

Criminal Law

11th Edition

Joel Samaha



CRIMINAL LAW

11th EDITION

Joel Samaha

Horace T. Morse Distinguished Teaching Professor
University of Minnesota



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Criminal Law, Eleventh Edition

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For My Students

About the Author

Professor Joel Samaha teaches Criminal Law, Criminal Procedure, and Introduction to Criminal Justice at the University of Minnesota. He is both a lawyer and a historian whose primary interest is crime control in a constitutional democracy. He received his BA, JD, and PhD from Northwestern University. Professor Samaha also studied under the late Sir Geoffrey Elton at Cambridge University, England. He was named the College of Liberal Arts Distinguished Teacher in 1974. In 2007, he was awarded the title of University of Minnesota Distinguished Teaching Professor and inducted into the Academy of Distinguished Teachers.

Professor Samaha was admitted to the Illinois Bar in 1962, where he practiced law briefly in Chicago. He taught at UCLA before going to the University of Minnesota in 1971. He has taught both television and radio courses in criminal justice and co-taught a National Endowment for the Humanities seminar in legal and constitutional history. At the University of Minnesota, he served as chair of the Department of Criminal Justice Studies from 1974 to 1978.

In addition to *Law and Order in Historical Perspective* (1974), an analysis of law enforcement in pre-industrial English society, Professor Samaha has transcribed and written a scholarly introduction to a set of local criminal justice records from the reign of Elizabeth I. He has also written several articles on the history of criminal justice, published in the *Historical Journal*, *American Journal of Legal History*, *Minnesota Law Review*, *William Mitchell Law Review*, and *Journal of Social History*. In addition to *Criminal Law*, he has written two other textbooks, *Criminal Procedure*, now in its eighth edition, and *Criminal Justice*, now in its seventh edition. He continues to teach and write full time.

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Criminal Law was my favorite class as a first-year law student at Northwestern University Law School in 1958. I've loved it ever since, a love that has only grown from teaching it at least once a year at the University of Minnesota since 1971. I hope my love of the subject comes through in *Criminal Law*, which I've just finished for the eleventh time. It's a great source of satisfaction that my modest innovation to the study of criminal law—the text-casebook—has endured and flourished. *Criminal Law*, the text-casebook, brings together the description, analysis, and critique of general principles with excerpts of cases edited for nonlawyers.

Like its predecessors, *Criminal Law*, Eleventh Edition, stresses both the general principles that apply to all of criminal law and the specific elements of particular crimes that prosecutors have to prove beyond a reasonable doubt. Learning the principles of criminal law isn't just a good mental exercise, although it does stimulate students to use their minds. Understanding the general principles is an indispensable prerequisite for understanding the elements of specific crimes. The general principles have lasted for centuries. The definitions of the elements of specific crimes, on the other hand, differ from state to state and over time because they have to meet the varied and changing needs of new times and different places.

That the principles have stood the test of time testifies to their strength as a framework for explaining the elements of crimes defined in the fifty states and in the U.S. criminal code. But there's more to their importance than durability; it's also practical to know and understand them. The general principles are the bases both of the elements that prosecutors have to prove beyond a reasonable doubt to convict defendants and of the defenses that justify or excuse defendants' criminal conduct.

So *Criminal Law*, Eleventh Edition rests on a solid foundation. But it can't stand still, any more than the subject of criminal law can remain frozen in time. The more I teach and write about criminal law, the more I learn and rethink what I've already learned; the more “good” cases I find that I didn't know were there; and the more I'm able to include cases that weren't decided and reported when the previous edition went to press.

Of course, it's my obligation to incorporate into the eleventh edition these now-decided and reported cases, and this new learning, rethinking, and discovery. But obligation doesn't describe the pleasure that preparing now eleven editions of *Criminal Law* brings me. It's thrilling to find cases that illustrate a principle in terms students can understand and that stimulate them to think critically about subjects worth thinking about. It's that thrill that drives me to make each edition better than the last. I hope it will make my students—and you—more intelligent consumers of the law and social reality of criminal law in the U.S. constitutional democracy.

