[A Brief Comparative Summary of the Criminal Law of the] United States

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UNITED STATES

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I. INTRODUCTION

This chapter provides a very brief summary of the central features of American criminal law. Section II describes its source and current form, which is almost exclusively statutory, embodied in the criminal codes of each of the fifty American states and (to a lesser extent) the federal criminal code. Section III sketches the typical process by which a case moves through an American criminal justice system, from the report of a crime through trial and appellate review. Section IV summarizes the most basic objective and culpability requirements necessary to establish liability for an offense and the doctrines that sometimes impute those elements when they do not in fact exist. Section V describes the general defenses that may bar liability, even if the offense elements are satisfied or imputed. Finally, section VI describes the general organization of a typical American criminal code's definition of offenses and gives highlights concerning a few of the most common offenses.

II. THE STRUCTURE OF AMERICAN CRIMINAL LAW

A. Source and Form

In the eighteenth century, English criminal law was generally uncodified. This “common law” was developed by—and embodied in—judicial opinions. The American colonies adopted the common law of England as it existed at the time of American independence. The period's most popular treatise, William 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 simply because its popularity coincided with American independence. Volume 4 provided a useful summary of the then-existing body of common-law criminal jurisprudence. American courts then took on the role of further refining and developing the law, thereby creating differences with English law. Today's courts generally no longer have the role of refining and developing the criminal law; that function has been taken over by 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 crimes or change the definition of existing crimes. The reasons for the shift from common-law, judicially defined offenses to criminal codes are found chiefly in the rationales offered in support of what is called the legality principle, discussed in section II.B in this chapter.

1. Modern Criminal Code Reform

Although there were some heroic efforts, little criminal code reform occurred in the United States before the 1960s. Most early codes were less a code and more a collection of ad hoc statutory enactments, each triggered by a crime or a crime problem that gained significant public interest for a time. The major contribution of early codifiers frequently was to put the offenses in alphabetical order. The greatest catalyst of modern American
criminal law codification was the Model Penal Code, which was promulgated by the American Law Institute (ALI) in 1962. Since its introduction, the Model Penal Code has served as the basis for wholesale replacement of existing criminal codes in almost three-quarters of the states. Some states adopted the Code with only minor revisions, while others—especially those that adopted it early—borrowed the Model Penal Code's style and form but only some of its content in the course of reworking their existing doctrine.

2. The Model Penal Code
The American Law Institute, which drafted the Model Code, is a nongovernmental, broad-based, and highly regarded group of lawyers, judges, professors, and others that undertakes 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, such as tort law and contract law. Although a criminal law project was undertaken by the Institute 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 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. Later, the original commentary contained in the various Tentative Drafts was consolidated, revised, and finally in 1985 published along with the 1962 text as a six-volume set.¹

3. Continuing Reform Efforts
About one-quarter of the states have not yet adopted a modern criminal code. The federal system is the most unfortunate example of frustrated reform. Congress has been engaged in an effort to reform the federal criminal code since 1966. At one point a modern code bill passed in the Senate but did not pass in 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 law 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. Fortunately, the U.S. Constitution vests the criminal law power in the states, not in the federal government, which has jurisdiction over only uniquely federal offenses.

4. Central Features of Modern American Codes
Modern American codes stand apart from many other modern codes because they are designed to include a comprehensive and self-contained statement of all the rules required to adjudicate all criminal cases. They try not to depend on other sources of law, academic or judicial. Modern codes have a general part containing general provisions that apply to the specific offenses defined in the code's special part. General provisions include such things as general rules for the definition and interpretation of offenses; a collection of definitions for commonly used terms; general liability doctrines concerning omission liability, complicity, and voluntary intoxication; and general defenses, such as self-defense, insanity, and time limitations. In the special part of a code, offenses are defined and organized
as conceptually related groups and are formulated and consolidated to minimize overlaps among offenses and gaps between them. 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 provisions in the general part must be consulted.

B. The Legality Principle

In its original Latin dress the legality principle was expressed as nullum crimen sine lege, nulla poena sine lege, meaning roughly, "no crime without law, nor punishment without law." In its modern form it means that criminal liability and punishment can be based only on a prior legislative enactment of liability rules expressed with adequate precision and clarity. The principle is not itself a legal rule, but rather a legal concept embodied in a series of legal rules and doctrines.

1. Legality Doctrines

Two of the doctrines that make up the legality principle include the rules in modern American criminal codes that abolish common-law crimes and prohibit the judicial creation of offenses. In contrast, in 1962 the English House of Lords approved prosecution of a common-law offense of "conspiracy to corrupt public morals." American jurisdictions typically would bar prosecution for such an uncodified offense because it is undefined by statute. In addition, the legality principle is embodied in the constitutional prohibition of vague statutes, the rule requiring strict construction of penal statutes, and the constitutional prohibition of application of ex post facto laws.

The vagueness prohibition, rooted in the Constitution's Due Process Clause, requires that a criminal statute give "sufficient warning that men may conform their conduct so as to avoid that which is forbidden." A statute is not unconstitutionally vague, however, merely because one of its elements calls for a matter of judgment. Rather, an offense provision is vague if it does not adequately define the prohibited conduct. If an offense definition defines the prohibited conduct with some specificity but is subject to two or more interpretations, then it is termed ambiguous, which is not necessarily unconstitutional. When faced with an ambiguity, the law traditionally applies a special rule for interpreting criminal statutes. The rule of strict construction, as it is called, directs that an ambiguity in a penal statute be resolved against the state and in favor of the defendant. For this reason, it is also called the rule of lenity.

One final legality doctrine is the constitutional prohibition against ex post facto laws. This has been interpreted to invalidate "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. Every law that aggravates a crime, or makes it greater than it was, when committed. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."

2. Legality Principle Rationales

The American devotion to the legality principle arises from rationales unrelated to, and often in conflict with, blameworthiness. Although not all the rationales may be applicable in all situations, the rationales most commonly offered in support of the legality principle include the following.
i. Procedural Fairness
Fairness requires that a person have at least an opportunity to find out what the criminal law commands. Actual notice is not required for liability; it is enough that the prohibition has been lawfully enacted. Similarly, a defendant's actual knowledge that the conduct is prohibited and punished does not vitiate a legality-based defense. The concern of the legality principle is procedural fairness, not blamelessness.

ii. Criminalization as a Legislative Function
In a democracy the legislature—the most representative branch of government—is generally thought to be the proper body to exercise the criminalization decision. This rationale directly supports the prohibition of judicial creation of offenses and the abolition of judicially created offenses. It also has application in less obvious ways to support the invalidation of vague statutes and the disapproval of ambiguous statutes. Courts applying such statutes provide the specificity the legislature has not—a de facto delegation of criminalization authority to the courts.

iii. Rules of Conduct and Principles of Adjudication
The rationales noted so far—procedural fairness and reserving the criminalization function to the legislature—concern the rule-articulation function of the criminal law, understood as its obligation to communicate the governing rules to all members of society. The rationales reflect the American preference for how that rule-articulation function ought to be performed: the legislature should set the rules, and the formulations should be calculated to give adequate notice to deter effectively and properly and to condemn a violation fairly. But the criminal law also serves an adjudication function, with which several rationales in support of the legality principle are associated.

iv. Inconsistency and Abuse of Discretion
Consistency in the treatment of similar cases is possible only with a sufficiently clear and precise definition of an offense, one that does not call for discretionary judgments. With individual discretion inevitably comes disparity based on the inherent differences among decision makers. Also, the exercise of discretion can allow the operation of malevolent influences, such as racism, sexism, and the like. An unclear prohibition, therefore, can create a potential for abuse of discretion by police officers, prosecutors, and others with decision-making authority. In Papachristou v. City of Jacksonville, for example, police officers arrested "mixed" couples (of blacks and whites), charging them with a variety of vague offenses such as "vagrancy," "loitering," and "disorderly loitering on street." The Supreme Court reversed the convictions finding that the vagueness of the statutes encouraged arbitrary convictions, as well as arbitrary arrests.

