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Four Distinctions That Glanville Williams Did Not Make: The Practical Benefits of Examining the Interrelation Among Criminal Law Doctrines

Paul H. Robinson
University of Pennsylvania Carey Law School

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Four distinctions that Glanville Williams did not make: the practical benefits of examining the interrelation among criminal law doctrines

PAUL H. ROBINSON*

As a student, I much admired Glanville Williams as one of the greatest living criminal law scholars. He is the reason I went to study at Cambridge after law school. His *General Part* was the most sophisticated criminal law treatise of the day. His *Textbook*, which he published the year after I left Cambridge, seemed a genuine innovation. The historical distance only seems to confirm the importance of his contributions.

As a matter of content, we tend to think of Glanville Williams as the mainstream of criminal law. His books have had such influence that they mark out much of what is now generally accepted. It is easy to forget, perhaps, that in his time he was something of a rebel. He was a free thinker who followed the argument where it led him, with a certain fearlessness about the consequences.

But my topic here concerns an area in which he was much less rebellious: the organizational principles for criminal law doctrines. His approach represents the classic United Kingdom scheme, which essentially follows the evolved common law structure of criminal law. He was largely responsible for popularizing the general part–special part distinction, but he did not go much beyond that in framework innovation.

In the United States, by contrast, there has been an explicit break with the common law framework. In the 1950s, the American Law Institute (ALI) essentially started from a blank slate and produced a structure for criminal law doctrine that it thought was more useful, and used this structure in the organization of its Model Penal Code. Glanville Williams

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was a consultant to the ALI during this work, but its framework renovation must have had little effect on him. His second edition of the *General Part*, published in 1961, shows apparent indifference to the Model Penal Code framework. His 1982 article, "A Theory of Excuses," concludes that the justification–excuse distinction, which the Model Penal Code drafters thought to be important, was of limited significance. The second edition of his *Textbook*, published the following year, remained uninfluenced by the distinction.

His concern was not that the distinction could not be made or that it was irrational, but rather that it simply had little practical significance, certainly nothing important enough that it should influence his organization of doctrine within his books. In this chapter, I would like to take up Glanville Williams' challenge and show that there is real practical value not just in the justification–excuse distinction, but in the general enterprise of examining the interrelation among different criminal law doctrines. Understanding how different doctrines are similar and are different from one another can improve criminal law in all of its functions. The failure to undertake such an examination can invite error and confusion.

Up front, I would concede that there might be some cost or at least risk in changing the existing framework that current judges, lawyers, and lawmakers have in their minds. Glanville Williams was influential with these people in part, I suspect, because he talked to them in their own terms. His analysis used as its reference points the framework of criminal law that they shared. They were not alienated or distracted by attempts to change that basic framework. But I want to argue that, while there is some risk in the enterprise, the benefits outweigh those risks. Introducing useful categories and distinctions among criminal law doctrines can produce such practical benefits that judges, lawyers, and lawmakers would quickly adapt to the revised framework and soon enough feel comfortable with it.

To illustrate my point that many distinctions can be important and useful, I will look at four distinctions, none of which Glanville Williams used in the organization of criminal law doctrine in his books. None of these distinctions are new with this chapter. Some will be familiar to some readers, but perhaps not all, so I will give some brief background for each.

The first and second distinctions I will look at come from looking at criminal law doctrine from what might be called an "operational" perspective. The first category, general defenses, are doctrines that provide a

defense to liability even though the defendant satisfies all the elements of the offense definition. The second category that I will talk about does the reverse: the "doctrines of imputation" impose liability on a defendant even though he does not satisfy all of the elements of the offense definition. That is, doctrines of imputation treat the defendant as if he satisfies an offense element that he in fact does not. Taken together the offense definitions, the general defenses, and the doctrines of imputation organize most of the doctrines within criminal law.

The third and fourth distinctions that I will consider are also related to one another. They look at criminal law doctrine from what might be called the "functional" perspective. Criminal law performs two quite different functions: it announces *ex ante* the rules of conduct for the community, then, upon a violation of those conduct rules, it adjudicates *ex post* the violation.

In this chapter I am not so much trying to sell these distinctions so much as trying to sell the importance of the enterprise – specifically, the practical value of examining the interrelation among criminal law doctrines. Many of these distinctions are at the core of my book *Structure & Function in Criminal Law*, which was dedicated to the memory of Glanville Williams, who died the year the book was published. I offer this short chapter as a rededication to that memory.

I Conceptual differences among general defenses: justifications, excuses, and non-exculpatory defenses

The first distinction that I would like to discuss distinguishes three kinds of general defenses: justifications, excuses, and non-exculpatory defenses. All general defenses fall into one of these three categories. I would define the categories in the following way. (Others have sometimes defined them differently.) As for the distinction between justification and excuse, which is the most familiar to people, I would define justification defenses as doctrines that give a complete defense, even though the defendant has satisfied all the elements of the offense definition, because his conduct is the right thing to do in the relevant circumstances. The law would be happy to have others do the same conduct under the same circumstances in the future, or at least would be similarly tolerant of it. Excuse defenses, in contrast, are doctrines in which the defendant has done something wrong. The law would wish that others would not repeat such conduct in the future, but this defendant is to be given a defense because he is blameless for doing it. Non-

exculpatory defenses are doctrines in which the defendant is given a defense, even though he may satisfy the elements of the offense definition and he is neither justified nor excused, but his acquittal serves to advance some other, typically important, interest.[1]

Justification defenses include defensive force justifications like self-defense and defense of others, public authority justifications like law enforcement authority, and the general justification of lesser evils. Excuse defenses include the disability excuses of insanity, involuntary intoxication, duress, and immaturity, and certain reasonable mistakes that render the defendant blameless (other than by negating an offense element). Non-exculpatory defenses include such doctrines as diplomatic immunity, double jeopardy, the legality doctrines, and the statute limitations, for example.