ORGANIZATION/APPROACH

The chapters in the text organize the criminal law into a traditional scheme that is widely accepted and can embrace, with minor adjustments, the criminal law of any

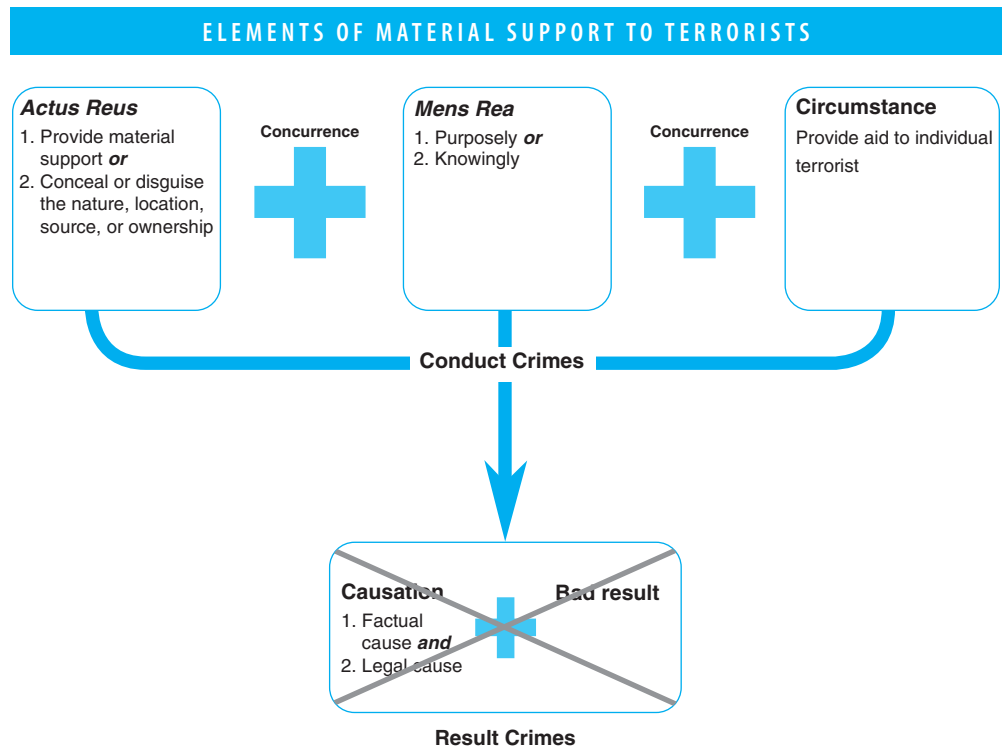
state and/or the federal government. The logic of the arrangement is first to cover the general part of the criminal law—namely, principles and doctrines common to all or most crimes—and then the special part of criminal law—namely, the application of the general principles to the elements of specific crimes.

Chapters 1 through 8 cover the general part of criminal law: the sources and purposes of criminal law and criminal punishment; the constitutional limits on the criminal law; the general principles of criminal liability; the defenses of justification and excuse; parties to crime; and incomplete crimes.

Chapters 9 through 13 cover the special part of the criminal law: the major crimes against persons; crimes against homes and property; crimes against public order and morals; and crimes against the state.

Criminal Law has always followed the three-step analysis of criminal liability (criminal conduct, justification, and excuse). *Criminal Law* brings this analysis into sharp focus in two ways. First, the chapter sequence: Chapters 3 and 4 cover the general principles of criminal conduct (criminal act, criminal intent, concurrence, and causation). Chapter 5 covers the defenses of justification, the second step in the analysis of criminal liability. Chapter 6 covers the defenses of excuse, the third step. So the chapter sequence mirrors precisely the three-step analysis of criminal liability.

Criminal Law also sharpens the focus on the three-step analysis by means of the *Elements of Crime* art. The design of the boxes is consistent throughout the book. All three of the analytic steps are included in each Elements of Crime graphic, but elements that aren't required—like crimes that don't require a "bad" result—have a gray "X" through the elements. The figures go right to the core of the three-step analysis of criminal liability, making it easier for students to master the essence of criminal law: applying general principles to specific individual crimes.



CHANGES TO THE ELEVENTH EDITION

Criminal Law, Eleventh Edition includes new case excerpts; an increased selection of relevant legal and social science research; a rich collection of examples to illustrate main points; all new chapter-opening vignettes to enhance student relevancy; and numerous new “Ethical Dilemmas” to give students an opportunity to prepare for on-the-job challenges.

