

SECTION 1

The Nature of Criminal Law and Its Analytic Structure

How is criminal law different from other kinds of law? What does society seek to achieve by imposing punishment through its criminal justice system? How is the criminal law organized to achieve this purpose? How are the sources and the form of criminal law different from that of other kinds of law? These are the questions addressed in this Section.

● OVERVIEW OF THE SOURCES OF CRIMINAL LAW

Two hundred years ago in England, criminal law was generally uncodified. This "common law" was developed by and embodied in judicial opinions. The American colonies adopted this common law of England as it existed at the time of their independence. The most popular treatise of the time, Blackstone's *Commentaries on the Laws of England*, became a highly influential work in America not because of anything particularly distinguished about the four volumes but rather because its popularity coincided with American independence. Volume 4 provided a useful summary of then-existing English common law criminal law.¹ American courts then took on the role of further refining and developing the law, thereby creating differences with English law. Today, courts generally no longer have this role with respect to criminal law. The function has been taken over by the legislatures. Nearly every state has a criminal code as its primary source of criminal law. Courts interpret the code but generally have no authority to create new

1. W. Blackstone, *Commentaries on the Laws of England* (1803, reprinted in 1969).

crimes or change the definitions of existing crimes. The reasons for the shift from common law's judicially defined offenses to criminal codes are found chiefly in the rationales for what is called the Legality Principle, the subject of Section 2. Even after codification, the power of courts to interpret criminal statutes can have significant effect.

Common Law Defined When lawyers speak of "common law," they may mean either the law as it existed during the Common Law period in England or law that is derived from a process of judicial development. The intended meaning frequently is evident from the context. For example, the "common law *process*" typically refers to the process of judicial law-making, whether or not it occurs during the Common Law *period*. "The Common Law rule" usually refers to the legal rule that existed in England during the eighteenth century. On the other hand, a minority of states continue to rely upon judicially modified variations of the original Common Law rule. Such rules may be referred to as "common law" rules even if they are significantly different from the rule described by Blackstone.¹

Current Role of Common Law While no state continues to permit judges to create crimes, the common law continues to be important for several reasons. Some state criminal codes incorporate common law offenses by name without defining them. Under so-called "reception" statutes, judicial decisions must be relied upon to determine the requirements of a common law offense. In addition, because some codes are simply codifications of the previously existing common law doctrine, ambiguity in code language that calls for an examination of the drafters' intent may require review of the cases in which the doctrine was developed. Similarly, the common law cases may be consulted because they tend to explain the rationale behind the original rule if the legislative history of the rule does not. An attorney seeking to persuade a court of the wisdom, or folly, of the policy behind a particular interpretation of a statute may look to common law cases to establish and explain the policy. The rules and techniques of statutory interpretation are discussed further in Section 2, concerning the Legality Principle.

Modern Criminal Code Reform While there were some heroic efforts, little criminal code reform occurred in the United States before the 1960s. Most codes at the time were less like codes and more a collection of ad hoc statutory enactments, each enactment triggered by a crime or a crime problem that gained public interest.² A major contribution of early codifiers frequently was to put the offenses in alphabetical order. The greatest catalyst of modern American criminal law codification has been the Model Penal Code, which was promulgated by the American Law Institute. Beginning even before its formal adoption in 1962, the Model Penal Code served and continues to serve as a basis for wholesale replacement of existing criminal codes in over two-thirds of the states. Some states have adopted the Code with only minor revision, while others, especially those that

1. If "Common Law" is capitalized it typically is meant to refer to the Common Law period, but most writers, including this one, are not consistent in following this convention.

2. See, e.g., 18 U.S.C. §§1201-1202 (the so-called Lindbergh Law), enacted in 1932, making kidnaping a federal crime when the victim is transported across state lines. The statute was an immediate response to the kidnaping of Charles Lindbergh, Jr., on March 1, 1932.

adopted it early, tended to redraft their existing doctrine, borrowing only pieces of the Model Penal Code language but most of its style and form.

The Model Penal Code The American Law Institute, which drafted the Code, is a nongovernmental broad-based highly regarded group of lawyers, judges, professors, and others who undertake research and drafting projects designed to bring rationality and enlightenment to American law. The Institute's Restatements of the Law have been influential in bringing clarity and uniformity to many fields. When a criminal law project was undertaken in 1953, it was concluded that the criminal law of the various states had become too disparate to permit a "restatement" and, in any case, the existing law was seen as too unsound and ill-considered to merit restating. What was needed instead was a model criminal code. After nine years of work and a series of Tentative Drafts, the Institute approved an Official Draft in 1962. The original commentary, which was contained in the various Tentative Drafts, was consolidated, revised, and republished with the 1962 text in 1980 and 1985 as a seven-volume set.¹

Federal Criminal Code Reform Of the third or less of the jurisdictions that have not yet adopted a modern criminal code, the federal system is the most unfortunate example of frustrated reform. The Congress has been engaged in an effort to reform the federal criminal code since 1966.² Several modern code bills passed the Senate but did not pass the House. Criminal code reform is always difficult because it touches highly political issues, but the lack of a modern federal criminal code is a matter of some embarrassment in a country whose states lead the world in enlightened criminal codification. The present federal criminal code is not significantly different in form from the alphabetical listing of offenses that was typical of the original American codes in the 1800s.