Glanville Williams understood the distinctions among these three groups of general defenses, but thought them of little importance. Williams noted the historic distinction between justification and excuse defenses, but saw it as being of little value to modern law.[2] "What is the difference between a justification and an excuse? Very little. They are both defenses in the full sense, leading to an acquittal. However, when the act is not justified but only excused it is still regarded as being in some tenuous way wrong, for certain collateral purposes."[3] Similarly, he placed little emphasis on non-exculpatory defenses as a group, referring to them as "certain technical points alleged by the defendant in order to avoid liability,"[4] and devoting little space in both his *Textbook* and his

[1] For a more detailed discussion, see Paul H. Robinson, *Structure and Function in Criminal Law* (Oxford: Clarendon Press, 1997), pp. 71–77.

[2] Glanville Williams, *Textbook of Criminal Law* (London: Stevens, 1978), p. 51 (hereinafter Williams, *Textbook*).

[3] Williams, *Textbook*, p. 51. Williams' failure to see the justification–excuse distinction as defined here, together with the lack of recognition of that distinction in the then current law, meant that there was considerable uncertainty about what was a justification and what was an excuse, and whether it mattered. For instance, he differentiated self-defense from a lesser evils defense by saying that: "It is sometimes thought that the difference between private defence [self-defence] and necessity [lesser evils] is that the former presupposes a wrong while the latter does not." Glanville Williams, *Criminal Law: The General Part* (London: Stevens, 1961), pp. 233–234 (hereinafter Williams, *The General Part*). He then goes on to minimize the importance of the distinction saying: "The line is pretty thin, and there is hardly any legal need to draw it." *Ibid.* At another point he says that duress, a defense understood to be an excuse, may also be analogized to a "type of necessity," which could be either a justification or excuse, depending upon how one defines the defense. *Ibid.* at pp. 759–762.

[4] Williams, *Textbook*, p. 51.

General Part to the concept.[5] And when he discussed non-exculpatory defenses, Williams did not note their conceptual difference with other general defenses. For example, he discusses diplomatic immunity in a chapter on criminal capacity that also discusses excuses like immaturity and insanity.[6]

I want to argue that there are important practical benefits that flow from distinguishing these three kinds of general defenses. For example, once one sees that two defenses are the same group – that is, that they play an analogous role – it follows that their formulations ought to be analogous or least consistent.[7] For example, the defenses of insanity and involuntary intoxication provide an excuse where one's disability causes significant dysfunction in the defendant at the time of and in relation to the offense. The dysfunction might be to a defendant's cognitive processes or, as some jurisdictions recognize, the dysfunction might be an impairment to a defendant's capacity to control his conduct. The Model Penal Code in fact uses the exact identical language in defining the excusing conditions for the two defenses: the defendant must "lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

But it is not uncommon for jurisdictions to fail to see the analogy between these two excuses and to define the excusing conditions for the two in inconsistent ways. For example, Alabama recognizes substantial control impairment as a basis for an involuntary intoxication defense, yet denies the same dysfunction a defense when it results from mental illness. Georgia has the reverse asymmetry. It allows the control impairment to provide the basis for an excuse if it results from mental illness, but not if it results from involuntary intoxication.[8] If the extent of a control impairment is identical in two cases, yet one dysfunction is caused by involuntary intoxication and the other by insanity, on what grounds could one provide an excuse in one case and not the other?

A second example of the practical value of these differences between general defenses is in the definition of the triggering conditions for the

[5] With the exception of diplomatic immunity and entrapment, Williams did not write any sections in either of his books that focussed exclusively on non-exculpatory defenses (e.g., exclusionary rule, double jeopardy, statute of limitations).

[6] Williams, *Textbook*, ch. 28, pp. 637–645.

[7] See Robinson, *Structure and Function*, pp. 83–92, 98–100.

[8] See Paul H. Robinson, "A System of Excuses: How Criminal Law's Excuses Defenses Do, and Don't Work Together to Exculpate Blameless (and Only Blameless Offenders)," *Texas Tech Law Review*, 42 (2009), 268–270.

use of defensive force. This is an instance where the defense distinctions are simply essential to the proper operation of the doctrine. That is, one simply cannot properly define triggering conditions for defensive force without recognizing the defense distinctions as I have set them out above. We want a defendant to be able to defend against the excused attacker or an attacker with the non-exculpatory defense – the psychotic or the immune diplomat – but we do not want the defendant to be able to lawfully defend against an objectively justified actor – such as the law enforcement officer making a lawful arrest.[9]

A third example of the practical importance of these general defense distinctions is seen in the problem of ambiguous acquittals that arises when these distinctions are not recognized. Note that justification and excuse defenses say directly opposite things about the defendant's conduct: a justification defense announces that the conduct is condoned; an excuse defense announces that the conduct is condemned. Where these two kinds of general defenses are not distinguished, as in a general verdict of acquittal, it is easy for an excuse to be mistaken for a justification.

