application of their literal meaning."[13]

Context

In order to interpret a statute or statutory provision, it is necessary to appreciate the *context* in which it was enacted. An influential British Law Lord, Johan Steyn, has said that "context is everything".[14]

In *CIC Insurance v Bankstown Football Club Ltd*, the High Court described the "modern approach to statutory interpretation" in the following terms:

> "[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."[15]

As the passage from *CIC Insurance* makes clear, the scope of what may be considered under the heading "context" may be very wide indeed.[16] However, the *Interpretation*

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[12] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (citations omitted).
[13] *SAS Trustee Corporation v Miles* [2018] HCA 55, [64] per Edelman J (citations omitted).
[14] Johan Steyn, 'Dynamic Interpretation Amidst an Orgy of Statutes' [2004] (3) *European Human Rights Law Review* 245, 249.
[15] *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). See also *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J): "The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."
[16] See generally Matthew Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103; Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42 *Federal Law Review* 333; For case law

of Legislation Act 1984, s 35(b), makes consideration of the following matters uncontroversial:

> "(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;
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> (ii) reports of proceedings in any House of the Parliament;
>
> (iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and
>
> (iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry, Formal Reviews or other similar bodies."

Before leaving context, however, it should be noted that courts do not always look favourably on arguments from context. Counsel should always be wary of basing an argument almost exclusively on a reference in a second reading speech, which reference has little support in the text of the statute. As the High Court said in 1987, and has oft repeated: "The words of a Minister must not be substituted for the text of the law."[17] This caution has been said to be "particularly salutary when the enactment is said to derogate from fundamental rights or damage fundamental interests"[18] or "where the Minister's intention, not expressed in the law, affects the liberty of the subject."[19]

To similar effect, in a seminal statutory interpretation case in 2009 a majority of the court wrote that "Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text."[20]

And in 2019, in a criminal case, a majority of the Court wrote: "The legislative history cannot overcome the plain words of the provision."[21]

Purpose

In recent decades, courts have been particularly mindful of interpreting statutes to give effect to their purpose or purposes. In 2007, then Chief Justice Spigelman of the Supreme Court of New South Wales observed:

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relying on parliamentary materials see Jeffrey Barnes, 'Contextualism: The "Modern Approach" to Statutory Interpretation' (2018) 41 *UNSWLJ* 1083, 1105 n154.

[17] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

[18] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 572, 605 [86] (Heydon J).

[19] *Lacey v Attorney-General (Queensland)* (2011) 242 CLR 573 at 598 [61] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, citing *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.

[20] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ, French CJ agreeing at 30 [1]).

[21] *Grajewski v Director of Public Prosecutions (NSW)* [2019] HCA 8, [19] (Kiefel CJ, Bell, Keane and Gordon JJ).

> "Law is a fashion industry. Over the last two or three decades the fashion in [statutory, constitutional and contractual] interpretation has changed from textualism to contextualism. Literal interpretation – a focus on the plain or ordinary meaning of particular words – is no longer in vogue. Purposive interpretation is what we do now …"[22]

Kirby J was a great champion of purposive interpretation, and he summarises the approach as follows:

> "there have been numerous cases in which members of this court … have insisted that the proper approach to the construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislature … Even to the point of reading words into the legislation in proper cases, to carry into effect an apparent legislative purpose … This court should not return to the dark days of literalism."[23]

In Victoria, the *Interpretation of Legislation Act* requires purposive interpretation, stipulating, at s 35(a):

> "a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object".

The purpose or object of a statute is generally to be ascertained both from its own statement of its purpose – usually in an "objects" clause at the start of a statute – and from reading the statute as a whole.[24]

Thus, where text and context leave a question of statutory interpretation unresolved, it is often the purpose of the statute that ultimately determines the way that a court will pick between competing interpretations. Kiefel CJ, Bell and Nettle JJ have explained:

> "Where the text read in context permits of more than one potential meaning, the choice between those meanings may ultimately turn on an evaluation of the relative coherence of each with the scheme of the statute and its identified objects or policies."[25]

However, as with text and context, purpose is not always a quick and easy to guide to resolving questions of statutory interpretation. As former Chief Justice Murray Gleeson has explained, writing extra-curially:

> "[A statute's] general purpose may be clear enough, but the dispute may be as to the extent to which it has pursued that purpose. … [T]o identify the general purpose may not be of assistance in finding the point at which

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[22] Chief Justice JJ Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (Speech delivered at the Risky Business Conference, Sydney, 21 March 2007) 1.
[23] *Federal Commissioner of Taxation v Ryan* (2000) 42 ATR 694, 715–6.
[24] *Unions NSW v New South Wales* [2019] HCA 1, [79] (Gageler J).
[25] *SAS Trustee Corporation v Miles* [2018] HCA 55, [20] (Kiefel CJ, Bell and Nettle JJ) (citations omitted).

> a balance has been struck or a political compromise reached. … [In addition], some legislation … pursues inconsistent purposes. In the case of a complex statute that has been amended many times … this is highly likely. …"[26]

Further, it is to be remembered that "no legislation pursues its purposes at all costs" and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law".[27]

Furthermore, courts will generally be more reluctant to use purpose to strain the meaning of text in cases where to do so would extend criminal liability to persons or acts not clearly covered by the statute.[28]

III. PRINCIPLES AND PRESUMPTIONS RELEVANT TO CRIMINAL STATUTES

Common law principles of interpretation are often described as *presumptions*. They operate as guides to the ascertainment of legislative intent. As Justice Edelman recently explained:

> "A presumption, in the sense used on this appeal, arises because human experience has shown that Parliament has historically acted in a certain way. A presumption in this sense is not a rule of law. It is a standardised inference that arises from 'common probabilities of fact'. The effect of the presumption is that a court is reluctant to give the words of a statute a meaning that 'would conflict with recognized principles that Parliament would be prima facie expected to respect'."[29]

Here I focus on four principles most relevant to the interpretation of criminal statutes however I will close by listing a number of other relevant principles and presumptions.

The following presumptions are those that I give close consideration:

1. strict interpretation of criminal statutes;
2. principle of legality;
3. *Charter*-consistent interpretation; and
4. presumptions about mens rea and strict vs absolute liability.

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[26] Murray Gleeson, 'Statutory Interpretation' (Speech delivered at the Taxation Institute of Australia, 24th National Convention, Sydney, 11 March 2009).

[27] *Rodriguez v United States* (1987) 480 US 522 at 525-526 (emphasis in original), quoted with approval in three High Court decisions: *Tjungarrayi v Western Australia* [2019] HCA 12, [46] (Gageler J); *New South Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, 271 [93]; *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 633 [41].

[28] For discussion of purposive interpretation of criminal statutes in the Queensland context see James Duffy and John O'Brien, 'When Interpretation Acts Require Interpretation: Purposive Statutory Interpretation and Criminal Liability in Queensland' (2017) 40(2) *UNSW Law Journal* 952.

[29] *Commissioner of Taxation v Tomaras* [2018] HCA 62, [100] (Edelman J, citations omitted).

Strict interpretation of criminal statutes

The classic statement of this rule comes from O'Connor J in *Scott v Cawsey*, who said:

> "where a Statute constitutes the committing of certain acts a criminal offence … [it is not] the duty of a Court to so add to the language of a Statute as to make it include the committing of acts of the same kind which lead to the same result, but which the legislature has not constituted an offence. To do so would be to make laws, not to interpret them."[30]

The rule that penal statutes are to be interpreted strictly has been said to be as old as the task of statutory interpretation itself.[31] Jeremy Bentham described it as "the subject of more constant controversy than perhaps of any in the whole circle of the Law."[32]

Most scholars locate the rule's historical origins in the practice of 17th century English courts strictly construing statutes that purported to displace the "benefit of clergy" (a common law doctrine that provided an exception to the death penalty for certain eligible defendants and crimes).[33] Some even seek to trace the origins of the rule to Roman or Byzantine times. [34]

Whatever its origins, the rule now appears to be well established in Australian jurisprudence. In what follows, I will outline three important things to know about the rule.

First, what is meant by "strict construction"?