Format of Modern Codes Modern criminal codes have several hallmarks: a General Part that contains general provisions, affecting all or many of the specific offenses defined in the Special Part of the code. General provisions include such things as the general rules concerning omission liability, complicity, and voluntary intoxication; general defenses such as self-defense, insanity, and time limitations; general rules for the definition and interpretation of offenses; and a collection of definitions for commonly used terms. In the Special Part of a code, offenses are defined and organized as conceptually related groups and are consolidated and revised to avoid overlaps and gaps. Thus, the offenses against property work together to define all prohibited harms involving property, etc. A significant practical effect of reform is that code sections can no longer be read in isolation. To fully understand each offense definition in the Special Part, several General Part provisions must be consulted. The largely successful goal of modern criminal code reform is a code that provides clarity in defining a sophisticated and rational set of rules for distributing liability and punishment.

1. Three volumes containing Part II of the Model Penal Code, Definition of Specific Crimes with revised comments, were published in 1980. Three additional volumes containing Part I of the Code, General Provisions, with revised Comments, were published in 1985. An official version of the completed text of the Model Penal Code was published in 1985.

2. These efforts began with the establishment of the "Brown Commission" (Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516) followed by that Commission's Final Report on Reform of Federal Criminal Laws presented in 1971. See also Ronald C. Gainer, Report to the Attorney General on Federal Criminal Code Reform, 1 Crim. L. Forum 99 (1989) (a comprehensive critique of the federal criminal code).

▲ PROBLEM

Fear of the Daggers

Box lives next door to the Golden Daggers' clubhouse. As he walks by on this morning, on his way home from his night shift at the Tower Grill, two gang members grab him and drag him inside. "I hear you're friendly with Bet Peppe," one spits, with his face an inch from Box's. "No, not really," Box says, shaking. "I used to see her around, hanging with you guys. I'm not really a friend of hers." The man responds, "Then you won't mind doing me a favor: You'll cut her face for me." Box isn't thrilled about the idea. He says nothing. "Look, it's either your face or hers," the man says as he pricks a knife in Box's face an inch below his eye. "OK. OK. I'll do it." The Dagger stares, "If I don't see cuts on her face tomorrow, we'll be looking for you."

Box goes to his apartment and pours himself a drink, spilling much of it because his hands are shaking. Yes, he is scared of those guys, he admits to himself. Hurting Bet would be a bad thing, but what's the alternative, especially if the Daggers find out that he and Bet have been dating? After several more hours of anxious drinking, Box gets a butcher knife from the kitchen and heads for Bet's, bottle in hand. By the time he gets there, he is staggering badly and barely coherent. Bet opens the door. "Hi Box." Box lurches forward, stumbling into the back of the sofa. "What's wrong with you?" Box does not respond. He staggers around the apartment, knocking over furniture. "This is your own fault," he screams at her, and babbles on about blood, knives, and eyes. When he has worked himself into a frenzy, he pulls his knife and begins flailing at everything around him, curtains, lamps, pictures on the wall. Bet gets caught by several of his swings and is badly cut. She runs from the apartment, screaming for the police. Box also runs. He takes the subway to his brother's place on the other side of town where he spends the night.

After reflecting on his situation, Box decides not to return to his apartment but rather to take a job in a small town in the southern part of the state. Unaware that Box has left town, Bet does not disclose his identity to the police for fear of reprisals by Box. Bet's shoulder heals but a cut to her hand has permanently damaged the muscles. She is no longer able to write with that hand and becomes increasingly bitter about the episode.

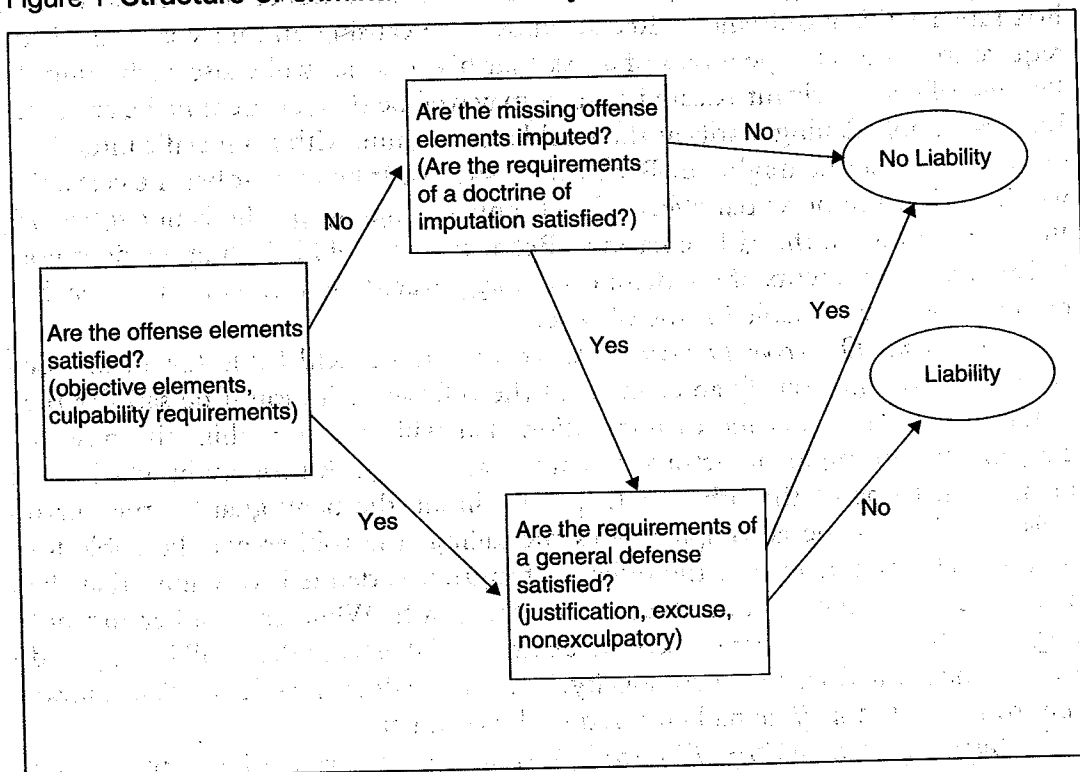
Several years later Box returns to town. Bet chances to see him on the subway one day and, after much stewing, decides to report him to the police. His arrest comes three years after the incident.