Recall the Rodney King case in which, after a long car chase, officers surrounded Rodney King and continued to beat him. The jury acquitted the officers, and riots in Los Angeles followed. The jury acquittal may well have been on the theory that the adrenaline build-up during the long car chase, the lack of adequate training to deal with such circumstances, as well as the lack of good supervision on the scene, meant that the conduct was not justified – it was excessive – but that the defendants did not deserve to be punished for it. In other words, the striking conduct on the tape is an example of conduct that we would not want repeated in the same circumstances in the future, but it is not to be punished in this instance because the officers were blameless for it. Yet with an ambiguous general verdict of acquittal, people in the community could easily have come to the conclusion that the conduct they saw on the tape was conduct that the criminal law was condoning (as objectively justified), and that could be quite upsetting.[10] It is easy enough to construct a more nuanced verdict system of a "no violation" verdict and a "blameless

[9] Williams seems to concede this: in discussing a person's right to defend against an insane attacker, he explains that "the lunatic has an excuse, on the ground of lack of *mens rea*; but his act of aggression is not authorised by law. It is not *justified*. This is one of the differences in law between a justification and an excuse." Williams, *Textbook*, p. 502.

[10] See Robinson, *Structure and Function*, pp. 119–121.

violation" verdict, but such a solution would be ineffective where the doctrine does not itself distinguish between (objective) justifications and excuses.[11]

A fourth illustration of practical value concerns what one might call post-acquittal collateral consequences. For a justification defense, there ought to be none. What the defendant did was the right thing to do, which others can do in a similar situation in the future. For an excuse defense, one might want to at least ask the question whether the cause of the excusing conditions is recurring. We already do this with insanity acquittals, by having a special verdict for "not guilty by reason of insanity," which is commonly followed by an examination to determine whether civil commitment is appropriate. But there might be any number of situations that give rise to excuse defenses that would benefit from future civil supervision or even just education. Non-exculpatory defenses present an even stronger case for the possible need for collateral consequences. It may well be that we want to give the serial child molester a double jeopardy defense for the case at hand, but that does not mean that we should not be sure that he is denied a license to drive school buses.[12]

Finally, note that non-exculpatory defenses are importantly different from justification and excuse defenses in their potential to undermine the moral credibility of the criminal law. Having justification and excuse defenses that are robust – that fully capture all the nuances of the community views of desert – is important for building and maintaining the criminal law's moral authority with the community, and, as I have discussed elsewhere, that moral credibility can have important implications for the crime-control effectiveness of the criminal law. A criminal law that has earned a reputation for reliably doing justice, no more but no less, is a system that improves its ability to stigmatize and is thus likely to prompt cooperation and acquiescence, rather than subversion and resistance. In turn, this criminal law system is more likely to get

[11] See Paul H. Robinson, "Rules of Conduct and Principles of Adjudication," *University of Chicago Law Review*, 57 (1990), 766–767; Paul H. Robinson and Michael T. Cahill, *Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve* (New York: Oxford University Press, 2006), pp. 210–212.

[12] In their current formulation, many non-exculpatory defenses operate to bar a fair adjudication of the case facts. See Robinson, *Structure and Function*, p. 70: "Diplomatic immunity may provide a defense, without regard to the guilt or innocence of the actor, because by forgoing trial and conviction of the offending diplomat our diplomats abroad are free from prosecution by their host countries."

deference in borderline cases where people are unsure about the "condemnability" of the conduct at hand, and, most importantly, will have a greater voice in the shaping of social norms that can harness the powerful forces of social influence.[13]

But every instance of a non-exculpatory defense is a potential failure of justice. Letting a potentially blameworthy offender go free, and doing so intentionally, can seriously undermine the system's moral credibility. It follows then that we should not be quick to make non-exculpatory defenses as robust as possible, thus taking quite a different approach than in the formulation of justifications and excuses. Non-exculpatory defenses, in contrast, ought to be defined as narrowly as possible to achieve their objective. Each aspect of a formulation ought to be tested to see whether the benefits that flow from it can justify the predictable costs to the system's moral credibility that the intentional acquittal of a blameworthy person will cause.[14]

II Doctrines of imputation: complicity, voluntary intoxication, diminished capacity, and *Majewski*

The second distinction that I want to offer as having practical benefit is that which sets apart from offense definitions and general defenses the doctrines of imputation. The most common such doctrines are voluntary intoxication and complicity, but also include causing crime by an innocent, transferred intent, the Pinkerton Doctrine in the United States, the complicity aspect of felony-murder rule, and others.[15] Glanville Williams obviously discusses the important imputation doctrines,[16] but makes no reference to the imputation process as operationally

[13] See Paul H. Robinson and John M. Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy," *Southern California Law Review*, 81 (2007), 1, 18: "Human beings will demand justice for serious wrongdoing, and [failure to do justice] ... would produce intolerable consequences"; Paul H. Robinson, Geoffrey P. Goodwin, and Michael D. Reisig, "The Disutility of Injustice," *New York University Law Review*, 85 (December 2010), 1940, Pt IV (presenting studies that show how the criminal justice system loses community deference if it fails to align with society's morals and notions of desert).