For the first time, we have also included a running glossary to define terms as each chapter progresses—a tool we think students will find invaluable. Additionally, the Eleventh Edition includes entirely new sections, including some on such high-profile topics as the ban on carrying concealed guns in churches, mandatory life without parole for juveniles, the duty to intervene (as exemplified in the Penn State child sex assault case), physician-assisted suicide, “homegrown” (U.S. born and/or longtime resident non-U.S. born) terrorists, and more.

There are also new charts and tables, and all retained graphics are updated to reflect the most recent information available. Finally, I’ve included a few *sample documents* that criminal justice professionals encounter in their daily work—a police report (Chapter 1), a probation report (Chapter 2), a grand jury presentment (Chapter 3), and a forfeiture order (Chapter 11). Here are the highlights of the changes in each chapter.

Chapter 1, Criminal Law and Criminal Punishment: An Overview

NEW

- **Case Excerpt** *State v. Chaney* (1970) “Did the punishment devalue the victim?” Did the sentence of one year in prison with early parole send the message that the suffering he caused the woman he raped twice and then robbed was worthless?
- **Figure** “Elements of Criminal Liability”
- **Table** “Crimes and Torts: Similarities and Differences”
- **Ethical Dilemma** “Are the private paparazzi informants doing ethical work?”
- **Sample Document** Sample police report

REVISED Explanation of the distinction between *mala in se* and *mala prohibita* with examples

- **Figure** Updated “World Imprisonment Rates, 2009”
- **Table** Updated “Estimated Number of Arrests, 2010”

Chapter 2, Constitutional Limits on Criminal Law

NEW

- **Section** “Life without Parole for Juveniles”
- **Case Excerpts:**
 - *Georgia Carry, Inc. v. Georgia* (2011) “Did he have a right to carry a gun in church?” Tests a “hot button” issue—the constitutionality of a Georgia ban on carrying guns in churches
 - *Lawrence v. Texas* (2003) “Do consenting adults have a right to privacy in their private sexual conduct?” Tests whether there’s a constitutional right to privacy, involving adult consensual homosexual sex
 - *State v. Ninham* (2011) “Is it cruel and unusual punishment to sentence Omer Ninham to “death in prison”?” Tests the constitutionality of a sentence of life in prison without parole for a fourteen-year-old convicted of murder
- **Table** “The U.S. Supreme Court and the Right to Privacy,” with leading cases on the issue from *Griswold* to *Lawrence*
- **Sample Document** Probation form

REVISED

- “The ‘Right to Bear Arms’” Major revision reflects extension of *D.C. v. Heller* (2008) to states in *McDonald v. Chicago* (2010)
- Expansion of the Ethical Dilemma, “Is Shaming ‘Right?’”

Chapter 3, The Criminal Act: The First Principle of Criminal Liability

NEW

- **Vignette** “Was His Sleep Sex a Voluntary Act?”
- **Section** “Epileptic Seizures” New information from the Epilepsy Therapy Project on the effects of failing to take medication, auras, and warning signs of imminent seizures
- **Case Excerpts**
 - *State v. Burrell* (1992) “Did he fire the gun voluntarily?” Tests whether Burrell’s last act before firing the gun that killed his friend had to be voluntary
 - *People v. Decina* (1956) “Was killing while driving during an epileptic seizure voluntary?” Leading epileptic seizure case tests the culpability of Emil Decina who, during an epileptic seizure as he drove his vehicle, hit six schoolgirls, killing four
 - *Miller v. State* (1999) “Did he possess illegal drugs?” Tests whether Miller legally “possessed” the drugs in the car in which he was a passenger
- **Exploring Further**
 - Voluntary acts—“Is sleep sex a voluntary act?” Did he commit rape in his sleep?
 - Possession—“Did she possess alcohol?” Did the minor “possess” the alcohol in the car in the DWI case?
- **Ethical Dilemma** “Did Assistant Coach Michael McQueary (of Penn State) have a moral duty to intervene in the alleged sexual assault he witnessed?”
- **Sample Document** Excerpt of grand jury indictment in the Penn State case

Chapter 4, The General Principles of Criminal Liability: Mens Rea, Concurrence, Causation, Ignorance, and Mistake

NEW

- **Vignette** “Did He Intend to Give Them AIDS?”