The rule's shorthand descriptor as a rule of strict construction is unfortunate, as it can sometimes require *liberal* construction. The important point is that it resolves ambiguities in favour of the subject. So, according to a holistic conception of the rule, whilst ambiguous provisions creating criminal liability will be construed strictly (against the State), ambiguous provisions *excusing* a defendant from liability – for

[30] *Scott v Cawsey* (1907) 5 CLR 132, 151 (O'Connor J).
[31] *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").
[32] Jeremy Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England* (1776) 141.
[33] Matthew Hale, 2 *The History of the Pleas of the Crown* 335, 371 ("That where any statute ousted clergy in any of those felonies, it is only so far ousted, and only in such cases and as to such persons, as are expressly comprised within such statutes, for *in favorem vitae & privilegii clericalis* such statutes are construed literally and strictly.").
[34] Geoffrey P. Miller, 'Pragmatics and the Maxims of Interpretation', (1990) *Wisconsin Law Review* 1179, 1189–90 nn 47-48 (seeking to draw a parallel between the rule and one of the maxims contained in the Digest of Justinian). See, also, J. Hall, *General principles of Criminal Law* 20-27 (1st ed. 1947) (tracing the related principle of *nulla poena sine lege* to ancient Roman times).

example, statutory defences or excuses – will be interpreted liberally (in favour of the subject).[35]

Secondly, what sort of statutes will engage the application of the rule?

In Australia, there does not appear to be any consensus as to the sort of statute that will engage the rule.[36] In general, invocations of the rule refer simply to "penal" statutes.[37] More specific articulations of the rule sometimes refer to "statutes creating offences",[38] or statutes that have "enlarged" an offence or that might be read as "extending any penal category".[39] Nevertheless, the rule has also been applied to non-criminal statutes, for example, legislation pertaining to government powers of property confiscation[40] and deportation.[41] Further difficulties arise when a statute contains an amalgam of penal and remedial provisions.[42]

Some courts have suggested that where legislation has a rights-restrictive function, but is nevertheless, beneficial or protective in character, then the rule of strict construction ought not apply. Respectfully, this line of reasoning should be approached with caution. If the rule of strict construction (or the principle of legality) are to be worth anything then they need to be engaged on an objective assessment of the operation of the laws. If courts can oust the operation of the rule by finding some "protective" purpose to the legislation, then there will be very few occasions when the rule will apply at all. Furthermore, history tells us that legislation purporting to be "protective" can in fact be the most invidious and rights-intrusive of all.[43]

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[35] Livingston Hall, 'Strict or Liberal Construction of Penal Statutes' (1935) 48(5) *Harvard Law Journal* 748, 749 ("Under the rule, an ambiguous statutory determinable imposing or enlarging criminal liability will be construed narrowly, while such a determinable relieving from or diminishing liability will be construed broadly, so that the particular determinate will be placed with reference to the statutory determinable where it is of most advantage to the accused.").

[36] For an illustration of this uncertainty see the exchange in oral argument between David Jackson QC and Justice Crennan in *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* [2009] HCATrans 150 (23 June 2009). Then see the decision, which deliberately skirts the issue: *Alcan (NT) Alumina* (2009) 239 CLR 27, [55].

[37] See, eg, *Aubrey v The Queen* [2017] HCA 18 at [39] (Kiefel CJ, Keane, Nettle, Edelman JJ).

[38] *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).

[39] *R v Adams* (1935) 53 CLR 563, 567–8.

[40] *Murphy v Farmer* (1988) 165 CLR 19, 28–9 (Deane, Dawson and Gaudron JJ).

[41] Minister for Immigration & Multicultural Affairs v Dhingra (2000) 98 FCR 1. See, generally, DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 382-383 [9.32]; Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Lawbook Co, 2014) 261-262 [8.55].

[42] D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, (8th ed, 2014) 357 [9.1].

[43] See, for example, the South Australian public nuisance laws which where considered to be "protective" but were in fact a means of controlling Aboriginal people. P Brock, "Protecting Colonial Interests: Aborigines and Criminal Justice" (1997) 21 *Journal of Australian Studies* 120.

In summary then, it seems uncontroversial that the rule of strict construction can apply to statutes creating or enlarging criminal liability. However, it also seems reasonably arguable that the rule should also apply to statutes that are not criminal but restrict an individual's interests in a similar way to classic criminal statutes.