[14] Robinson, *Structure and Function*, p. 73: "Permitting [non-exculpatory] defenses undermines the purposes for which criminal liability is imposed"; Robinson and Cahill, *Law Without Justice*, Pt III.

[15] See Robinson, *Structure and Function*, pp. 59–64.

[16] See generally, Williams, *General Part*, chs. 9 and 11; Williams, *Textbook*, chs. 15 and 21.

different from other doctrines, nor does he note similarities between the provisions that make up the doctrines of imputation.

As my first exhibit on the practical benefits of recognizing the conceptual category, let me offer a passage from *Director of Public Prosecutions* v. *Majewski*,[17] where the court, quoting Lord Hailsham in *Director of Prosecutions* v. *Morgan*, said:

> Once it be accepted that an intent of whatever description is an ingredient essential to the guilt of the accused I cannot myself see that any other direction [than requiring proof of the intent] can be logically acceptable. Otherwise a jury would in effect be told to find an intent where none existed or where none was proved to have existed. I cannot myself reconcile it with my conscience to sanction as part of the English law what I regard as a logical impossibility, and, if there were any authority which, if accepted, would compel me to do so, I would feel constrained to declare that it was not to be followed.[18]

These are strong words, but they reflect a serious misconception of the process of imputation. The imputation of missing offense elements is not itself a matter for concern. And if doctrines of imputation had been recognized as a doctrinal category, this would have been obvious to Lord Hailsham and "the academics" who share his view and to the court in *Majewski*. Imputation is a common and sensible process that is done in a host of doctrines, such as complicity. Puzzling over the propriety of imputation only distracts from the important issue that should be the point of focus for every doctrine of imputation: is that which is being imputed by the doctrine justified by the conditions that the doctrine sets for that imputation?

That is the central test that must be the focus in all instances of imputation. So, for example, most people seem to think that the requirements of the complicity doctrine do generally justify treating the offender as if he had satisfied the conduct elements of the offense definition, even though he does not in fact. In the case of the doctrine of voluntary intoxication, one can see some basis for an imputation: the defendant's culpability in voluntarily intoxicating himself as he did is seen to justify treating him as if he has some other culpability that might be required for the offense. However, once we announce the "imputation test question," we may be somewhat more critical of the doctrine. Negligence as to becoming intoxicated – typically what is required in

[17] [1976] 2 All ER 142.

[18] *DPP* v. *Morgan* [1975] 2 All ER 347, at p. 360, quoted in *Majewski* [1976] 2 All ER at 166.

the United States to trigger the imputation – may be an adequate moral justification for imputing some missing offense culpability elements, but perhaps not all. For example, such negligence as to becoming intoxicated may not be adequate to justify imputation of recklessness as to causing death, as is required for manslaughter, yet the doctrine would operate to impute such missing culpability.[19] Seeing that the apparently disparate doctrines have the common imputation effect prompts this "imputation test question," which reveals many as coming up short.

Another practical advantage of recognizing the category of imputation doctrines is the help it provides in seeing when such imputation occurs. Imputation takes a variety of forms. In complicity, the doctrine is quite explicit: the rule often explicitly provides that the perpetrator's conduct is being "imputed" to the defendant under the described conditions. In the doctrine of voluntary intoxication, the language is a bit less explicit: where the defendant has voluntarily intoxicated himself, his unawareness of the risk required by the offense definition is said to be "immaterial," yet it is obvious that this means that it is to be imputed – the actor is to be treated as if he satisfied the offense element even though in fact he does not.

In other doctrines, however, the imputation is even more obscured. For example, consider the doctrine that governs what is sometimes called "diminished capacity" or some similar phrase in the United States, that is, the rules governing the use of mental illness to negate an offense culpability element. The Model Penal Code allows evidence of mental illness to be introduced to negate any offense element, but 60 per cent of the jurisdictions in the United States adopt rules that purport to restrict the defendant's ability to introduce evidence of mental illness that would show that he did not have the required offense culpability.[20] These doctrines are sometimes presented as if they were defenses or mitigations but, of course, in practice they are just the reverse; they are doctrines of imputation. They treat the defendant as if he satisfies the required offense element when in fact he does not. That his mental illness negates the required offense element is treated as immaterial.

This operation of the doctrine of diminished capacity serves to illustrate the usefulness of the doctrinal category of imputation in another way. Once the operation of a doctrine shows it to be a doctrine of

[19] See Robinson and Cahill, *Criminal Law*, §5.3: "Hypothetical with Buff and Sharon on Voluntary Intoxication."