Is Box liable for aggravated assault under the Model Penal Code?

● OVERVIEW OF THE OPERATIONAL STRUCTURE OF CRIMINAL LAW

Operational Structure Let us use Box's case to examine how the doctrines of criminal law operate. Each rule typically does one of three things. A doctrine may define what constitutes an *offense*. A doctrine may define the conditions under which an actor will be acquitted even though he satisfies the elements of an offense. Such a doctrine commonly is termed a *defense*. Or a doctrine may define the conditions under which an actor will be held liable even though he does not satisfy the elements of an offense. Such a doctrine may be called a doctrine of *imputation*. This coursebook is organized around this three-part doctrinal structure. Their interaction in the analysis of criminal cases might be summarized as the flow chart illustrates.

Figure 1. Structure of criminal law's liability decision



Offense Definitions The definition of an offense typically is comprised of objective elements—for example, conduct, its attendant circumstances, and, sometimes, its results—and culpability elements—for example, purpose, knowledge, recklessness, or negligence—as to each objective element. Thus, the objective elements of murder might require that an actor engage in *conduct* that causes the *death of another human being*. The culpability elements might require that the actor *know* the nature of his conduct, that it will cause a death, and that the death caused is that of a human being (e.g., not that of a non-viable fetus). The

culpability requirements may be different for different elements of the same offense. A jurisdiction might, for example, require that an actor *know* the nature of his conduct and that it will cause a death but only require that the actor be *reckless* as to whether the death is that of a human being.

Special vs. General Part of Code Part II of this coursebook examines the general principles governing objective and culpability elements of the offense definitions. Part III examines the elements of the most important offense, homicide. The definitions of specific offenses make up what is called the Special Part of a criminal code. The general rules governing the definition of the offenses, together with the doctrines of imputation and defense, make up the General Part of a code and typically apply to many or all specific offenses. Look at the table of contents of the Model Penal Code in Appendix B to see the distinction between the General Part and Special Part in the organization of a criminal code.

Box and Elements of Aggravated Assault In Box's case, aggravated assault might be defined to require, as an objective elements, that the actor engage in conduct that causes serious bodily injury to another.¹ Box has done that. The offense also might require, as culpability elements, that the actor be at least reckless as to causing such injury, at the time of his conduct. It is unclear that Box satisfies this requirement. Recklessness as to causing an injury is defined to require that the actor be aware of a risk that his conduct will cause such injury.² Because of his grossly intoxicated state, it may well be that, at the time he cut Bet, Box was simply flailing madly at the world around him, with no specific intention or awareness that he might cut Bet with his swings. If he were sober, he certainly would realize the potential effect of such knife-swinging, but he is not sober. If Box is not aware of this risk of harm to Bet at the time of his flailing, he does not satisfy the requirements of the definition of aggravated assault. As we shall see, he nonetheless may be liable for the offense.

Imputing Objective Elements An actor may be held liable for an offense even if he does not satisfy an element of the offense definition if he satisfies the requirements of a doctrine of imputation that will impute to him the missing element. For example, an actor may participate in a bank robbery in which it is planned that one of the other participants will kill the bank guard if the guard resists. Although the accomplice does the killing, the robber may be liable for murder. This is true even if the offense of murder is defined to require that the actor engage in the conduct that causes the death. While the robber did not engage in the conduct that caused the death, the killer's conduct will be imputed to him under the doctrine of complicity. That is, the doctrine of complicity allows him to be treated *as if* he had engaged in the conduct.