Thirdly, when is the rule engaged?

There is a short answer and a long answer to this question. The short answer is that the rule is engaged whenever the meaning of a statute is ambiguous.

The long answer is necessary because the very concept of "ambiguity" can be difficult to define and this threshold test for the rule's application has found varied expression. For instance, a recent High Court case suggested that all that is needed to engage the rule is "doubt about the meaning of a penal statute".[44] Earlier case law required "a fair and reasonable doubt" about the meaning of statutory language before the rule would be engaged.[45]

More recently, it has been suggested that the rule is one of "last resort".[46] On this version, the rule is only engaged if ambiguity remains after all of "the ordinary rules of construction [have been] applied".[47] This means that a court will only apply the rule after it has had regard to text, context and purpose.

Lest this be understood to render the rule to relative obscurity, it is worth noting that, in the final result in *Beckwith*, Justice Gibbs in fact applied the rule in favour of the defendant, writing: "The effect of the [statutory] provisions at least remains doubtful and that should be resolved in favour of the liberty of the subject."[48] And the rule has remained relatively regularly cited in the High Court since that time, so its labelling as a rule of "last resort" does not appear to have dramatically diminished its relevance.

Principle of legality

Stripped of its complexities and controversies, the principle of legality essentially operates as a presumption against reading legislation to erode fundamental rights or principles of our legal system.

The classic historical statement of the principle of legality in Australia comes from the 1908 judgement of O'Connor J in *Potter v Minahan*:

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to

[44] See, recently, *Aubrey v The Queen* [2017] HCA 18, [39] (Kiefel CJ, Keane, Nettle, Edelman JJ).
[45] *Chandler and Co v Collector of Customs* (1907) 4 CLR 17, 1734 per O'Connor J (quoting *Nicholson v Fields* 31 L.J. Ex. 233, 235).
[46] *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).
[47] *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).
[48] *Beckwith v The Queen* (1976) 135 CLR 569, 578 per Gibbs J.

> give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."[49] (citations omitted)

Whilst O'Connor J's neat articulation of the principle has been approvingly quoted and referred to in numerous High Court judgments, there have been clarifications and refinements that bear some explication.

First, the categories of legal interests protected by the principle have potentially been expanded. In *Lee v New South Wales Crime Commission*, Gageler and Keane JJ explained:

> "Application of the principle … is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and *systemic values*."[50] (emphasis added)

Secondly, the principle has been explained to apply with varying degrees of rigour depending on the importance of the legal interest which it is protecting. Chief Justice Gleeson has cautioned that the degree of clarity required "will vary with the context."[51] Justice Edelman has also explained:

> "A more nuanced approach than one which is all-or-nothing might calibrate the strength of the presumption to the unlikelihood of an intention to impair the particular right based on factors including the importance of the right within the legal system and the extent to which it is embedded in the fabric of the legal system within which Parliament legislates."[52]

Elsewhere, his Honour has explained that "the principle of legality has 'variable impact'"[53] because "The less need there is for the rationale for the narrow approach to construction, the weaker will be the operation of the narrow approach to construction."[54] The question will be whether there is "much practical effect on rights", if not the principle of legality may have little force.[55]

Thirdly, there has been caution expressed about extending the principle beyond its rationale – that is, applying the principle to statutes which quite clearly were designed to interfere with fundamental rights or principles of the legal system.

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[49] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
[50] *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 at [312]-[313].
[51] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 328.
[52] *Commissioner of Taxation v Tomaras* [2018] HCA 62 at [101].
[53] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [102], quoting *R (on the application of Privacy International) v Investigating Powers Tribunal* [2017] EWCA Civ 1868 at [25] per Sales LJ (Flaux and Floyd LJJ agreeing).
[54] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [103].
[55] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 at [108].