[20] See authorities collected at Robinson and Cahill, *Criminal Law*, §15.1 (noting "diminished capacity" as a basis for mitigation and the modern rules related to it).

imputation, thus triggering the "imputation test question," the answer to the question for the doctrine of diminished capacity is revealing: are the offense elements imputed by the doctrine in fact justified by the doctrine's conditions? In the case of diminished capacity, there are no conditions other than the character of the evidence being related to mental illness. But on what grounds might one argue that the defendant has some culpability for being mentally ill that justifies imputing to him a required culpability offense element that he does not in fact have? While the doctrine of voluntary intoxication may not be perfect, at least one can point to some prior culpability (as to becoming intoxicated) that provides some arguable basis for imputing of some offense culpability. But the mentally ill defendant is not likely to be culpable for causing his own mental illness (short of a case where he has failed to take his needed medication). Once we understand that diminished capacity is in truth a doctrine of imputation, its impropriety becomes more obvious.

III Functional differences among doctrines: *ex ante* articulation of rules of conduct versus principles of *ex post* adjudication

A third distinction that has practical benefits arises from taking a "functional" perspective of the doctrine, focusing upon the two different and sometimes competing functions of criminal law: announcing *ex ante* the rules of conduct for the community, and adjudicating *ex post* violations of those rules. What is perhaps most striking about this distinction is that it maps directly onto the doctrines. That is, each doctrine, or part of a doctrine, serves either one function or the other. If one were to review the provisions of a comprehensive criminal code, one would be able to mark out those specific passages that were required to give the community a statement beforehand of what they can, cannot, and must do: the rules of conduct. The remaining code provisions are necessary only for the *ex post* adjudication process. As it turns out, the proportion of the criminal law that serves to set the rules of conduct is quite a small proportion, and this fact, as we shall see, turns out to have practical importance.

Figure 5.1 gives a simplified summary of which doctrines serve which function. A more detailed account is available in my *Structure and Function* book.[21]

[21] For a more detailed analysis, see Robinson, *Structure and Function*, Pt III, in particular, see figure at p. 141.

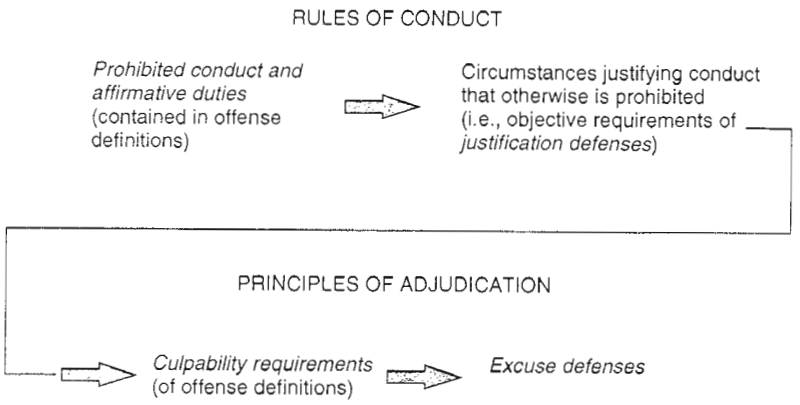

Figure 5.1

In order to state the rules of conduct, one must include a description of the prohibited conduct and affirmative duties, which are typically contained in offense definitions, as well as the objective requirements of justification defenses, which define general exceptions to the prohibitions and duties contained in offense definitions. The primary components of the *ex post* principles of adjudication are found in the culpability requirements within offense definitions and in excuse defenses.

A number of examples of the practical benefits in making these distinctions in the function of doctrines has already been reviewed in section I, above. Note that justification defenses serve to announce the rules of conduct, while excuse defenses serve the principles of adjudication. Thus, all the practical benefits from recognizing that distinction, examined in section I, serve also as illustrations of the practical value of the functional distinction. Recall, for example, the value in seeing different defenses as part of the same general defense category, as in assuring consistency between the excusing conditions of insanity and involuntary intoxication excuses; the essential nature of the distinction in defining the triggering conditions for defensive force; the solution to the problem of ambiguous acquittals; the important differences in implication for post-acquittal collateral consequences; and the differences in effect on the criminal justice system's moral credibility and thereby its crime-control effectiveness.

But let me give several other examples that go beyond these practical benefits of the justification–excuse distinction. For example, mixing the

rules of conduct in with the principles of adjudication, which is the standard form in modern criminal codes and is necessarily the case in common law systems, has the detrimental effect of obscuring the rules of conduct within an overlay of principles of adjudication. The rules of conduct represent a relatively small portion of a criminal code, and if they were pulled out into a separate code of conduct, with the other provisions left to be organized into a separate code of adjudication, one could much more effectively perform the function of announcing the rules of conduct to the community. One could imagine a world in which we really took seriously the obligation of government to inform citizens of the rules to which they are bound on pain of criminal conviction. Indeed, one could produce a relatively short pamphlet that sets out all those rules that told citizens what the criminal law expected of them – something that could be carried by officers, and studied by high school students to graduates.[22]

Note, for another example, that the drafting styles one would use in these two documents – code of conduct and code of adjudication – would be quite different because their audiences are different. The code of conduct, addressed as it is to the lay community to guide them in their everyday life, ought to be written in a form that is as simple and as objective as possible. It ought to be easy to understand, remember, and apply. Indeed, its rules will sometimes have to be applied quite quickly and under difficult circumstances, such as the rules governing the use of defensive force. In contrast, the code of adjudication is one that can be, and probably should be, much more subjective and complex. It must capture the complexities of our judgments about blameworthiness. It will be applied only by people who have whatever time they need to apply it, as well as special training or instruction: lawyers, judges, police officers, and jurors acting under their jury instructions.