Imputing Culpability Elements Just as the doctrine of complicity can impute to the defendant an objective element—another's conduct—the doctrine of voluntary intoxication can impute a culpability element. An actor who voluntarily intoxicates herself and in that drunken state strikes and kills a pedestrian with her car in fact may lack the culpability as to causing death required for

1. Model Penal Code §§211.1(2), 210.0(3).

2. Model Penal Code §§2.02(2)(c).

the offense of manslaughter — for example an awareness of a substantial risk that her conduct will cause the death of another human being. Yet, such awareness of a risk of causing a death (i.e., recklessness as to causing death) may be imputed to the actor under the doctrine of voluntary intoxication. That is, because of her voluntary intoxication, she may be treated *as if* she satisfies the required element of recklessness as to causing death, and therefore may be convicted of manslaughter. Box would fall under the application of this doctrine. Because his intoxication was voluntary, recklessness as to causing serious bodily injury, required for aggravated assault liability, will be imputed to him.¹ Part V of this coursebook takes up the doctrines of imputation.

Doctrines of Defense Where an actor satisfies all of the elements of an offense, actually or through imputation, he nonetheless may be acquitted of the offense if he satisfies the conditions of a defense. Box has several claims of defense that he might make, although some are more promising than others. He might claim that his conduct was justified by his need to protect himself from the Golden Daggers. He might claim that he should be excused because the Daggers coerced him into doing what he did. Or, he might claim that the period of limitation has run and that he can no longer be prosecuted for the offense.

Failure of Proof Defenses Some doctrines that are called “defenses” are nothing more than the absence of a required offense element. When I take your umbrella believing it to be my own, I may claim a *mistake defense*. Yet my defense derives not from a special defense doctrine about mistake as to ownership but rather from the elements of the theft offense. The definition of theft includes a requirement that the actor know that the property taken is property owned by another. If I mistakenly believe that the umbrella I take is my own, I do not satisfy that required element of knowledge. Such a mistake “defense” is called a *failure of proof defense* because it derives from the inability of the state to prove a required element. When Box claimed that he did not have the required recklessness as to causing serious bodily injury to Bet, he is claiming such a failure of proof defense. He is claiming that the prosecution cannot prove all of the elements of the offense. In casual usage, such claims are called “defenses,” but they are simply another way of talking about the requirements of an offense definition.

Offense Modification Defenses Some defenses are indeed independent of the offense elements but in fact concern criminalization issues closely related to the definition of the offense. They typically refine or qualify the definition of a particular offense or group of offenses. Voluntary renunciation, for example, can provide a defense to inchoate offenses like attempt or conspiracy. Consent is recognized as a defense to some kinds of assault. The consent defense helps to define what we mean by the offense of assault (as including minor injury when it is not consented to), just as renunciation helps refine the definition of inchoate offenses (as including only unrenounced criminal plans). Indeed, assault frequently is defined as an *unconsented to* touching. That is, the absence of consent sometimes is included as an element of the offense. As this illustrates, the difference between failure of proof defenses and offense modification defenses is one of

1. Model Penal Code §2.08(2).

form more than substance. An offense modification *defense* can as easily be drafted as a *negative element* of the offense.

Criminalization Defenses vs. General Defenses Because both failure of proof and offense modification defenses serve to refine the offense definition (and therefore might be called “criminalization” defenses), they tend to apply to a single offense or group of offenses. Justifications, excuses, and nonexculpatory defenses, in contrast, are unrelated to a particular offense; they theoretically apply to all offenses and therefore are called *general defenses*. The recognition of each general defense rests upon reasons extraneous to the criminalization goals and policies of the offense. A general defense is provided not because there is no criminal wrong, but rather despite the occurrence of a legally recognized harm or evil. The offense harm or evil may have occurred but the special conditions establishing the defense suggest that the violator ought not to be punished for the offense harm or evil.

Justification Defenses An actor may satisfy all of the elements of an offense and his or her conduct may clearly be a legally recognized harm or evil of the sort that generally is prohibited, yet the circumstances of the offense may suggest that, because of special justifying circumstances, this particular offense conduct ought to be tolerated or even encouraged under the circumstances. An unconsented-to striking of another constitutes assault and generally is prohibited, yet it ought not result in liability if done in self-defense against an aggressor to protect one’s life. Burning another’s farm constitutes arson, yet it ought to be tolerated and even encouraged if it creates a firebreak that saves a town from a raging forest fire. Providing a justification defense in such cases is not meant to lessen the general prohibition against assault and arson but only to recognize that the harm or evil of even such serious offenses as these can be outweighed by a greater good that flows from the commission of the offense under the special justifying circumstances.

Justification for Box? Box might claim a justification defense, arguing that the cuts to Bet were a less serious harm than the injury he was likely to suffer at the hands of the Daggers. But his conduct is not likely to be deemed justified. The defensive force justifications authorize injury to aggressors, but Bet is an innocent person.¹ Justification defenses also typically require that no other less harmful means of avoiding the harm be available.² Box could have reported the incident to police, gone into hiding, as he did, or both. Cutting Bet was not the least harmful means of avoiding the harm. Justification defenses are examined in Sections 17 through 19.

Excuse Defenses Even if an actor’s conduct is harmful or evil in itself and is not justified by special circumstances, an acquittal nonetheless may be appropriate. The criminal law has a special commitment to punishing only the blameworthy. An actor who is acting involuntarily, who is insane, involuntarily intoxicated, or immature, or who is acting under duress or under a reasonable mistake of law or mistake as to a justification may be blameless. That is, we may feel that such an actor in such a situation could not reasonably have been expected to remain

1. Model Penal Code §3.04.

2. See, e.g., Model Penal Code §3.02.

law-abiding. The excuse defenses are designed to exculpate such blameless offenders. Excuse defenses are the subject of Sections 20 through 23.