III. A BRIEF SUMMARY OF THE AMERICAN CRIMINAL JUSTICE PROCESS
The authority to define and punish crimes is vested primarily in the states, not in the federal government (except for offenses relating to a special federal interest). Thus there are fifty-two American criminal justice systems (including the federal and District of Columbia
systems), and each is different from the others in some way. Below is a brief description of a procedural process that is typical in most American criminal justice systems.

A. Investigation and Accusation

1. Report and Investigation
The criminal justice process usually begins with a report of a crime by a citizen or a police officer. Typically an investigation follows to determine whether a crime has in fact been committed and, if so, by whom. Once a suspect has been identified, the investigation may continue in order to collect evidence for use in prosecution.

2. Arrest and Booking
When a police officer believes that there exists “probable cause” to think that a crime was committed and that a particular suspect committed it, the officer may arrest that suspect. Sometimes the evidence is presented to a magistrate beforehand and a judicial warrant to arrest is obtained, but most arrests are made without a warrant. An arrest is essentially a taking of physical control over the person and usually includes a search of the person for weapons, contraband, and evidence relating to the crime. The arrestee is then taken to the police station, where he or she is “booked.” This procedure consists of entering the arrestee’s name, the time, and the offense charged in a police log. The arrestee is photographed and fingerprinted, informed of the charge, and allowed to make a telephone call. Those charged with minor offenses are allowed to post cash security as “station-house bail,” which allows them to leave the police station with a promise to appear before a magistrate at a specified date. Persons who are arrested for more serious offenses or who are unable to post station-house bail are sent to a “lockup” after another more careful search, including an inventory of their personal possessions.

3. Precharge Screening
The first of many reviews of the charging decision is frequently made at this point. A higher-ranking police officer may reduce or drop the charges for which a suspect was booked. This may occur either because the evidence is insufficient to proceed or because an informal disposition—perhaps including a lecture and warning—is more appropriate. Ten to 20 percent of all cases are dropped from the system at this point. A member of the prosecutor’s office also may screen the cases during this stage, although this frequently occurs only in felony cases.

4. Filing Complaint
If it is determined that the prosecution will proceed, formal charges are filed with the court via a “complaint.” This document briefly describes the facts of the case and is sworn to by the complainant, likely to be either the victim or the investigating officer. The affiant (or person giving the affidavit) can swear only to the facts known to him or her, of course, so a complaint by the investigating officer is likely to contain only claims about what the officer believes or what others reported. A magistrate will review the complaint ex parte (without the presence or participation of the parties) to determine whether probable cause exists to believe that the “defendant,” as he or she is now called, committed the offense charged. If the magistrate is not satisfied that there is probable cause, he or she will dismiss
the complaint, but without prejudice—that is, the prosecutor may amend and refile the complaint in the future. Where an arrest warrant was previously obtained on the basis of a complaint, this step will, of course, already be complete; the defendant will be taken directly from booking to the initial appearance.

5. Initial Appearance
Soon after a person is arrested and booked, unless released on station-house bail, he or she is brought before a magistrate. The magistrate confirms that the arrestee is the person named in the complaint and informs the arrestee of his or her constitutional rights, including the right to remain silent, the right to have counsel, and the right to have counsel appointed if he or she cannot afford one. Frequently, counsel is appointed at this stage.

6. Bail
The magistrate at the initial appearance also reviews any bail conditions previously set at the station house and sets bail for those arrestees who did not previously have it set. High bail amounts typically require the services of a professional bondsman to ensure the defendant's appearance, to whom the defendant must pay a nonrefundable or only partially refundable fee. Increasingly, defendants have been allowed to pay, in cash, an amount equal to 10 percent of the total bail amount, which is then refundable if the defendant appears as directed.

B. Pretrial
   1. Preliminary Hearing
For felony cases, another judicial screening decision is made within a week or two of the initial appearance. Unlike the ex parte review at the complaint stage, this screening involves an adversarial process where the prosecution presents witnesses and the defendant, now represented by counsel, may cross-examine. The defendant may present his or her own evidence but in practice rarely does so, preferring instead to learn as much as possible about the prosecution's case without divulging his or her own defense. The magistrate may dismiss the charges or may allow only a lesser charge than that alleged in the complaint.

   2. Grand Jury Indictment and Prosecutorial Information
Another screening stage for felonies is grand jury review to determine whether an indictment should be returned against a defendant. The federal system and about half the states give felony defendants a right to grand jury review. A grand jury is made up of citizens who are called to meet regularly to review cases during a set term of perhaps several months. The traditional size is twenty-three people, of whom a majority of twelve must agree in order to indict a defendant. This majority corresponds to the standard size of a trial jury. The grand jury review procedure is significantly different from trial and from the preliminary hearing; it is in fact more akin to a magistrate's review of a complaint. Only the prosecution presents witnesses; the hearing is held in secret; and the defendant has no right to be present.

   3. Arraignment
If the defendant is indicted by the grand jury, the indictment substitutes for the complaint as the formal charging document. The defendant is arraigned in the general trial court on
this document and is asked to plead guilty, not guilty, or, where permitted, *nolo contendere*. A date is then set to hear pretrial and trial matters.

4. *Plea Bargaining*

From the point of filing the complaint, and sometimes before, until trial, the defense counsel and prosecutor may engage in plea negotiations. This may involve either an agreement to dismiss some charges if the defendant will plead guilty to others or, in some jurisdictions, a promise of a lenient sentence or a recommendation for one in exchange for a plea of guilty. Challenges to the institution of the prosecution (such as challenging the makeup of the grand jury) or the sufficiency of the charging instrument, as well as requests for discovery and motions to suppress evidence, typically are made before trial. These motions may produce a dismissal for a defendant without the need for a plea bargain.

C. *Trial and Post-Trial*

1. *The Trial*

After a defendant has been arrested and charged with a crime, if there has not been a dismissal (on a pretrial motion) and the defendant has not entered a guilty plea, the case goes to trial. Several features distinguish the American criminal system from the civil system. These include (1) the presumption of a defendant’s innocence, (2) the requirement of proof beyond a reasonable doubt, (3) the right of the defendant not to take the stand, (4) the exclusion of evidence obtained by the state in an illegal manner, and (5) the more frequent use of incriminating statements of defendants as evidence.

An American trial uses an adversarial process. The defendant is represented by an advocate representing his or her position, while the state’s prosecutors represent the state’s interest in punishing offenders. The sides argue in front of an impartial decision maker. In all fifty-two jurisdictions the defendant has a right to a jury trial for all felony offenses and for misdemeanors punishable by more than six months’ imprisonment. Most states also provide a jury trial for lesser misdemeanors as well. The right to a jury trial can be waived in favor of a bench trial.

2. *Sentencing*

If a defendant is convicted at trial or pleads guilty before a trial takes place, the court will set a date for a sentencing hearing at which both sides will present evidence relating to the appropriate sentence. While a few jurisdictions allow for sentencing by a jury in non-capital cases, most assign the sentence determination to the court. Typically, three different types of sanctions can be used: financial sanctions (e.g., fines, restitution orders); some form of release into the community (e.g., probation, unsupervised release, house arrest, drug rehabilitation); and incarceration in a jail (for lesser sentences) or a prison (for longer sentences). The most severe form of punishment is the death penalty, the availability of which is determined by each individual state. The legislature typically sets the maximum penalty available for an offense. It sometimes also narrows the sentencing options for an offense by excluding community release or by setting a mandatory minimum term of imprisonment. Increasingly, court sentencing decisions are re-
stricted by guidelines that suggest a guideline sentence for offenders of a particular sort committing offenses of a particular sort. Some guideline systems are more binding than others.