Finally, before moving on, it might be helpful to enumerate the rights and principles that are protected by the principle of legality. A number of other authors have sought to compile comprehensive lists of all the interests protected by the principle of legality,[56] here I will only list those most relevant to criminal lawyers:

i. The availability of habeas corpus;[57]
ii. The right to liberty;[58]
iii. The right to property;[59]
iv. The right to free speech;[60]
v. The principles of natural justice;[61]
vi. The protection against double jeopardy;[62]
vii. Access to the courts;[63]
viii. The principles of the administration of justice which protect the subject;[64]
ix. The right to a fair trial, which includes: "A right to secure the production of relevant documents from third parties";[65]
x. The privilege against self-incrimination, sometimes called the "right to silence";[66]
xi. Other defining principles of the general system of law.[67]

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[56] See, e.g., D C Pearce, *Statutory Interpretation in Australia*, (9th ed, 2020) [5.11].
[57] *INS v St Cyr* 533 US 289 at 327, 333-334 (20001) (Scalia J dissenting, joined by Renquist CJ, Thomas J, O'Connor J).
[58] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J.
[59] *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619 per French CJ ("As a practical matter … where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights."); *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683 per Mason J.
[60] *Evans v New South Wales* (2008) 168 FCR 576 at 595-596 per French, Branson and Stone JJ.
[61] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ. See also *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539 at 591 per Lord Steyn: "Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."
[62] *Lacey v Attorney-General (Queensland)* (2011) 242 CLR 573 at 582, 583 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
[63] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
[64] *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 129, 132, referred to with approval by the majority in *Lacey* (2011) 242 CLR 573 at [18], where Deane J's comments were endorsed as correctly describing "The effect of the common law on the interpretation of criminal statues." But, to be clear, Deane J, and the Court in *Lacey*, were not discussing statues which create or extend criminal liability. Both Courts were discussing that broader category of statutes which bear upon the administration of criminal justice.
[65] *Application of the Attorney General for New South Wales dated 4 April 2014* [2014] NSWCCA 251 at [4].
[66] *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53 at [101] per Kiefel CJ, Bell and Nettle JJ ("the principle of legality, mandates that any statutory provision that purports to restrict the common law right to silence must be perspicuously expressed and strictly construed" citation omitted).

Interpretation consistent with the *Charter*

The Victorian *Charter of Human Rights and Responsibilities Act 2006* creates an interpretative presumption similar to that of the principle of legality.

Section 32(1) provides: "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

There are a number of human rights contained within the *Charter* that might pose interpretative limits on the operation of certain criminal laws, these include:

- the protection from cruel, inhuman or degrading treatment;[68]
- the right to free movement;[69]
- the right not to have one's privacy or home arbitrarily interfered with;[70] and
- the right to be free from arbitrary arrest or detention.[71]

There is some question, at least in Victoria, as to whether the Charter requires interpretation that minimizes rights infringement or whether it only requires bare compatibility.[72] On the former approach, courts ought to prefer an interpretation which would infringe the human rights of fewer people or would reduce the extent of the infringement on the people on whom it operates. Justice Gageler has acknowledged "the apparent logic"[73] of this approach, and the approach is consistent with the interpretative operation of the common law principle of legality.[74]

Mens rea and strict vs absolute liability

Before launching into a discussion of the interpretative principles relating to mens rea, strict and absolute liability it is necessary to briefly recall what these three concepts mean.

All statutory offences fall into one of three categories,[75] which can be summarised as follows:

1. *Mens rea* offences, that is, offences requiring a subjective fault element;

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[67] *X7* (2013) 248 CLR 92 at 131-133 per Hayne and Bell JJ; 153-154 per Kiefel J; *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 at 392-393 [73]; 395 [84] per Hayne J; 417 [176], 428 [221] per Kiefel J.
[68] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 10(b).
[69] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 12.
[70] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13.
[71] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 21(2).
[72] *Minogue v Victoria* [2018] HCA 27, [54]-[56] (Gageler J).
[73] *Minogue v Victoria* [2018] HCA 27, [55] (Gageler J).
[74] See, e.g., *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [43]-[44], 200 [512].
[75] *Chiou Yaou Fa v Morris* (1987) 46 NTR 1, 19 per Asche J. See generally Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (4th ed, 2017, Lawbook Co, Sydney) 224 [3.235].

2. Strict liability offences, that is, offences which do not require a subjective fault element, but which excuse responsibility in cases of honest and reasonable mistake of fact; and
3. Absolute liability offences, that is, offences where no fault element needs to be proved.