Excuse for Box? Box might claim an excuse of some sort. Because his intoxication was voluntary, the law does not permit it to be the basis for an excuse.¹ He might do better to claim a duress defense based on the coercion from the Daggers. But many states make the duress defense unavailable for offenses of violence against another person. And, where it is not expressly barred in such cases, as in the Model Penal Code, a duress defense is available only where a person of reasonable firmness would have been unable to resist the coercion to commit the offense.² It seems unlikely that a jury could be persuaded that, faced with threats like those from the Daggers, a person of reasonable firmness would slash Bet the way Box did. In other words, a jury is likely to find that, despite the Daggers' threats, Box is blameworthy and ought to be held liable for his offense.

Nonexculpatory Defenses Even blameworthy actors may be acquitted if they satisfy the requirements of a nonexculpatory defense. Such defenses are disfavored yet recognized because they each further an important societal interest, judged to be more important than punishing the offender at hand. Diplomatic immunity, for example, is allowed to shield criminal offenders because by recognizing such a defense we protect our diplomats abroad, and this in turn allows the establishment of diplomatic relations between nations. That a societal benefit is derived from the defense may seem to make nonexculpatory defenses similar to justifications, but note that the benefit in nonexculpatory offenses flows not from the actor's offense conduct, as is the case with justifications, but rather from forgoing his conviction despite the undesirability of his conduct and his blameworthiness.

Nonexculpatory Defense for Box? Box may claim a nonexculpatory defense in the statute of limitations.³ The passage of three years, during which he has been in the jurisdiction, may well bar his prosecution for the offense. The defense is not based on any lack of harm or blame but rather is recognized, despite the presence of both, because such a limitation period is said to avoid a counterproductive preoccupation with the past. At some point, the argument goes, society is better off letting go of the past and moving ahead to deal with the problems and challenges of today. In most jurisdictions, if the arrest warrant for Box is issued more than three years after the assault, prosecution will be barred. Section 24 examines nonexculpatory defenses.

Liability Assignment vs. Sentencing All of these criminal law doctrines — offense definitions, doctrines of imputation, and general defenses — serve only to assign criminal liability. Such liability suggests that some punishment is appropriate and gives a general classification of the offense — for example, third-degree felony, first-degree misdemeanor — that serves as a starting point for determining how much punishment is appropriate. The specific amount and nature of the

1. Model Penal Code §2.08(4).

2. Model Penal Code §2.09.

3. Model Penal Code §1.06.

punishment, however, is determined during the sentencing process, which frequently is entirely discretionary with the sentencing judge. In that sense, the criminal law, for all its intricacy and for all the resources devoted to its adjudication of an individual case, has a limited effect in determining the ultimate sanction. It has the important role of determining *who* shall be punished but it leaves to the sentencing process most of the determination of *how much* or *what kind* of punishment will be imposed.

Criminal Law Principles in Sentencing This state of affairs may seem peculiar. The criminal law is drafted with great care to make the assignment of liability a matter of rules rather than discretion. As Section 2 details, this commitment to the articulation of liability rules, called the principle of legality, has always been a foundation of Anglo-American criminal law. Yet the highly articulated criminal law has a limited effect in determining the punishment imposed. Instead, the highly discretionary sentencing process determines the punishment. If unguided discretion is carefully avoided in the liability assignment process, why is it tolerated in sentencing, where the punishment is in large part determined? In part because of legality concerns, the trend in modern sentencing systems is toward more articulated sentencing rules. As one might expect, these articulations typically draw upon and extend principles of criminal law. Thus, while the rules of liability assignment are only a stop on the way to determining punishment, the principles behind those rules are likely to play an increasingly larger role in the formulation of sentencing rules and guidelines.

Practical Importance of Criminal Law Theory The articulation of sentencing rules is but one example of the value of understanding the principles behind criminal law and not just its rules. The effective advocate and the informed judge are at their best when they understand the theory of the rules, why the doctrine is the way it is. Only then can they interpret code provisions to give them proper effect or criticize interpretations that would frustrate the purpose of a provision. In addition, lawyers inevitably play a large role in the law-making process, in which criminal codes are drafted and enacted. Therefore, a rational, effective, and just criminal law depends on an informed bar. The structure for criminal law described above is an example of a conceptualization that can have significant practical value. Lawyers and judges, not just academics, benefit from a sense of this larger conceptual framework of criminal law, for it is through such a structure that they can appreciate the role that each doctrine plays within the larger whole.