3. Appeal
A defendant generally has a right to appeal a conviction to the next higher court in the particular system’s judicial hierarchy. For misdemeanors tried in a magistrate court, this may mean a new trial in the general trial court. The right to appeal is not necessarily limited to those convicted at trial, however; a defendant who pleads guilty but who receives a more severe sentence than he or she expected, for example, may be able to appeal, challenging his or her plea. Appellate review of the appropriateness of the sentence is generally not permitted, although review of a deviation from sentencing guidelines may be. The most common objections on appeal concern admission of evidence claimed to be improperly obtained (generally the most successful claim), insufficient evidence to support the conviction, incompetent counsel, improper identification procedures, and improper admission of a defendant’s confession or incriminating statements.

4. Postconviction Remedies
After exhausting possibilities for appellate review, a convict who has not gained release may seek relief through postconviction remedies, sometimes called collateral attacks on conviction. Sometimes this is done through the writ of habeas corpus, but it is commonly governed by a more modern statutory procedure. After exhausting postconviction remedies in state court, state prisoners who have a constitutional claim may present the same claim for review by the federal courts under federal postconviction remedy procedures. In both state and federal systems the process of appellate review of a denial of a postconviction petition follows the same appellate course that the direct appeal did.

IV. LIABILITY REQUIREMENTS

Offense definitions are typically made up of three kinds of objective elements—conduct, circumstance, and result elements—each accompanied by a corresponding culpability requirement of purpose, knowledge, recklessness, or negligence. Some doctrines will allow a defendant to be treated as if he or she satisfies a required element that is not in fact present, if the defendant does satisfy the requirements of a doctrine of imputation. For example, a defendant may be liable for an offense that requires conduct that the defendant did not commit if the conduct, performed by another person, is imputed to the defendant by the complicity doctrine. Finally, a defendant who is apprehended or stops before completing an offense may be held liable for an inchoate offense on the basis of his or her intention to commit or encourage conduct toward the commission.

A. Objective Offense Requirements
Offense definitions consist of two kinds of elements: objective elements (conduct, circumstance, or result elements) and culpability elements (typically purpose, knowledge, recklessness, or negligence). Each objective offense element has a corresponding culpability element,
and the culpability level may be different with respect to different objective elements of the same offense.

1. **Conduct, Circumstance, and Result Elements**

The Model Penal Code's drafters constructed a useful system for the precise definition of offenses. Section 1.13(9), defining "elements of an offense," distinguishes between (i) conduct, (ii) attendant circumstances, and (iii) a result of conduct. These are the objective building blocks for offense definitions. Each offense definition typically has at least one conduct element, which satisfies the act requirement inherent in all criminal offenses. Most offense definitions include one or more circumstance elements as well, defining the precise nature of the prohibited conduct (e.g., having intercourse with a person under fourteen years old) or the characteristic of a prohibited result (e.g., causing the death of another human being). A minority of offenses contain a result element. Homicide offenses, personal injury offenses, and property destruction offenses are examples of this minority of offenses; they require a resulting physical harm in order to sustain a conviction for the offense. Other offenses, such as endangerment, indecent exposure, and falsification, may require the person to cause a risk of harm or to cause an intangible harm, such as alarm or a false impression.9

2. **Causation Requirement**

Whenever an offense definition includes a result element (e.g., homicide requires a death), a causation requirement also is implied. That is, it must be shown that the person's conduct caused the prohibited result. This required relation between the defendant's conduct and the result derives from American notions of causal accountability. The rules of the causation doctrine are the means by which the law attempts to define the conditions under which such causal accountability exists.

i. **Requirements of Causation**

Establishing a causal connection between a defendant's conduct and a result typically has two independent requirements. First, the conduct must be a "but-for" cause of the result. That is, in the language of Model Penal Code section 2.03(1)(a), the conduct must be "an antecedent but for which the result in question would not have occurred." This is sometimes called the *factual cause* requirement. Second, the strength and nature of the causal connection between the conduct and the result must be sufficient. *Legal cause,* or *proximate cause,* as this is sometimes called, requires that the resulting harm be "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense." This language, from Model Penal Code sections 2.03(2)(b) and (3)(b), is sometimes supplemented by an additional requirement that the resulting harm "not be too . . . dependent on another's volitional act."10

ii. **Factual Cause**

Conduct is a factual (but-for) cause of a result if the result would not have occurred but for the conduct. In other words, the conduct is a factual cause if it was necessary for the result to occur. The factual cause inquiry is essentially a scientific and hypothetical one. It asks what the world would have been like had the defendant not performed his or her conduct.
Specifically, would the result still have occurred when it did? If the answer is no, then the defendant’s conduct was necessary for, and thus was a but-for cause of, the result.

iii. Proximate (Legal) Cause
In contrast to the scientific inquiry of the factual cause requirement, the proximate (legal) cause requirement presents essentially a normative inquiry. Deciding whether a result is “too remote or accidental in its occurrence” or “too dependent on another’s volitional act” obviously calls for an exercise of intuitive judgment. The inquiry cannot be resolved by examining the facts more closely or having scientific experts analyze the situation. Ultimately, the decision maker must determine how much remoteness is “too remote” or how much dependence on another’s volitional act is “too dependent” for the result to have a just bearing on the defendant’s liability. Typically the foreseeability of the result following from the defendant’s conduct is a highly influential factor in a determination of proximate cause.

B. Offense Culpability Requirements
Modern American codes typically follow Model Penal Code section 2.02(1) in providing that “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.” This provision reflects the criminal law’s commitment to requiring not only a breach of society’s objective rules of conduct but also a defendant’s culpability with regard to the conditions that make the conduct a breach. A defendant’s conduct may be harmful; the victim may have a claim in tort; and fairness and utility both may suggest that the defendant rather than the victim should bear the loss for the injury. But without culpability in the defendant, causing the injury may be seen as lacking sufficient blameworthiness to deserve the condemnation and reprobation of criminal conviction.

1. Shift to Element Analysis
Model Penal Code section 2.02(1) makes clear that the Code requires culpability “with respect to each material element of the offense.”11 In other words, it is not just that different offenses may have different culpability requirements. With this section the Model Penal Code makes clear that different objective elements within a single offense may have different culpability requirements than all or some of the other objective elements of the offense.

2. Culpability Levels under the Model Penal Code
In place of the plethora of common-law terms—wantonly, heedlessly, maliciously, and so on—the Code defines four levels of culpability: purposely, knowingly, recklessly, and negligently. Ideally, all offenses are defined by designating one of these four levels of culpability with regard to each objective element. If the objective elements of an offense require that a person take the property of another, the culpability elements might require, for example, that the person know that he or she is taking property and that he or she be at least reckless about it being someone else’s property. An offense also may require culpability with regard to a circumstance or result beyond what the objective elements of the offense
require. Thus theft may require a purpose to permanently deprive the owner of his or her property, although it need not be shown that the owner was permanently deprived.

3. Purpose
Under the Code, a person acts “purposely” with respect to a result if his or her conscious object is to cause such a result. This is a demanding requirement that is often difficult to prove. The offense of indecent exposure, for example, requires more than showing that the defendant exposed himself or herself to another, knowing that it would alarm the person; it must be proved that the conduct was motivated by a desire to gain sexual gratification or arousal by the conduct. Doing it just to annoy or alarm the victim would not satisfy the offense’s gratification purpose requirement, even if the offender did experience unplanned-for gratification.

4. Purposely versus Knowingly
A person acts “purposely” with respect to a result if it is his or her conscious object to cause the result. A person acts “knowingly” with respect to a result if it is not his or her conscious object, but he or she is practically certain that the conduct will cause that result. An antiwar activist who sets a bomb to destroy a draft board’s offices may be practically certain that the bomb will kill the night watchman, but may wish that the watchman would go on a coffee break so that he would not be killed. The essence of the narrow distinction between these two culpability levels is the presence or absence of a positive desire to cause the result; purpose requires a culpability beyond the knowledge of a result’s near certainty. In the broader sense this distinction divides the vague notion of “callousness” from the more offensive “maliciousness” or “viciousness.” The latter may simply be an aggressively ruthless form of the former.