In addition to these practical benefits of the distinction in permitting codes that more effectively perform their function – drafting rules of conduct that more effectively communicate their demands to those bound to obey them, and drafting principles of adjudication that provide nuanced and thoughtful *ex post* adjudication of violations – let me give a few specific doctrinal examples of practical benefits that can flow from recognizing the functional distinction between doctrines. Consider, for example, the treatment of risk in modern codes.

[22] Robinson, *Structure and Function*, pp. 157–164.

Modern codes commonly define offenses as recklessly causing one result or another. The offense of manslaughter is recklessly causing another's death. The offense of endangerment is recklessly endangering another. Thus, the operation of these offenses is wholly dependent upon the definition of recklessness. The Model Penal Code, for example, defines "recklessness" this way:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be *of such a nature and degree that, considering the nature and purpose of the actor's conduct* and the circumstances known to him, its disregard involves a gross deviation from *the standard of conduct that a law-abiding person* would observe in the actor's situation.[23]

The difficulty is that there are two quite different sorts of requirement at issue here, which are being mixed together, creating confusion and error.[24] In the context of rules of conduct, the law must define those *ex ante* risks that are prohibited. Not all risks are prohibited. Presumably this definition will mark out the kinds of harm that ought to be avoided as well as identifying some sliding scale between probability and harm. That is, citizens ought to know that even minor risks of causing another's death ought to be avoided, but that some greater degree of risk may be acceptable for some lesser harm, such as bumping into somebody on the street. The italicized language in the "recklessness" definition above shows some sensitivity to the need for such considerations in defining prohibited risks.

In the context of principles of adjudication, the issue does not concern *ex ante* objective risks at all, but rather subjective risk-taking – that is, a defendant acting with a certain awareness of risk in certain circumstances existing in the real world. Thus, the principles of adjudication may hold a defendant liable for unconsent to intercourse only if, at the time of intercourse, he was aware of a certain possibility that his partner was not consenting.

Yet by failing to appreciate the two quite different functions of criminal law doctrine, by mixing them together throughout the code, by failing to appreciate the difference between the rules of conduct's *ex ante* objective prohibited risk definition and the principles of adjudication's culpable risk-taking definition, the Model Penal Code confuses

[23] Model Penal Code, §2.02(2)(c) (emphasis added).

[24] See Robinson, "Rules of Conduct and Principles of Adjudication," pp. 745–749.

the two in a way that is likely to hurt both functions.[25] For example, in the manslaughter and endangerment offenses noted above, the Code simply fails to provide any statement of the needed rule of conduct. That is, it says nothing about what the prohibited risk is. And its principle of adjudication definition of culpable risk-taking ends up being distracted by factors that are relevant primarily to issues of *ex ante* risk definition. By mixing the two functions, the Code invites a similar confusion in its readers. Notions of risk-creation and risk-taking are often used interchangeably.[26]

This can also invite liability errors. Consider, for example, the case where a defendant dumps what he believes are toxic chemicals in a field next to a schoolyard, believing that such dumping will create a risk of death or serious injury to those playing in the schoolyard. If he is correct, and such an *ex ante* risk actually is created, he is properly liable for endangerment and, if somebody becomes sick or dies, he is properly liable for aggravated assault or manslaughter. However, consider the situation where he is mistaken, where the material he dumps has no toxicity because he has been duped in some earlier transaction. A system that cared about the significance of resulting harm and, therefore, probably cared about the existence of a real *ex ante* risk, as opposed to only the subjective belief of risk, would want to punish the actual risk-creation more severely than a simple mistaken belief that a risk was created. Presumably, the liability in the latter case of mistake would be in the nature of attempt liability; the defendant would be liable at most for attempted endangerment, with a lesser offense grade than if he actually had created a real-world risk of harm to the children in the schoolyard. Yet by having only a definition of culpable risk-taking, and by defining offenses purely in terms of culpable state of mind, as the Model Penal Code does, the code treats the latter case as no different from the former and would impose full liability for endangerment even though no *ex ante* risk was ever created.

[25] A better approach is to give independent definitions of criminal risk and of culpable risk-taking. Risk-creation offenses, then, are properly defined to prohibit creation of a "criminal risk" of the specific harm, incorporating by reference the general formula. This replaces the current practice of defining these offenses by using either undefined terms such as "risk" or "substantial risk," or by using culpability terms that drop the requirement that the prohibited risk actually be created. For a proposed formulation, see Robinson, *Structure and Function*, pp. 148–155.

[26] See, e.g., Lawrence Alexander, "Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law," in E. Paul, F. Miller, Jr., and J. Paul (eds.), *Crime, Culpability, and Remedy* (Oxford: Blackwell, 1990), pp. 88–89.