Presumption of mens rea

It has long been accepted to be a background assumption of statutory interpretation that a legislative provision creating criminal liability will entail a mens rea ingredient. As early as 1895 it was said:

> "There is a presumption that *mens rea*, an evil intention, of a knowledge of the wrongfulness of the act, is an essential ingredient of every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered."[76]

Of course this presumption can be displaced in certain circumstances. Whether or not the presumption of mens rea has been displaced will depend on the text, context and purpose of the legislation. Historically, factors considered to be relevant to the assessment of whether the presumption has been displaced include the seriousness of the offence (i.e. whether it is declared to be a regulatory offence or a crime), the penalty prescribed and whether or not the creation of a strict liability offence would promote the observance of the regulations.[77]

The current approach to the presumption of mens rea is summarised in the decision of the High Court in *He Kaw Teh v The Queen* (1985) 157 CLR 523. In that case, Chief Justice Gibbs outlined four relevant considerations for determining whether or not the presumption of mens rea has been displaced:[78]

(i) The language of the offence provision;
(ii) The subject matter of the statute;
(iii) The consequences of an offence for the public; and
(iv) The consequences for the defendant if convicted.

Those criteria have been summarised in a slightly different fashion by Warren J in the Victorian Court of Appeal:

> "The first criterion is consideration of the words of the statute creating the offence … The second criterion is consideration of the subject matter of the statute … The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute … The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately

[76] *Sherras v De Rutzen* [1895] 1 QB 918, 921 per Wright J, referred to with approval in *Cameron v Holt* (1980) 142 CLR 342.
[77] *Lim Chin Aik v R* [1963] AC 160, 174 per Lord Evershed.
[78] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528-530 per Gibbs CJ.

> sized, the statute is more easily regarded as imposing absolute liability …"[79]

Presumption of strict, rather than absolute, liability

The presumption that an offence is one of strict, rather than absolute, liability can alternatively be framed as the presumption that a statute has not ousted the "defence" of honest and reasonable mistake of fact.

In 1987, Chief Justice Street of the New South Wales Supreme Court observed "a discernable trend in modern authorities away from construing statutes as creating absolute liability and towards recognising statutes as [strict liability]".[80]

The presumption of strict, rather than absolute, liability can be displaced or overcome by consideration of much the same factors that are taken into account when rebutting the presumption of mens rea.

Nevertheless, there are occasions when courts are prepared to interpret statutory offence provisions as creating absolute liability (that is, excluding the "defence" of honest and reasonable mistake of fact). These include offence provisions in legislation relating to traffic;[81] environmental pollution;[82] the sale of alcohol;[83] employment;[84] and child pornography.[85]

What these cases indicate is that courts will only interpret a provision to create absolute liability where it is necessary to do so to give effect to the public protective purpose of the statute. If an offence of strict liability could just as well give effect to the purpose of the statute then such a reading should be preferred.[86]

<u>Other principles and presumptions particularly relevant to criminal statutes</u>

The following further principles and presumptions also regularly arise for consideration when interpreting criminal statutes:

1. Presumption against retrospectivity;

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[79] *Wilson v Gahan* [1999] VSC 72, [98] (Warren CJ) (citations omitted), cited with approval in *Stanojlovic v DPP* [2018] VSCA 152, [25].
[80] *R v Wampfler* (1987) 11 NSWLR 541, 547.
[81] *Kearon v Grant* [1991] 1 VR 321.
[82] *Allen v United Carpet Mills Pty Ltd* [1989] VR 323.
[83] *Hicking v Laneyrie* (1991) 21 NSWLR 730.
[84] *Llandilo Staircases Pty Ltd v Workcover Authority of New South Wales* [2001] NSWIRComm 64.
[85] *R v Clarke* (2008) 100 SASR 363.
[86] *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120, 129-130 per Hunt CJ; *Roads and Traffic Authority (NSW) v Jara Transport Pty Ltd* (2005) 44 MVR 394, 400.