5. Knowingly versus Recklessly
A person acts “knowingly” with respect to a result if he or she is nearly certain that his or her conduct will cause the result. If he or she is aware only of a substantial risk, he or she acts “recklessly” with respect to the result. The narrow distinction between knowledge and recklessness lies in the degree of risk—“practically certain” versus “substantial risk”—of which the defendant is aware. The distinction between recklessness (and lower levels of culpability) and the two higher levels of culpability (purposely and knowingly) is that we tend to scold a reckless person for being “careless,” while we condemn an offender who falls within one of the higher culpability categories for “intentional” conduct.

6. Purpose as Independent of Likelihood
While knowing and reckless culpability focus on the likelihood of causing the result—“practically certain” versus “substantial risk”—purposeful culpability pays no regard to the likelihood of the result. This characteristic of the purpose requirement reflects an instinct that trying to cause the harm, whatever the likelihood, is more condemnable than acting with the belief that the harm will or might result without desiring it. The practical effect of this is that reckless conduct, as manifested in risk taking, can be elevated to purposeful conduct if the defendant hopes that the risk will come to fruition. This characteristic of purpose also illustrates how specially demanding it is. A requirement of a particular belief
is something a jury might logically deduce from other facts: the defendant “must have known” the certainty or the risk of harm if he or she knew this fact or that. A purpose requirement requires the jury to determine a defendant’s object or goal, a somewhat more complex psychological state. To find this, a jury may have to dig deeper into the defendant’s psyche and his or her general desires and motivations to reach a conclusion. If a jury is conscientious in adhering to the proof-beyond-a-reasonable-doubt standard constitutionally required for offense elements, this may be a difficult conclusion to reach.

7. Recklessly versus Negligently
A person acts “recklessly” with respect to a result if he or she consciously disregards a substantial risk that his or her conduct will cause the result; he or she acts only “negligently” if he or she is unaware of the substantial risk but should have perceived it. The recklessness issue focuses not on whether he or she should have been aware of the risk, but instead on whether he or she was, in fact, aware (and whether it was culpable for him or her to disregard the risk).

8. Recklessness as Conscious Wrongdoing
The narrow distinction between recklessness and negligence lies in the defendant’s awareness of risk. The difference between negligence and the three higher levels of culpability is one of the most critical distinctions in U.S. criminal law. A person who acts purposely, knowingly, or recklessly is aware of the circumstances that make his or her conduct criminal or is aware that harmful consequences may result and is therefore both blameworthy and deterrable. A defendant who acts negligently, in contrast, is unaware of the circumstances or consequences and therefore, some writers argue, is neither blameworthy nor deterrable. Although writers disagree over whether negligence ought to be adequate to support criminal liability, it is agreed that negligence represents a lower level of culpability than, and is qualitatively different from, recklessness in that the negligent person fails to recognize, rather than consciously disregards, the risk. For this reason, recklessness is considered the norm for criminal culpability, while negligence typically is punished in American jurisdictions only in exceptional situations, such as where a death is caused.

9. Negligence as Normative Assessment
A person who fails to appreciate the risk that his or her conduct will cause a result is “negligent” with regard to the result if the failure “involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.” Thus, unless he or she grossly deviates from the standard of care that a reasonable person would observe, a person is not negligent and, at least in the eyes of the criminal law, is without cognizable fault. If a person is not aware of the risk of death, should he or she have been? Would a reasonable person in his or her situation have been aware that a risk of death existed? Was his or her failure to perceive the risk a gross deviation from the attentiveness to the possibility of risk that the reasonable person in his or her situation would have had? These are the issues that a jury considers in assessing whether the person ought to be liable for negligent homicide. They are not factual but rather normative issues. The jury is asked to judge whether the person’s failure to perceive the risk was, under the circumstances, a blameworthy failure.
10. Negligently versus Faultlessly
Liability imposed for faultless conduct is termed absolute or strict liability. The distinction between negligence and strict liability focuses on whether the defendant's unawareness of the risk constituted a failure to meet the standard of the reasonable person. The broader distinction between the four categories of culpability and faultlessness is the distinction between a blameworthy and a blameless defendant. The objections to strict liability stem from an understandable reluctance to punish conduct that is not unreasonable.

11. Concurrence Requirement
When an offense definition requires a particular level of culpability for a particular element, it means that the required culpability for the element must exist at the time of the conduct constituting the offense. This concurrence requirement, as it is called, reflects the law's interest in judging the culpability of the act rather than the general character of the defendant. The required concurrence between act and culpability is implicit in the Model Penal Code’s culpability definitions in section 2.02(2). It is neither necessary nor sufficient that the culpability exist at the later time of the result of the conduct. Changing one's mind after setting a bomb, for example, does not bar liability for deaths caused by the blast, even if the intent to kill no longer exists at the time the bomb explodes or the victims die.

C. Doctrines of Imputation
Typically a person is liable for an offense if and only if the person satisfies the elements of an offense definition. There are two exceptions to this rule. First, a person may be liable for an offense even though he or she does not satisfy all offense elements, if a rule or doctrine imputes the missing element. Second, a person may escape liability even though the person does satisfy the elements of an offense, if he or she satisfies the conditions of a general defense. General defenses are discussed in section V; this section examines doctrines of imputation.

1. Imputation Principles as Independent of Offense
A legislature conceivably could include inculpatory (and exculpatory) exceptions to the offense paradigm within the offense definition. For example, Tennessee defines the offense of arson to include not only setting the fire but also assisting another in doing so. More typically, however, doctrines of imputation such as complicity are drafted in a form independent of offense definitions—a form that applies to all offenses. This approach harnesses the benefits of drafting efficiency, as well as encouraging conceptual clarity. Like general defenses—such as insanity, duress, and law-enforcement authority, which are separate and apart from any offense definition—the rules of imputation represent principles of liability independent of any single offense. An additional point of similarity with general defenses arises because most of the doctrines of imputation, at least theoretically, can impute a required element for any offense defined in the code's special part. Some doctrines of imputation may tend to apply most frequently to certain recurring factual situations. Transferred intent, for example, appears most commonly in bad-aim murder cases. This, however, is a factual rather than a theoretical limitation of the principle.
2. Doctrines Imputing Objective Elements
American criminal law permits the imputation of both objective and culpability elements of an offense. The most obvious and common instances of imputing objective elements are found in the rules governing complicity, discussed in section III.C.3 in this chapter. But complicity is only one of several doctrines that impose liability even though the person does not satisfy the objective elements of an offense. Where a person exercises control over an innocent or irresponsible person, the latter's satisfaction of the objective elements of an offense may be imputed to the former as an instance of "causing crime by an innocent."
Similarly, various statutory and judicial presumptions permit the imposition of liability even though the evidence adduced at trial would not establish the objective elements of the offense. Finally, rules imposing liability for a person's omissions, even when the offense charged is defined only in terms of affirmative conduct, also may be viewed as instances of imputed conduct.

3. Complicity
Complicity is not an offense in itself, as are conspiracy and solicitation (discussed in section III.C.4), for example. Rather, it is a theory of liability by which an accomplice is held liable for an offense committed by the perpetrator. An offense definition typically requires that the person have performed certain conduct, but a person may be held liable for the offense, although the person has not performed the required conduct, if he or she is legally accountable for the actual perpetrator's conduct. At common law, complicity liability required that the accomplice assist the perpetrator in committing the offense. The assistance need not be necessary for successful commission of the offense, nor need it be substantial. Indeed, the accomplice need not assist in a physical sense at all; encouragement is recognized as a form of assistance. On the other hand, the Model Penal Code, in section 2.06(3)(a)(ii), extends complicity liability to those instances in which the person simply "agrees or attempts to aid" the principal. Actual assistance, even in the form of psychological assistance through encouragement, is not required. The drafters intended that what constitutes an adequate "attempt to aid" will be determined by reference to the definition of the general inchoate offense of attempt.