REVISED

- **Section** “Ignorance and Mistake” section to clarify the “failure of proof” theory

Chapter 5, Defenses to Criminal Liability: Justifications

NEW

- **Vignette** “When Seconds Count, the Police Are Only Minutes Away”
- **Section** “Proving Defenses” Revised and expanded “Affirmative Defenses and Proving Them” from *Criminal Law* 10
- **Case Excerpts**
 - *U.S. v. Haynes* (1998) “Can a sneak attack be self-defense?”
 - *Toops v. State* (1994) “Was driving drunk a lesser evil than a car out of control?” Choice of evils and drunk driving
- **Table** Hot-button issue—“Summary of Florida Castle Law Changes”

REVISED

- **Section** “Self-Defense” Expanded, adding new material on inevitable and imminent attack and sneak attacks and self-defense
- **Figure** “Castle Doctrine Map” Updated to reflect state statutes in 2009

Chapter 6, Defenses to Criminal Liability: Excuses

NEW

- **Vignette** “Did He Know It Was ‘Wrong’ to Kill His Father?”
- **Major Sections**
 - “The History of Insanity Defense” Explores the history of the insanity defense from Plato (350 B.C.) to modern times, with emphasis on historical cases, especially from eighteenth-century England to the right-wrong test created in the famous *McNaughtan* case and its development up to the present. I’ve stressed the major legal and historical evidence regarding the myth that the insanity defense is a way to escape punishment.
 - “The Insanity Defense: Myths and Reality” Explores the enormous gap between the public *perception* of how the insanity defense works and how it actually works. The myth is that the defense allows many dangerous people to escape punishment for the crime; the reality is that few do escape.
- **Subsection** “The Product of Mental Illness Test (*Durham* Rule)”
- **Case Excerpts**
 - *U.S. v. Hinckley* (2009) “Should his furlough releases be expanded?” Latest decision in the series of opinions expanding John Hinckley’s furlough privileges since he attempted to kill President Reagan in 1981
 - *State v. Odell* (2004) “Did he know ‘the nature and wrongfulness’ of his acts?” Insanity case tests whether Darren Odell knew it was wrong to kill his father
- **Table** “Juveniles Tried as Adults” Briefly summarizes cases
- **Figure** “Duress Statutes” Highlights examples of defense of duress statutes from three states

REVISED Sections

- “The Right-Wrong Test” Expanded to explain the controversy between lawyers and mental health experts on the definition of insanity, especially on reason (cognition) and will (volition)
- “The Substantial Capacity Test (Model Penal Code)” Expanded to include criticisms of this test of insanity

Chapter 7, Parties to Crime and Vicarious Liability

NEW

- **Vignette** “Was He an Accessory?”
- **Figure** Examples of “Accomplice *Mens Rea*”

REVISED Section “Parties to Crime” Expanded explanation and discussion of the two theories of liability for someone else’s crime—“agency” and “forfeited personal identity”

Chapter 8, Inchoate Crimes

NEW

- **Vignette** “Did He Attempt to Rape?”
- **Major Section** “The Racketeer and Corrupt Organizations Act (RICO)” describes the history of RICO; **Four New Subsections** “Prosecuting Organized Crime,” “Prosecuting White-Collar Crimes,” “Prosecuting Government Corruption,” and Punishing RICO Offenders”
- **Section** Added “Defenses to Attempt Liability” to clarify and simplify two concepts, which are now two **New Subsections** under defenses: “Legal Impossibility” and “Voluntary Abandonment”

- **Case Excerpts**
 - *Mims v. U.S.* (1967) “Did he attempt to rob the bank?” (application of the Model Penal Code “substantial steps”)
 - *Alexander v. U.S.* (1993) “Was the forfeiture an excessive fine?”
 - *State v. Schleifer* (1923) “Did he solicit his audience to destroy their employers’ homes and businesses?”