▲ PROBLEM

Fear, Pain, and Bubble Gum

Ike has decided to join ZBT fraternity. During "hell week" the aspiring "pledges" are on call at all times to provide labor, entertainment, or anything else that a brother of ZBT might desire. School policy prevents skipping classes during hell week, a godsend for the pledges. Classes provide the only opportunity to

sleep. With the altered function of classes, books are unnecessary. Instead, pledges carry hardwood pledge paddles and the favorite candy of each brother. After a very restful hour of thermodynamics, Ike meets Brother Constin. "Cherry bubble gum, pledge." Ike's mouth drops and his heart stops. "Aaaah. . . I thought you liked strawberry, Mr. Constin." "You have five minutes to compensate for your incompetence, pledge." Ike scrambles. He spots Ed Begley, another ZBT pledge, 100 yards away. "Ed, have you got cherry bubble gum for Constin?" Ed's eyebrows pop up. "I thought he liked strawberry." Ike bolts for the local convenience store, with Ed close behind. He spots cherry in the bubble gum box. "Yes!" The moment sours as they realize that neither has any money. Ike grabs two pieces and heads for the door. "I'll be back later to pay for this," he shouts over his shoulder to the shopkeeper, who is unimpressed. "Come back here. You can't take that without paying for it."

Ed explains their situation to the shopkeeper. After some discussion, the shopkeeper lets Ed have two pieces free, but notes that he still considers Ike a thief. Ed dashes out the front and around the back of the store. He thinks he can make up for lost time by taking a shortcut that he knows. But as he squeezes between two cars parked in the alley behind the store, he loses his footing. As he falls, he cuts his leg badly and becomes wedged between the two cars. His struggles only wedge him tighter and his cries for help go unheard. He feels himself getting faint from loss of blood and decides that he must break the window of one of the cars to get maneuvering room to extricate himself. He gets free and limps back into the store, where the owner calls an ambulance and puts a tourniquet on his bleeding leg.

Ike wonders where Ed is and concludes that Ed may be having second thoughts about pledging ZBT. Brother Constin is waiting at the edge of campus. "That was six minutes, pledge." Ike's watch says four minutes but he decides protestation would not be useful. Brother Constin pronounces sentence. "Three whacks." Ike hands Brother Constin his paddle and bends over. All three are stingers. He responds, "Thank you sir, you have helped me in my quest to reach the perfection of brotherhood." "You are welcome." Ike expects to have permanent scarring, as do all of the current brothers of ZBT.

While "hazing" is technically unlawful, it has been generally ignored in the past. But the incident at the convenience store, in particular, draws University ire. The fraternity's pledge privileges are suspended for a year. To show its concern for lawless conduct during pledge week, the University insists that both civil claims and criminal charges be filed against Brother Constin for assault, against Ike for theft of the bubble gum, and against Ed for damage to the car. The civil assault claims against Constin are dismissed on the ground that Ike consented, he knew the effects of the paddling he was consenting to, and he is an adult who can make an informed decision to consent to the injury. In the civil action for taking the gum without permission, Ike concedes his civil liability and pays the minor damages sought by the store owner. Ed similarly concedes and compensates the car owner.

What liability, if any, under the Model Penal Code, which is reproduced in Appendix B? Consider the following Model Penal Code sections for what they say about the nature of criminal law.

■ THE LAW

Model Penal Code

(Official Draft 1962)

Section 2.02. General Requirements of Culpability

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense....

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto....

Section 2.11. Consent

(1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:

(a) the bodily injury consented to or threatened by the conduct consented to is not serious; or

(b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or

(c) the consent establishes a justification for the conduct under Article 3 of the Code.

(3) Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

- (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or
- (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

Section 2.12. De Minimis Infractions

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

- (1) was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
- (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
- (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense. The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

Section 3.02. Justification Generally: Choice of Evils

- (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
 - (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
- (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

● OVERVIEW OF THE NATURE OF CRIMINAL LAW

Criminal-Civil Similarities Criminal law is not unique in the conduct it punishes; some conduct violates criminal and civil law. Striking another person without her consent may be both a crime and a tort. Nor is criminal law unique in the deprivations that it imposes; civil commitment, tort law, and a variety of other civil measures can deprive a person of his or her liberty, put restrictions on what a person can do, and compel the payment of money. Criminal cases do typically have procedural characteristics different from civil cases. Crimes are prosecuted by the state rather than by the victim, while civil cases have a private “plaintiff” who brings the action. On the other hand, state prosecution is not unique to criminal actions; civil actions sometimes are brought by the state, as when the state sues for breach of a contract. If criminal law is not unique in either the conduct it prohibits, the deprivations it dispenses, or the party that brings the action, why is it kept distinct? Its existence must have an explanation apart from its prohibitions, deprivations, or procedures.

Criminal Conviction as Moral Condemnation The conventional wisdom holds that criminal liability and criminal commitment are different from civil liability and civil commitment in that the former generally are thought to reflect moral blameworthiness deserving condemnation and punishment. “An act or omission and its accompanying state of mind which, if duly proven to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”¹ This notion that the distinctiveness of criminal law is its focus on moral blameworthiness is supported by the traditional requirements for criminal liability, which as a group are not characteristic of civil liability.

Culpability Requirement Characteristic of criminal law is a requirement that the actor have a culpable state of mind as to the offense elements. Bringing about a prohibited harm or evil, even wrongfully, is not itself sufficient for criminal liability. Generally, a minimum culpability of recklessness is required as to every offense element,² that is, an actor must have some degree of awareness of the facts that make her conduct criminal. Still higher culpability levels, knowledge or purpose, commonly are required as to one or more offense elements. Lower culpability than recklessness, criminal negligence, is used infrequently; strict liability—liability in the absence of culpability—generally is limited to “violations,”³ which are distinguished from “crimes.” Civil liability, in contrast, frequently requires no culpable state of mind. When culpability is required, commonly only negligence need be shown.