4. Doctrines Imputing Culpability Elements
Just as a variety of rules and doctrines can impute an unsatisfied objective element of the offense charged, another group of doctrines can impute a required culpability element. The most common of these doctrines governs cases of voluntary intoxication. Even though a person does not have the awareness of risk required by the offense definition, for example, the required recklessness can be imputed to him or her by the voluntary intoxication rules. Because the person voluntarily intoxicated himself or herself, the reasoning goes, he or she can properly be treated as if he or she had the awareness of risk that he or she would have had if he or she had not intoxicated himself or herself at all.
Another doctrine that can impute a culpable state of mind is the doctrine of transferred intent, which imputes the required culpability to a person who intends to harm one person but actually harms another. Imputation also is accomplished through a device that may be termed substituted culpability. This doctrine uses a person's culpability for the offense
the person thought he or she was committing as the basis for imputing to the person the
intention required for the offense actually committed. Thus a person who commits statutory rape but who, because of his mistake about the true identity of his partner, believes
that he is instead committing incest can nonetheless be held liable for statutory rape. His
missing culpability with respect to his partner being underage is imputed to him on the
grounds that he thought that he was committing another offense, namely, incest. His inten
tion to commit incest is transferred to satisfy the intent required for statutory rape.
Another doctrine of imputation is apparent in those cases where courts permit suspen
sion of the requirement of concurrence between act and intent: a person's earlier intention
to commit an act that the person believes is the offense, but is not, is relied on to impute
the required intention during the later conduct that actually constitutes the offense. Fi
nally, as with objective elements, a variety of statutory and judicial presumptions effectu
ally impute culpability elements upon proof of a logically related fact.

5. Corporate Criminal Liability
Because an organization can neither act nor think except through its agents and officers,
it cannot satisfy the elements of an offense except through imputation. Thus, if criminal
liability for organizations is to be provided, the criminal law must specify the rules for
imputation of conduct and culpability to an organization. Under current American law,
two forms of liability against organizations are common and accepted. First, liability is
permitted where the offense consists of an omission to perform a specific duty imposed on
the organization by law. This requires no imputation and no application of special rules
for liability, because liability follows directly from an organization's failure to perform the
affirmative duty placed on it by relevant legislation.

Most jurisdictions also permit organizational criminal liability for standard offenses
based on an affirmative act of an agent or an omission of an agent to perform a legal duty
not expressly imposed on the organization. Most jurisdictions permit corporate liability
for a serious offense under certain circumstances—even for offenses carrying a significant
penalty and requiring culpability. In State v. Christy Pontiac-GMC, Inc., for example, a sales
man for the Christy Pontiac car dealership swindled two customers out of cash rebates
and kept the money for the corporation. Under the rules of organizational liability used in
Christy, the criminal acts of a corporation's agents are imputed to the corporation if they
are (1) performed within the scope of employment, (2) in furtherance of the interests of
the corporation, and (3) authorized, tolerated, or ratified by corporate management.
Because the corporation received the swindled funds and the conduct was ratified, if not
authorized, by the corporation's president, the corporation was held liable for the em
ployee's criminal act.

Some jurisdictions follow the Model Penal Code in extending liability beyond conduct
authorized or ratified by corporate management to offense conduct "recklessly tolerated"
by such actors. This doctrine seeks to prevent management from simply turning a blind
eye to violations because the violations further the corporate interest. Most jurisdictions
provide a defense where upper management exercised due diligence to prevent commis
sion of the offense.
D. Inchoate Liability

American criminal law recognizes three general inchoate offenses: attempt, conspiracy, and solicitation. Where a person attempts, conspires with another, or solicits another to commit an offense, but the offense is never committed, the person nonetheless may be liable for one of these inchoate offenses.

1. Attempt

At some point in the chain of events from thinking about committing an offense to completing it, a person's conduct becomes criminal. This point typically is described as the moment at which mere preparation becomes a criminal attempt. Defining this point is an important part of attempt liability because it demarcates both when a person becomes criminally liable and when authorities lawfully may intervene. Attempt is significantly different from other offenses under American law because even after this point is reached and all the elements of attempt (or other inchoate offense) are satisfied, a person typically may escape liability if he or she voluntarily and completely renounces the attempt. Absent such renunciation, the failure to complete an offense only prevents liability for the full offense; it does not relieve the person from liability for the attempt.

The most common American objective requirement for attempt is that the person take a "substantial step" toward commission of the offense.27 Rather than focusing on how close to the end of the chain the person has come—the approach of the "proximity" test used at common law—this approach focuses on how far from the beginning of the chain the person has gone. The Code gives seven illustrations of what "shall not be held insufficient as a matter of law" to constitute a substantial step.

Current American law commonly elevates the culpability required for an offense when it is charged in its inchoate form.28 Thus, although recklessness with respect to causing injury may be sufficient for aggravated assault, in many jurisdictions attempted aggravated assault may require purpose or knowing with regard to causing injury. There is disagreement over whether this is wise policy. It may well be that attempt should require proof of a purpose to complete the conduct constituting the offense, but that the normal culpability levels for the offense elements ought not to be elevated.

2. Conspiracy

Conspiracy typically requires an agreement between two or more conspirators that at least one of them will commit a substantive offense.29 The agreement need not be an act in a strict sense. Speaking, writing, or nodding can signal agreement, but one also can agree through silence where, under the circumstances or custom, silence is meant and understood to mean positive agreement. At common law, and currently in some jurisdictions without modern codes, the agreement requirement is taken to require actual agreement on both sides—an actual "meeting of the minds." Thus, for the person to be liable for conspiracy, the other conspirator must actually be agreeing, not just pretending to agree (as an undercover police officer would, for example). Modern American codes have adopted a unilateral agreement requirement, which permits conspiracy liability as long as the person agrees with another person, without regard for whether the other person is returning
the agreement. Perhaps because conspiracy's agreement requirement is so slim a conduct requirement, an overt act is typically also required of one of the conspirators in furtherance of the agreement in order to sustain a conviction.

3. Solicitation
Solicitation is essentially an attempt to commit conspiracy by encouraging or requesting another person to do what would constitute an offense or an attempt. As with conspiracy, the offense focuses on the person's subjective view of the world. The solicitation need not be successfully communicated; it is sufficient that the solicitor's "conduct was designed to effect such communication." Unlike attempt, where the person's conduct may be ambiguous with respect to its criminal purpose, the solicitation offense includes no special requirement that the person's conduct strongly corroborate his or her criminal purpose.

V. GENERAL DEFENSES

In casual language anything that prevents conviction of a person is called a defense, but this term includes doctrines that are very different from one another. The legal doctrines that we refer to as defenses typically are of five sorts: absent-element defenses, offense modifications, justifications, excuses, or nonexculpatory defenses.

A. Types of Defenses
   1. Absent-Element Defenses
Some doctrines that are called defenses are nothing more than the absence of a required offense element. If a person takes an umbrella, believing it to be his or her own, he or she may claim a mistake defense, but this defense derives not from a special defense doctrine about mistake as to ownership, but rather from the elements of the theft offense itself. The definition of theft includes a requirement that the person know that the property taken is owned by another. If a person mistakenly believes that the umbrella taken is his or her own, he or she does not satisfy the required culpability element of knowledge that it belongs to another. Such a mistake defense is called an absent-element defense (or a failure-of-proof defense) because it derives from the inability of the state to prove a required element. The person is claiming that the prosecution cannot prove all the elements of the offense. It is within accepted casual usage to call such claims defenses, but they are simply another way of talking about the requirements of an offense definition.

   2. 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. Such a consent defense helps define what we mean by the offense of assault, just as renunciation helps refine the definitions 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 the practice illustrates, the difference between absent-element defenses and offense-modification defenses is one more of form than of substance. An offense-modification defense can as easily be drafted as a negative element of the offense, for each defines in part what the offense is not.

3. Criminalization Defenses versus General Defenses
Because both absent-element and offense-modification defenses serve to refine the offense definition, 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 on 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's harm or evil may have occurred, but the special conditions establishing the defense suggest that the violator ought not to be punished.