2. Interpretation consistent with Australia's international law obligations,[87] - note, however, that occasionally Australia's obligations under international law are cited to be "consistent with" a broad reading of a penal provision.[88]

3. Presumption against extra-territoriality.

IV. PARTICULAR TYPES OF CRIMINAL PROVISIONS AND HOW THEY SHOULD BE INTERPRETED

To provide a more concrete illustration of the principles governing criminal statutory interpretation, I will now extract a few brief comments on how particularly types of criminal provisions have been approached by courts in the past.

Offence provisions

The rule of strict construction of penal statutes is perhaps most jealously guarded in the interpretation of offence provisions. What this means is that, when it comes to interpreting criminal offence provisions, text is first among equals in the holy trinity of text, context and purpose.

The practical effect of this is threefold.

First, courts will be reluctant to "read in" words to a criminal offence provision,[89] even if doing so would give it an operation more consonant with the apparent purpose of the legislation.

Secondly, scraps of legislative history that suggest that an offence provision ought to extend to a particular act will rarely trump textual indicators to the contrary. As Justice Nettle has remarked: "The safest guide is the language of the legislation and *the requirement for clarity in the framing of criminal provisions*."[90]

Thirdly, while reference to context is required, it cannot result in the statutory text being "unduly stretched or extended", as Kiefel CJ and Keane J explain:

> "It is nevertheless accepted that offence provisions may have serious consequences. This suggests the need for caution in accepting any 'loose' construction of an offence provision. The language of a penal provision should not be unduly stretched or extended. Any real ambiguity as to meaning is to be resolved in favour of an accused."[91]

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[87] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7. See, also, *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J): "every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law."
[88] *The Queen v A2* [2019] HCA 35, [56] (Kiefel CJ and Keane J).
[89] *The Queen v Holliday* [2017] HCA 35, [83] (Nettle J).
[90] *The Queen v Holliday* [2017] HCA 35, [83] (Nettle J, citation omitted, emphasis added).
[91] *The Queen v A2* [2019] HCA 35, [52] (Kiefel CJ and Keane J, citations omitted).

Provisions creating or excluding defences

The converse of the above is that provisions containing defences are usually interpreted liberally [92] and provisions excluding or limiting defences should be interpreted strictly.[93]

Deeming provisions

Deeming provisions create and enforce a sort of statutory fiction. On occasions that fiction may align with reality, on other occasions "[t]he effect of statutory deeming provisions is often to arrive at results quite different from those which the ordinary meanings of words would produce." [94] In *Chiro v The Queen*, Justice Edelman (dissenting) explained the effect of deeming provisions: "A fiction deems to be true that which is known not to be so or that which is unproved."[95]

Unsurprisingly, these provisions are interpreted particularly strictly when they impose criminal liability. A unanimous High Court has said: "A clear statement of legislative intention is required before the courts will find that liability for a serious Commonwealth offence is imposed by means of a statutory fiction."[96]

V. CONCLUDING MATTERS

I hope this presentation has served to convey both the general thrust, but also the nuance, of the way courts interpret criminal legislation. As I have suggested, the surest approach to mounting plausible interpretative arguments is to combine an analysis of text, context and purpose with reliance on any relevant interpretative presumptions. Of course, the suggestions I have made here have only scratched the surface – so here is a list of resources that address this topic in considerably more detail.

Resources

1. Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019)

2. Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020)

3. Dennis Pearce, *Interpretation Acts in Australia* (LexisNexis, 2018)

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[92] See, eg, *R v Tawill* (1974) VR 84, 88.
[93] *Peniamina v The Queen* [2020] HCA 47, [17] (Bell, Gageler and Gordon JJ).
[94] *Maroney v The Queen* [2003] HCA 63 at [11] per Gleeson CJ, McHugh, Callinan and Heydon JJ.
[95] *Chiro v The Queen* [2017] HCA 37 at [122] per Edelman J (dissenting) (emphasis in original).
[96] *DPP (Cth) v Keating* (2013) 248 CLR 459, 487 [47] (the Court, citations omitted).

4. Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 5th ed, 2017)

5. Julian R Murphy, 'Oceans Apart? The Rule of Lenity in Australia and the United States' (2020) 9(2) *British Journal of American Legal Studies* 233