This might be a tolerable result if a jurisdiction did not believe in the significance of resulting harm, but would be an inappropriate result for the vast majority of jurisdictions that do. Unfortunately, many states whose codes are based on the Model Penal Code take this view, but are then misled into ignoring the difference between a case of real-world prohibited risk-creation and purely subjective risk-taking.[27]

IV Two kinds of legality: conduct rule legality and adjudication legality

The final distinction to discuss concerns the principle of legality. In its classic form, the legality principle is an umbrella concept for five or six doctrines all of which express a preference for a prior, written, specific statement of criminal law rules. In the United States, these doctrines typically include the statutory prohibition against the judicial creation of offenses, the statutory abolition of common law offenses,[28] the constitutional prohibition against vague statutes,[29] the constitutional prohibition against *ex post facto* application of criminal statutes,[30] as well as a bar on the retroactive application of judicial interpretations of criminal statutes and the rule of strict construction of criminal statutes.[31]

[27] For a more detailed discussion, see Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentativeness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, vol. 4, No. 1, art. 7, available at: http://www.bepress.com/til/default/vol4/iss1/art7.

[28] In the Model Penal Code, both limitations are achieved by the force of section 1.05(1): "No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State." The UK and US systems are not the same in this respect. In 1962, for example, the English House of Lords approved the prosecution of a common law offense of "conspiracy to corrupt public morals." *Shaw* v. *Director of Public Prosecutions* [1962] AC 220 (HL) (defendant published *Ladies Directory* that contained names, addresses, and phone numbers of prostitutes).

[29] The *vagueness* prohibition is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. The doctrine requires that a statute should give "sufficient warning that men may conform their conduct so as to avoid that which is forbidden." *Rose* v. *Locke*, 423 US 48, 50 (1975) (statutory phrase "crime against nature" gave adequate notice that forced cunnilingus was prohibited).

[30] US Constitution, Art. I, §9, cl. 3: "No bill of attainder or *ex post facto* law shall be passed"; US Constitution, Art. I, §10, cl. 1: "No State shall . . . pass any bill of attainder, [or] *ex post facto* law."

[31] See, e.g., *Rewis* v. *United States*, 401 US 808 (1971) (ambiguity in statute prohibiting interstate travel with intent to "promote, manage, establish . . . certain kinds of illegal activity," could not be construed to extend to operation of illegal establishment frequented by out-of-state customers).

It is appropriate that these doctrines are grouped under the umbrella principle of legality because they share overlapping rationales, of which I will now share five of the commonly presented rationales. A legality principle makes good sense because it helps to provide fair notice to citizens of what the criminal law requires of them; it increases the likelihood of compliance with the criminal law by making the rules clear, thereby improving the effectiveness of deterrence and avoiding over-deterrence that can have an inappropriate chilling effect on conduct; it helps reserve the criminalization authority to the legislature, the most democratic branch; it increases the uniformity in application of criminal law rules; and it reduces the potential for abuse of discretion in the application of those rules. Each of the legality doctrines typically rely on some combination of these rationales, often a different subset for different doctrines.

I want to argue here that there is in fact not a single principle of legality, but rather two quite different principles of legality: conduct rule legality and adjudication legality, which mirror the distinction between rules of conduct and principles of adjudication.[32] If one considers more carefully the legality principle rationales, one sees that the first two concern notice and compliance, which relate almost

[32] Glanville Williams wrote extensively on the legality principle and discussed its rationales (Williams, *The General Part*, ch. 12; Williams, *Textbook*, §§1.3, 1.4, 1.8), but did not suggest that there were two kinds of legality or two different roles or aspects of the legality principle. Nonetheless, he did recognize some of the implications of the differences between conduct rule legality and adjudication legality. For example, he explained that rules of conduct must be accessible to the public, while adjudication rules need not be. "Penal laws should be accessible and intelligible . . . Criminal law is not like the law of procedure, meant for lawyers only, but is addressed to all classes of society as the rules that they are bound to obey on pain of punishment": Williams, *The General Part*, p. 582. Then he later says: "The layman does not need to learn the difference between murder and manslaughter in order to understand that he must not kill others. While everyone should know that he may be punished if he assaults another, he does not, in general, need to be told the scale of punishment that may legally follow each particular kind of aggravated assault," *Ibid.* He notes other distinctions that track the two kinds of legality. Thus, while judicial discretion in the definition of offenses may offend the legality principle, it "does not, in its usual acceptance mean that the actual punishment must be established by law," *Ibid.*, at p. 606. Judges have discretion in sentencing and "modern tendency has been to find substitutes for punishment . . . all in the discretion of the court," *Ibid.* Consistent with this, in *The General Part*, Williams provides an entire chapter on legality, but only touches on legality in adjudication in a single section within the chapter on punishment, *Ibid.*, at ch. 12, §192. Similarly, in *Textbook*, he has separate sections that touch on legality concepts for conduct rules versus adjudication (e.g., §1.3 is relevant to conduct and §1.8 is relevant to adjudication).

exclusively to the *ex ante* rules of conduct. In contrast, the last two rationales relate almost exclusively to controlling discretion in the *ex post* adjudication process.