4. Justifications
Justification defenses such as lesser evils, self-defense, and law-enforcement authority exculpate on the theory that the person's otherwise criminal conduct avoided a greater harm or evil. That is, although a person satisfies the elements of an offense, his or her offense is tolerated or even encouraged because it does not cause a net societal harm. A person who burns a firebreak on another's land may thereby commit arson but also may have a justification defense (of lesser evils) because, by the burning, the person saves innocent lives threatened by the fire. The commonly available doctrines of justification are the lesser-evils defense, the defensive-force defenses of self-defense, defense of others, defense of property, and defense of habitation, and the public authority defenses of law-enforcement authority, authority to maintain order and safety, parental authority, benevolent custodial authority, medical authority, authority to prevent a suicide, judicial authority, military authority, and general public authority.35

5. Excuses
Excuse defenses such as insanity and duress exculpate under a different theory. The defendant has admittedly acted improperly—has caused a net societal harm or evil—but the defendant is excused because he or she cannot properly be held responsible for his or her offense conduct. Note the difference in focus between justifications and excuses: a defendant's conduct is justified, a defendant is excused. Excuses are of two sorts: disability excuses, which include insanity, involuntary intoxication, duress, and immaturity (the defense for involuntary conduct also serves this purpose), and mistake excuses, which include mistake about a justification, reliance on an official misstatement of law, and unreliable law.36

6. Nonexculpatory Defenses
A final group of general defenses does not exculpate a person but does provide an exemption from liability. Even if the person's conduct is criminal and unjustified and the person is fully responsible for it, such nonexculpatory defenses are made available because each furthers important societal interests. Thus diplomatic immunity may provide a defense,
without regard to the guilt or innocence of the person, because by doing so a country's diplomats are protected from interference when abroad, and diplomatic communications among nations can be established and maintained. Other common nonexculpatory defenses in American codes include statutes of time limitation; judicial, legislative, and executive immunities; and immunity after compelled testimony or pursuant to a plea agreement. Further, many constitutional principles function as nonexculpatory defenses, such as the double-jeopardy clause and the exclusionary rule, as well as the legality principle doctrines discussed earlier.

B. Justification Defenses

1. Lesser-Evils Defense
The lesser-evils defense—sometimes called choice of evils or necessity, or simply the general justification defense—is formally recognized in about half of American jurisdictions. It illustrates the structure and operation of justification defenses generally by relying explicitly on the rationale inherent in all justifications: although the person may have caused the harm or evil of an offense, the justifying circumstances suggest that his or her conduct avoided a greater harm or evil than it caused. In the language of the Model Penal Code, a person's conduct is justified if it is "necessary to avoid a harm or evil to himself or to another ... provided that: 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."40

The triggering of a lesser-evils defense, like that of all other justifications, does not give a person unlimited authority. His or her response must be both necessary and proportionate. The necessity requirement has two components: the conduct must be necessary in time and in the amount of harm caused. The lesser-evils defense, like all other justifications, requires proportionality between the harm or evil caused by the person's conduct and the harm or evil avoided. Indeed, the defense contains a more explicit statement than does any other justification. While most other justifications require proportionality through a general requirement that the person's conduct be "reasonable," the lesser-evils requirement might be seen as being more demanding. It is not enough for the defense that the harmfulness of the person's conduct is generally proportionate to the harm threatened. The person's conduct must be shown to have been less harmful than the harm threatened.

2. Defensive-Force Justification
Defensive-force justifications are triggered when an aggressor unjustifiably threatens harm. The triggering conditions for defensive force are considerably more specific than those of the lesser-evils defense; defensive force requires an unlawful, aggressive use or threat of force. That the person against whom the defendant uses force is acting unlawfully is not sufficient to trigger a defensive-force justification. Smoking on a bus or refusing to get out of the way of an emergency vehicle may be unlawful conduct that justifies the use of force against the violator, but a justification defense other than defensive force must be relied on. For defensive force, active physical aggression is required. In order to trigger a defensive-force justification, the aggressor must unjustifiably threaten harm to the defendant. Thus, when a police officer uses justified force to effect an arrest, the arrestee
has no right of self-defense, and others may not lawfully use defensive force on his or her behalf. Similarly, where a person unjustifiably attacks another and his or her victim then uses justified defensive force to repel the attacker, the initial aggressor has no right of self-defense against the justified defensive response. On the other hand, where the intended victim uses unnecessary or disproportionate force in response, the initial aggressor gains a right to use defensive force.

3. Public Authority Justifications
Public authority justifications are available when a person has been specifically authorized to engage in conduct otherwise constituting an offense that is necessary to protect or further a societal interest. Unlike defensive-force justifications, the person's authority is not limited to defensive action. He or she may act affirmatively to further a public interest, even one that is entirely intangible. These justification defenses most commonly are distinguished from one another according to the specific interests they foster: different defenses authorize the use of force for law-enforcement purposes, medical purposes, military purposes, judicial purposes, to maintain order and safety on public carriers or in other public places of assembly, or for use by parents or guardians. A catchall public authority justification commonly provides a defense for performing public duties other than those for which a special defense is provided.

The common structure of public authority justifications is thus that special authorization and evoking conditions trigger a person's right to use necessary and proportional force. The authorization and evocation elements as triggering conditions act together to describe the factors and circumstances that will give rise to an authority to act. For example, a police officer and a bus driver are both given authorizations to act, but in different situations and with different limitations on their use of force. The necessity and proportionality requirements—the response elements—describe the nature of the conduct that is justified once the authority to act is triggered.

C. Excuse Defenses
The common rationale of excuse defenses—to exculpate the blameless—gives rise to common requirements: a disability or reasonable mistake must cause an excusing condition. The disability and mistake excuses generate the same conclusion of blamelessness in different ways. In disability excuses, the disabling abnormality, such as insanity or involuntary intoxication, sets the person apart from the general population. The mistake excuses seem to do the opposite: they argue that the person should not be punished because in fact he or she has made a mistake that anyone else would have made in the same situation. That is, the person's mistake was reasonable; any reasonable person would have made the same mistake.

1. Mistake Excuses
Several types of mistakes are commonly allowed as grounds for a general excuse defense (as distinguished from mistakes that provide an absent-element defense by negating an element of the offense). Reliance on an official misstatement of law and mistake due to the unavailability of a law are two such general mistake excuses. A mistake about whether
one's conduct is justified also is commonly recognized as an excuse. (A fourth commonly recognized mistake excuse is reliance on unlawful military orders, essentially a special subclass of a mistake about a justification excuse, where the justification is the public authority of lawful military orders.)

2. Exceptions to “Ignorance of Law Is No Excuse”
The common law adhered to the maxim that “ignorance or mistake of law is no excuse,” but states following the lead of the Model Penal Code recognize two exceptions to it. A general defense is commonly available to a person whose ignorance or mistake of law results because the law violated was not made reasonably available or because the person reasonably relied on an official misstatement of the law. In a few jurisdictions the maxim is simply rejected, and a general excuse is given for a reasonable mistake of law.

3. Mistake with Regard to Justification
Every jurisdiction recognizes a defense for some form of mistake with regard to a justification. The often-unpredictable and confrontational nature of justifying circumstances makes such mistakes particularly understandable. This is especially true for defensive-force justifications, where the person must make the decision to act under an impending threat of harm. Most jurisdictions provide the mistake defense by including the word believes or the phrase reasonably believes in the definition of the justification defense (or by giving a defense if the person acts with a proper justifying “purpose”). This means that a person will get the defense if he or she believes that the conduct is justified, even if it is not. A popular alternative means of providing an excuse for mistake with regard to a justification—and one with some advantages—is to define justifications objectively, without the “believes” language, and to provide a separate general excuse defense for mistakes with regard to a justification.