1. H.L.A. Hart, *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 405 (1958).

2. Model Penal Code §2.02(3).

3. *Id.* §2.05(2). The most notorious exception to this is the common law’s use of strict liability in statutory rape, a serious offense. See, e.g., Model Penal Code §§213.1(1)(d), 213.3(1)(a), 213.6(1); *id.* §213.6(1) comment (1980).

De Minimis Defense Another point of contrast is found in the fact that criminal law addresses only harms of a sufficient seriousness; situations analogous to civil law's liability-with-nominal-damages typically do not support criminal liability. Under the Model Penal Code's "de minimis infraction" defense, for example: "The Court shall dismiss a prosecution if . . . it finds that the defendant's conduct . . . did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent *too trivial to warrant the condemnation of conviction* . . ." ¹ Consider the person who leaves a restaurant with an apple from a buffet after paying for the buffet but in violation of the establishment's rule against removal of food. This violates the terms of the theft prohibition — taking property of another without consent — yet one might conclude, as the court did, that such a violation is too trivial to generate community condemnation and therefore is not properly dealt with by the criminal law. ² At civil law, in contrast, the extent of the harm is important to assessment of the amount of the award but generally does not affect liability. Thus, the shopkeeper from whom Ike took the gum will not recover much in tort, but he does have a right to liability and compensation from Ike for the extent of his injury. Criminal law, on the other hand, generally limits liability to cases where the conduct is sufficiently serious to merit the condemnation of criminal conviction.

Crimes vs. Violations In the same vein, the Code distinguishes "crimes" from "violations": "A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense." Thus, illegal parking, motor vehicle violations, and other such prohibitions generally are not "crimes," even though they are enforced by the same officers who enforce the criminal law.

Consent as a Defense Consent similarly has a different effect in the criminal and civil contexts. It generally is a complete defense to a civil action. A plaintiff generally has no right to recover for a harm to which he or she consented. It was for this reason that Brother Constin was able to successfully defend the civil suit for assault. In contrast, a victim's consent is rarely a defense to a criminal charge. It is allowed as a defense only if it *vitiates the harm or evil of the offense*. That is, consent is a defense to criminal liability only if the presence of consent means that there no longer is a harm. That Ed got the shopkeeper's permission to take the bubble gum without paying for it means that the taking is not theft. Similarly, where valid consent is present, sexual intercourse is not rape.

Denying Consent Defense to Crime In most criminal offenses, however, consent is not a defense. Assault occurs if one "purposely, knowingly, or recklessly causes bodily injury to another." ³ The criminal law generally does not allow consent of the victim to bodily injury as a defense. ⁴ Criminal conduct is seen as

1. Model Penal Code §2.12(2) (1962) (emphasis added). Where the damage is minor under civil law, in contrast, liability nonetheless is imposed but only nominal damages are awarded.

2. See *State v. Nevens*, 197 N.J. Super. 531, 485 A.2d 345 (1984) (conviction reversed and complaint dismissed as a de minimis infraction).

3. Model Penal Code §211.1(1)(a).

4. See, e.g., Model Penal Code §2.11(1). As is common in civil law, assent might not necessarily provide effective consent. See Model Penal Code §2.11(3).

a harm against the community. While it may be an individual who suffers the immediate injury, it is the breach of the society's rules of conduct prohibiting the act that serves to justify punishment. If the law prohibits the conduct without exception, it is not within the power of an individual to revoke the law's prohibition. The law may give an individual the authority to consent to minor injury, just as it gives individuals the authority to give away their property, as the shopkeeper gave Ed free bubble gum. But causing more than minor injury is an offense, no matter that the victim consents.

Justification and Excuse Defenses Even if the actor has the required culpable state of mind for the offense, criminal liability is barred if the actor's conduct is justified because it avoids a greater societal harm. Such an actor is exculpated under a justification defense. Thus, one has a justification defense to theft if one breaks into a cabin to avoid starvation and exposure while lost in the woods. Even if the actor is not justified, criminal liability also is barred if the person commits the offense because of circumstances or conditions that render the person blameless for the offense, as is frequently the case with one who is insane or who commits the offense because coerced to do so by another. Such an actor is exculpated under an excuse defense. Criminal codes recognize a wide range of justification and excuse defenses, such as lesser evils, law enforcement authority, insanity, immaturity, involuntary intoxication, duress, and reasonable mistake as to a justification.¹ Civil liability, such as tort, typically recognizes neither justification nor excuse defenses. If you tie up to my dock in a storm in order to save your ship and those aboard, you will have a justification defense to criminal liability but nonetheless may be liable in tort to pay me for the damage you caused to my dock. Similarly, an insane person may gain an insanity defense to criminal liability but the person or his guardian nonetheless must compensate another for harm caused. The difference logically follows from the difference in the criteria for criminal and civil liability. Rather than the moral blameworthiness of the actor, the criterion for civil liability is frequently said to be the fair or efficient allocation of the loss, or some other nonblameworthiness criteria.