To summarize:

Legality rationales as related to ex ante *conduct rules and* ex post *adjudication*

	Rationales:	*As related to conduct rule legality and adjudication legality:*
1	• Providing fair notice. • Gaining compliance with criminal law rules, including effective deterrence and avoiding over-deterrence (chilling effect).	Relate to *ex ante* function of announcing rules of conduct. (*Conduct rule legality* applies.)
2	• Reserving the criminalization authority to the legislature.	Relates to both.
3	• Increasing uniformity in application. • Reducing the potential for abuse of discretion.	Relate to *ex post* function of adjudication of rule violations. (*Adjudication legality* applies.)

The distinct principles of conduct rule legality and adjudication legality have important practical consequences because they suggest that when the classic legality doctrines are applied, they ought to be applied differently to rules of conduct than when applied to principles of adjudication. For example, the standard legality doctrines commonly make sense in their traditional form when applied to the rules of conduct. To assure that citizens have fair notice of the rules of conduct, it follows that vague statutes ought to be barred, that common law rules ought to be abolished, that judicial creation of offenses ought to be prohibited, and that judicial interpretation of broadened statutes should not be retroactive.

But when those same legality doctrines are applied to doctrines that serve the principles of adjudication, where the same notice and compliance concerns do not exist, the proper results are quite different. We may well want to allow what otherwise would be considered a vague statute, if it is necessary to capture the complexity and nuance in our judgments of

blameworthiness.[33] For example, in the defenses of insanity and involuntary intoxication discussed above, we are quite comfortable with a standard as vague as "lacks substantial capacity" to appreciate the criminality of one's conduct. We need a relatively vague standard here because it is meant primarily as an invitation to the decision maker to consult intuitions about what can be expected of a defendant under the circumstances of dysfunction in which he committed the offense. Similarly, when considering principles of adjudication, we might well want to allow a common law excuse, to allow a court to create a new or expand an old excuse, or to retroactively apply a broadened excuse defense (as long as the existing criminal code does not have a legislative direction that precludes such judicial exercise of authority).

V Conclusion

Here, then, are four distinctions that Granville Williams did not make, but which I think have practical benefits that we ought to be, and he would have been, attracted to. Not all distinctions that one could make have practical benefits. A distinction might have some appeal for philosophers, for example, yet have no practical value for the operation of the doctrine, in which case its use would bring only unnecessary cost and confusion.

For example, if one were to rely upon a subjective conception of justification defenses – that is, if one included mistaken justification within the concept of justification, as the Model Penal Code does, and as a host of modern theorists do – then most of the practical benefits discussed above would disappear.[34] Such a subjective conception of justification generally destroys the practical value of the justification–excuse distinction. For example, while we would want to prohibit defensive force against an objectively justified attack, we would not want to prohibit it against an attacker who only mistakenly believes his attack is

[33] See generally, Paul H. Robinson, "Why Does the Criminal Law Care What the Layperson Thinks is Just?: Coercive Versus Normative Crime Control," *Virginia Law Review*, 86 (2000), 1839–1869.

[34] See Paul H. Robinson, "Objective versus Subjective Justification: A Case Study in Function and Form in Constructing a System of Criminal Law Theory," in P. Robinson, S. Garvey, and K. K. Ferzan (eds.), *Criminal Law Conversations* (Oxford University Press, 2009), p. 343; but see Mitch N. Berman, "In Defence of Subjective Justifications," in Robinson, Garvey, and Ferzan (eds.), *Criminal Law Conversations*, p. 357.

justified, even if that belief were reasonable. By combining the two, into a subjective conception of justification, the resulting conception no longer works as a proper trigger for the use of defensive force.

Similarly, one would want objectively justified conduct to be marked by a "no violation" verdict to signal to others that they can do the same thing under similar objective circumstances in the future, but we would not want to send such a signal for an actor who only mistakenly believes he is justified. If his mistake was reasonable, we might want to acquit him under a "blameless violation" verdict, which serves to condemn, not to condone, his conduct. Indeed, the Rodney King beating case used above to illustrate the confusion sown by general acquittals is exactly this case: a mistake as to a justification, where the conduct should be condemned but the actor excused, is confused for a true objective justification, which condones the conduct, with disastrous results from the confusion.

To give one last example, note that only objective justifications are part of the *ex ante* rules of conduct telling citizens what they can do. The mistaken justification excuse is part of the *ex post* principles of adjudication, and would be appropriate to include only in a code of adjudication and would be drafted in a form appropriate for that audience and purpose. While a code of adjudication needs to earn a reputation within the community for reliably doing justice – giving mistake excuses when deserved – citizens have no need for the details of the mistake excuse, or any other excuse, to know what is expected of them by the rules of conduct.

My larger point here is that there are practical benefits that flow from organizing doctrine around those distinctions that mark useful differences and similarities among different doctrines. While the judges and lawyers may not always like academic attempts to change the basic framework by which the doctrines are organized, if the distinctions used in building the framework have important practical benefits, it seems likely that attempts at modification will be accepted and, in their time, become familiar and comfortable. Glanville Williams may well have been right to demand a showing of practical benefits before incorporating a distinction into the doctrinal framework, but I would like to think that some distinctions, even some he never thought to use, can meet that practical test.