4. Disability Excuses
Similarly, disability excuses share a common internal structure: a disability causes a recognized excusing condition. The disability is an abnormal condition of the person at the time of the offense, such as insanity, intoxication, subnormality, or immaturity. Each is a real-world condition with a variety of observable manifestations apart from the conduct constituting the offense. It may be a long-term or even permanent condition, such as subnormality, or a temporary state, such as intoxication, somnambulism, automatism, or hypnotism. Its cause may be internal, as in insanity, or external, as in coercion from another person (duress).

Having a recognized disability does not itself qualify a person for an excuse, for it is not the disability that is central to the reason for exculpating the person. A person is not excused because he or she is intoxicated, but rather because the effect of the intoxication is to create a condition that renders the person blameless for the conduct constituting the offense. The requirement of an excusing condition, then, is not an element independent of the person’s disability but rather is a requirement that the person’s disability cause a particular result—a particular exculpating mental or emotional condition in relation to the conduct constituting the offense.
5. Mental Disease or Defect as Disability

The disability requirement of the insanity defense is a mental disease or defect. What constitutes a mental disease or defect is a question for the jury. It is a legal concept, not a medical one, but the members of the jury will no doubt be influenced by the expert witnesses they hear.

i. M’Naghten Test

In M’Naghten’s Case the House of Lords held that a person has a defense of insanity if, “at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, [he] did not know he was doing what was wrong.” This test is in use in many American jurisdictions today.

ii. Irresistible-Impulse Test

As early as 1887 the M’Naghten test was criticized as failing to reflect then-modern advances in the behavioral sciences. To permit a defense in cases where the person involved suffers a loss of the power to choose, a “control prong” was introduced by adding the irresistible-impulse test to M’Naghten. Under this modification, a person is given an insanity defense if he or she satisfies the requirements of the M’Naghten defense or (1) if, by reason of the duress of such mental disease, he or she had so far lost the power to choose between right and wrong, and to avoid doing the act in question, that his or her free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely. This formulation remains popular in the United States as an addition to the M’Naghten test.

iii. American Law Institute Test

The most modern test is that contained in the American Law Institute’s Model Penal Code § 4.01(1): “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law” (emphasis added). This formulation conceives that there are degrees of impairment possible and requires as a minimum that the person must “lack substantial capacity.” The ALI test follows the structure of the M’Naghten-plus-irresistible-impulse test in specifically noting that the dysfunction may affect either cognitive or control capacities. It differs from M’Naghten-plus-irresistible-impulse, however, in that those tests appear to require absolute dysfunction: the absence of knowledge of criminality or the loss of power to choose. The ALI test, in contrast, requires only that the person lack “substantial capacity” to “appreciate” the criminality or to conform his or her conduct to the requirements of the law. The test has gained wide acceptance, rivaling or surpassing the popularity of the M’Naghten and M’Naghten-plus-irresistible-impulse formulations.

iv. Federal Insanity Test

Some jurisdictions that previously adopted the ALI test have recently cut back on it. The new federal insanity statute, for example, uses the “appreciates” language of the ALI, rather
than the *M'Naghten* “know” language and thereby implies that there are degrees of cognitive dysfunction short of complete loss that nonetheless may exculpate. On the other hand, the new federal statute drops the “lacks substantial capacity” language, which makes it closer to the apparently absolute requirement of *M'Naghten*. Most important, the federal formulation drops the control prong of the defense; it reverts to the single cognitive prong of *M'Naghten*, adopting a position that was criticized more than 100 years ago.50

6. Involuntary Intoxication
The involuntary intoxication excuse has a disability of intoxication and the same excusing conditions as the insanity defense—a cognitive or a control dysfunction. That is, a person's involuntary intoxication provides an excuse if it causes the same level of dysfunction required by the jurisdiction's insanity defense (*M'Naghten* test, *M'Naghten*-plus-irresistible-impulse test, or ALI test, for example). Voluntary intoxication, even when severe enough to cause an excusing condition, will not provide an excuse defense.51

7. Duress
The duress defense typically requires that the person committed the offense while under coercion to do so. The defense does not require, however, that the coercion cause in the person a “substantial lack of capacity to conform his conduct to the requirements of law” or another similar description of the degree of control impairment that the excusing conditions for insanity or involuntary intoxication require. Instead, the duress defense requires that the person's disability, which is in this case the state of coercion, come from a particular cause: a threat of force that “a person of reasonable firmness... would have been unable to resist.”52 The Model Penal Code's duress formulation permits a court to take account of a person's individual circumstances and characteristics by allowing a partial individualization of the reasonable-person standard. The seriousness of the threat is to be assessed against the kind of threat that would coerce “a person of reasonable firmness in [the actor's] situation” (emphasis added).

D. Nonexculpatory Defenses
Nonexculpatory defenses, which give a defense even though the person's conduct may be wrongful and the person blameworthy, include such defenses as statutes of time limitation; diplomatic immunity; judicial, legislative, and executive immunities; immunity after compelled testimony or pursuant to a plea agreement; and incompetency to stand trial. Each of these forms of immunity furthers an important societal interest. Overriding nonexculpatory public policy interests also serve as the basis for many constitutional defenses. The double-jeopardy clause of the Fifth Amendment, for example, may foreclose the trial of even a blameworthy and convictable offender by barring the state from making repeated attempts to convict him or her. Notions of procedural fairness are said to demand that the state not subject a person to the embarrassment, expense, and ordeal of trial more than once for the same offense, nor compel him or her to live in a continuing state of anxiety and insecurity. Dismissals based on the operation of the exclusionary rule or on prosecutorial misconduct also may be nonexculpatory in nature, especially if the dismissals are unrelated to the reliability of the evidence in the fact-finding process.
public policies served by nonexculpatory defenses may be as broad as protecting all members of society from unlawful searches, or they may narrowly focus on assuring fairness in the treatment of individual defendants.

The nonexculpatory entrapment defense furthers societal interest in deterring police misconduct. Where a police officer or agent has had some hand in having a person commit an offense, the person may be entitled to an entrapment defense. The United States is one of the few countries that recognize such a defense, and within the United States, jurisdictions disagree over how the defense should be formulated. "Objective" formulations of the entrapment defense focus on the impropriety of the police conduct. The defense is available, even if the person was predisposed to commit the offense, if the police conduct is such that it "creates a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." "Subjective" formulations of the entrapment defense focus on the degree to which the entrapping conduct, rather than the person's own choice, is responsible for commission of the offense. Under this formulation, the defense is given "because the wrongdoing of the officer originates the idea of the crime and then induces the other person to [commit the offense] when the other person is not otherwise disposed to do so."

The objective formulation is clearly nonexculpatory: it uses the threat of acquittal of the defendant as a means of deterring improper police conduct. The blameworthiness of the defendant is not relevant. A subjective formulation, in contrast, might appear to be an excuse similar to duress that exculpates the defendant because he or she is coerced to commit an offense. However, the subjective formulation does not require that the inducement to commit the offense be one that a "person of reasonable firmness would have been unable to resist," as the duress excuse does. Instead, it gives the defense even if we could well have expected the defendant to have resisted the temptation. The subjective formulation is a nonexculpatory defense like the objective formulation, but one that seeks to exclude career criminals from the defense in order to limit the costs it accrues in trying to deter overreaching on the part of police.

VI. SPECIFIC OFFENSES

A. Overview

Most modern American codes are typically divided into two sections common in modern codes around the world. The general part sets out those doctrines that are applicable to all specific offenses, such as the definitions of culpability level, theories of imputation, inchoate offenses, and general defenses, as previously discussed. The special part enumerates the liability requirements for each specific offense. Most American codes follow the Model Penal Code's approach of grouping offenses by subpart and article according to the interest they concern:

Offenses Involving Danger to the Person

Article 210. Criminal Homicide

Article 211. Assault; Reckless Endangering; Threats
B. Homicide

1. Murder

With some important exceptions, an intentional killing is murder. Model Penal Code section 210.1(1)(a) defines murder as "criminal homicide ... committed purposely or knowingly." Thus either causing the death must be the person's "conscious object" or he or she must be "practically certain" that his or her conduct will cause the death. Although all objective elements of an offense need not have the same level of culpability, in this instance the "purposely or knowingly" requirement appears to apply both to causing the result (death) and to the requirement that the victim be a human being (and not just a fetus, for example). Thus it also must be shown that the person "believed or hoped" that the victim was a human being.