"Condemnation as Criminal" Some aspects of civil law may recognize some doctrines similar to these, but criminal law is unique in reliance on such a collection of doctrines: the requirement of conscious culpability, rejection of consent as a general defense, recognition of a defense for de minimis violations, justification, and excuse. This is as one would expect. For, taken together, these doctrines serve "to safeguard conduct that is without fault from condemnation as criminal,"² and it is moral condemnation that distinguishes criminal law from all other law.

1. E.g., Model Penal Code §§3.02, 3.07, 4.01, 4.10, 2.08(4), 2.09.

2. Id. §1.02(1)(c).

SECTION 2

The Legality Principle

The wide-spread codification of criminal law in the 1960s and 1970s, discussed in the previous Section, makes American criminal law primarily a statutory creature. Why should this be so? What prompted the enactment of these comprehensive criminal codes? The answer lies in what is called the "legality principle," a concept that expresses interests and values with special application to criminal law.

◆ THE CASE OF RAY BRENT MARSH

Noble, Georgia, is a small unincorporated cluster of houses and businesses off Highway 27, about 20 miles outside Chattanooga. Though people tend to live here for decades, they are not as close as they might be in the typical small town. "We come here and we stay here, but a lot of people don't know who their neighbors are," explains the video store owner, who has been living here for 47 years. "It's a place where you don't need to worry about what's in your backyard."

One prominent family in town is the Marsh family, descendants of Willie Marsh, who in the 19th century was the first African-American child in Walker County. In a county that is almost 94% white, the Marshes have become one of the more prominent families in town. Members of the family served in both World Wars and in Vietnam. During World War I, one of the Marshes got into the lumber business. Many of his thirteen children (nine of them boys) worked in the mill, where their father hired whites and blacks. His motto, passed down through the family, was "you don't look up, you don't look down, you look 'em straight in the eye." Several generations of Marshes are buried in the family graveyard a few blocks from the Tri-State Crematory, a family business started by Tommy Ray Marsh in 1982.

Tommy Ray had been a postal worker, but also worked digging septic tanks with a backhoe. In the mid-1970s, a family friend, William J. Willis, Sr., who now runs Willis Funeral Home, called Tommy Ray because he needed a grave digger. Realizing the business potential, Tommy Ray started his own burial vault.

After a decade of digging graves, he bought a \$20,000 cremation unit from Industrial Equipment & Engineering in Apopka, Florida, and opened Tri-State Crematory. Local newspapers reported that it was the first minority-owned crematory in the country.

When he started the business, cremations were rare in that part of Georgia, but starting in the late 1980s they have become increasingly common, partly because they are less expensive than the alternatives. Tommy Ray's family now owns and rents out a fair amount of land in Noble. He is a member of the Rotary Club. His wife also is active in the community. After working as a school teacher for 30 years, she was Walker County Citizen of the Year, and was both president of the Walker County Association of Educators and the first African American to serve as chair of Walker County Democratic Committee.

In 1996, Tommy Ray has a stroke, which confines him to a wheelchair. His son Ray Brent Marsh now runs his father's cremation business. Like the rest of his family, Ray Marsh is well regarded in the community. He was a star sprinter at LaFayette High School, co-captain of the football team, and a linebacker at the University of Tennessee at Chattanooga. He is the treasurer at New Home Missionary Baptist Church, which his family helped start 93 years earlier. His mother sings in the choir. He and his wife Venessa recently had a baby girl. Like his parents, Marsh lives on the crematory grounds.

More than 30 funeral homes in the area use Tri-State Crematory, which is the only independent crematory. The Marshes charge as little as \$250, where other such companies tend to start at \$600. The Marshes have never really needed to advertise. One funeral director who did business with them noticed that there wasn't really any paperwork or tracking system, and the business, which is just in a shed, seemed a bit unprofessionally run.

In Georgia, the cremation industry was unregulated until 1990. Even when regulation began, there were only two inspectors. Recently, Georgia's Funeral Service Board has been trying to close down Tri-State. After an investigation that resulted in charges of operating without a state license, Marsh was granted exemption from some of the newer regulations, such as that requiring that a funeral director run the facilities; the Marshes argued that their daughter needed time to get certified as a funeral director. When the two-year exemption ended, the Board tried again to enforce the regulations and close the business. Marsh lobbied State Representative Mike Snow for another exemption, but Snow refused. The Marshes' attorney successfully argued, however, that the Marshes' facility did not fall within the regulatory definition of a crematory, defined as a place where cremations are done that is run by a funeral director and "open to the public."

Revised regulations are proposed for the industry, but language to close the loophole that the Marshes exploited have not made the final draft. The Board eventually gives up, thinking that the Marshes would get tired of the business and close it down after a short time or that people wouldn't want to do business with an unlicensed crematory. "We felt he would be out of our hair in a short while," James Neal, a member of Georgia's Funeral Services Board, would later say.

Yet, for now, Tri-State remains busy. For the most part, funeral directors are happy to let Marsh continue his father's business. They know that there is sometimes abuse in the industry, and that they should visit facilities or make