2. Manslaughter and Negligent Homicide

The paradigm for murder is an intentional (knowing) killing; the paradigm for manslaughter is a reckless killing. The Model Penal Code provides that "criminal homicide constitutes manslaughter when it is committed recklessly," by which the Code means a killing for which the person is reckless about causing death and is reckless about the victim being a human being. Where a person is not aware of a substantial risk that a death will result from his or her conduct, but should have been aware of such a risk, he or she is negligent about causing the death and is liable for negligent homicide.
3. Mitigation for Extreme Emotional Disturbance
The Model Penal Code provides for a mitigation from murder to manslaughter where "murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."59 The mitigation has two components. First, the killing must have been committed under the influence of extreme mental or emotional disturbance. If most people would have experienced such a disturbance under the same circumstances, but the person in fact did not, he or she is not eligible for the mitigation. Second, if the person is acting under the influence of extreme mental or emotional disturbance, there must be a reasonable explanation or excuse for the disturbance. No mitigation is available if the person's reaction to the situation is unreasonable or peculiar to the person.

4. Aggravation for Extreme Indifference to the Value of Human Life
Although a reckless killing is normally manslaughter, homicide doctrine typically deviates from the paradigm to aggravate a reckless killing to murder in circumstances judged to be egregious. At common law, this doctrine of aggravation was called depraved and malignant heart or abandoned and malignant heart murder. The Model Penal Code carries forward the common law's recognition of a reckless form of murder but bases the aggravation on the person's "extreme indifference to the value of human life."60 The Code allows a killing in the course of certain enumerated felonies to trigger a presumption of the recklessness and extreme indifference required for this aggravation. It offers this as a substitute for a felony-murder rule, which it does not otherwise recognize.

5. Felony Murder
Most American jurisdictions adopt a felony-murder rule, although there are many varieties of the rule in operation. The traditional felony-murder rule has two components. First, it imposes liability for murder for any killing, even one that is entirely accidental, that occurs in the course of an attempt of, commission of, or flight from a felony. Second, the traditional rule holds accomplices in the original felony accomplices in the murder. Nearly every jurisdiction limits the felony-murder rule in one or more of the following ways: the killing frequently must be a "probable consequence of the unlawful act"; the underlying felony must be a malum in se offense (an offense that is inherently wrong or evil, as opposed to an offense that is wrong only because it is prohibited); or the underlying offense must be inherently dangerous.

C. Sex Offenses
Rape and related sexual offenses have engendered some of the greatest controversy in the definition of specific offenses. This has occurred in part because of changing views of women and toward women, changing social mores concerning sexual relations among consenting adults generally, and increased awareness of the harm of unwanted intrusions on personal bodily autonomy.

Traditional sexual offense statutes are concerned with intercourse induced by force or threat of force. Current statutes tend to go further and criminalize many lesser forms of conduct, often including any unconsented-to intercourse. In this area the Model Penal
Code’s liability requirements for sexual offenses are often viewed as outdated. First, the Code’s continuation of the common law’s spousal exception is commonly dropped in modern American statutes. Second, in both its rape and statutory rape offenses the Model Penal Code follows the common-law rule of limiting liability to males who victimize females. Current statutes, in contrast, are commonly gender neutral. Statutory rape provisions have also been expanded in most states. States commonly apply a two-level approach to this offense: sexual intercourse with a very young girl remains punishable at the level of rape; intercourse with a girl over a certain age but under another age (especially if the male is older than the female by a specified number of years) is a felony of a lesser degree.

Another shift from traditional to modern sexual offense statutes is the advent of rape shield statutes. Defendants traditionally sought to present evidence regarding the alleged victim’s sexual history and character. However, almost every state now denies a defendant the opportunity to cross-examine the alleged victim without good cause and prevents the introduction of evidence regarding the alleged victim’s prior sexual activity.

D. Theft Offenses

The recent trend in modern code development has been to consolidate traditional common-law theft offenses, such as larceny, embezzlement, and false pretenses, into a single theft offense. The differences between the offenses were relatively insignificant because there was no meaningful difference between the offenses in terms of the culpability of the defendants, their dangerousness, or the seriousness of the harm caused. The Model Penal Code creates a single theft offense that can be committed in a variety of ways, such as theft by unlawful taking or disposition, theft by deception, theft by extortion, and theft of property lost, mislaid, or delivered by mistake. The consolidation avoids problems of pleading and proof by allowing the prosecutor simply to allege that the defendant stole and to support this at trial with evidence of any form of theft.

SELECTED BIBLIOGRAPHY


NOTES

2. Model Penal Code Proposed Official Draft was published by the American Law


6. U.S. Const. art. I, § 9, cl. 3 (“No bill of attainder or *ex post facto* law shall be passed”); U.S. Const. art I, § 10, cl. 1 (“No State shall ... pass any bill of attainder, *ex post facto* law”).


12. Ibid. § 2.02(2)(a)(i).

13. See, e.g., ibid. § 213.5 (requiring “purpose of arousing or gratifying sexual desire”).

14. Ibid. § 2.02(2)(b)(ii).

15. Ibid. § 2.02(2)(c).

16. Ibid. § 2.02(2)(d).

17. Ibid. Parallel language appears in the definition of recklessness in § 2.02(2)(c). In that context, however, the language concerns whether a “law-abiding” person would have consciously disregarded the risk that the defendant disregarded.


21. See, e.g., ibid. § 2.06(3).

22. See, e.g., ibid. § 2.08(2).

23. See ibid. § 2.07(1)(b).


26. See ibid. § 2.07(5).

27. Ibid. § 5.01(1)(c).

28. See, e.g., ibid. § 5.01(1).

29. See, e.g., ibid. § 5.03(1).

30. See, e.g., ibid. § 5.02(1).

31. Ibid. § 5.02(2).

32. See, e.g., ibid. § 2.04(1).

33. See, e.g., ibid. § 5.01(4).

34. See, e.g., ibid. § 2.11(2).

35. See, e.g., ibid. §§ 3.01–3.11.

36. See, e.g., ibid. §§ 2.04; 2.08; 2.09; 3.09; 4.01–4.10.

37. See, e.g., ibid. §§ 2.13; 4.04.

38. See, e.g., ibid. §§ 1.08–1.10.


41. The excuse and the justification of lawful military orders commonly are treated together under "defense of military orders." See, e.g., *ibid.* § 2.10.


43. The "purpose" formulation is most common in justifications for persons with special responsibilities.

44. For an interesting discussion of the legal concept of "mental disease or defect," see *State v. Guido*, 191 A.2d 45 (N.J. 1963).


46. See authorities collected at Robinson, *Criminal Law Defenses*, § 173(a) n. 1.


48. See authorities collected at Robinson, *Criminal Law Defenses*, § 173(a) n. 2.

49. See *ibid.*

50. See, e.g., *Parsons*, 2 So. 854.

51. See, e.g., Model Penal Code § 2.08(4), (5) (Official Draft 1962) (requiring both involuntary intoxication and resulting dysfunction similar to insanity).

52. See, e.g., *ibid.* § 2.09(1).


54. Model Penal Code § 2.13(1)(b) (Official Draft 1962). An officer also entraps if he or she "[makes] knowingly false representations designed to induce the belief that such conduct is not prohibited." *Ibid.* § 2.13(1)(a).


56. See Model Penal Code § 2.02 (2)(a)(i) & (b)(ii) (Official Draft 1962) (defining purposely and knowingly as to a result).

57. See *ibid.* § 2.02(2)(a)(ii) & (b)(i) (defining purposely and knowing as to a circumstance).