REVISED Sections

- “Attempt *Actus Reus*” Revised to clarify and simplify the tests of the criminal act in attempt law, adding **New Subsections** for each test—all but the last act test; dangerous proximity to success test; indispensable element test; unequivocal test; probable desistance test; and the substantial steps (Model Penal Code) test
- Expanded “Solicitation *Actus Reus*”

Chapter 9, Crimes against Persons I: Murder and Manslaughter

NEW

- **Vignette** “Is Doctor-Assisted Suicide Murder?”
- **Section** “The Deadly Weapon Doctrine” History and modern application of the doctrine, explaining how prosecutors can prove the element of intent to kill by proving the defendant attacked the victim with a deadly weapon
- **Subsection** “Provocation by Nonviolent Homosexual Advance (NHA)” Debate over whether “gay panic” killings are murder or voluntary manslaughter
- **Case Excerpts**
 - *State v. Snowden* (1957) “Did he premeditatedly and deliberately murder?”
 - *People v. Phillips* (1966) “Is ‘grand theft’ an underlying felony for felony murder?”
 - *Commonwealth v. Carr* (1990) “Did seeing the lesbian lovemaking cause a ‘gay panic’?”
- **Table** “Stage of Fetal Development in Feticide Statutes”
- **Figures**
 - “The FBI’s Index of Serious Crimes in the United States (2010)”
 - “Inherently Dangerous to Life in the Abstract Felonies” Cases illustrating the range and variety of felonies that qualify for the felony murder rule
 - “Model Penal Code Homicide Sections”
- **Sample Document** Sample jury instruction on provocation

REVISED Sections

- “When Does Life Begin?” More emphasis on fetal death, especially feticide statutes
- “Felony Murder” Includes the history, the debate over, and the modern trend toward restricting, and even abolishing, the ancient rule
- “Manslaughter” Expanded by adding an introduction providing more background and history of manslaughter
- “Adequate Provocation” Expanded to clarify and elaborate on the complex definition and application of the concept, including a new list of the definition of legally accepted provocations

Chapter 10, Crimes against Persons II: Sex Offenses, Bodily Injury, and Personal Restraint

NEW

- **Vignette** “Did He Seduce or Rape Her?”
- **Case** *People v. Evans* (1975) “Was it rape or seduction?”

- **Figures**
 - “Relationship of Rape Victim to Rapist”
 - “Michigan Criminal Sexual Conduct Statute”

Chapter 11, Crimes against Property

NEW

- **Vignette** “Did He Commit Credit Card Fraud?”
- **Sections**
 - “Ponzi Schemes” History and impact of the 2007 “Great Recession” on Ponzi crimes
 - “White-Collar Crime” History and application to federal mail fraud
- **Case Excerpts**
 - *People v. Gasparik* (1981) “Did he ‘steal’ the leather jacket?” Description and analysis of adapting the ancient offense of larceny to fit the modern crime of shoplifting
 - *U.S. v. Maze* (1974) “Did he commit federal mail fraud?” Maze stole his roommate’s credit card to pay for his road trip from Kentucky to California

REVISED Section “Cybercrimes” Added history, showing that “digital people” weren’t the first “victims” of data collection and mining, giving an example of how GM used it in the 1920s to “steal” Ford’s customers by “target marketing”

Chapter 12, Crimes against Public Order and Morals

NEW

- **Vignette** “Violent Video Games”
- **Sections**
 - “Violent Video Games” Do they cause violent behavior like the killings at Columbine and other schools?
 - “Prostitution” Focuses on the inequality issue captured in this opener to the section: “The law’s desire to punish bad girls has often been moderated by its wish to save nice boys from harm, inconvenience or embarrassment”
- **Subsections include:**
 - The History of Prostitution Laws
 - The Double Standard Today
 - Court Remedies for the Double Standard
 - Local Government Programs Targeting Johns (car forfeiture, driver’s license revocation, and publishing the names of arrested johns in local newspapers and online)
- **Case Excerpts**
 - *Interactive Digital Software Association v. St. Louis County* (2002) “Can counties ban juveniles from playing violent video games in arcades?”
 - *Commonwealth v. An Unnamed Defendant* (1986) “Is it constitutional to arrest only prostitutes and not johns?”
- **Figure** “Male–Female Prostitution Arrests, 2010”

UPDATED Table “Estimated Number of Arrests, 2010”

Chapter 13, Crimes against the State

MAJOR CHAPTER REVISION In response to reviewers’ excellent suggestions, and to developments in the law, as well as my own interests in the history of espionage and its

application to present law, this is almost a 75 percent rewrite of the old chapter. The result: a chapter that engages more deeply the issues of the substantive criminal law and crimes against the state.

NEW

- **Vignette** “Did He Provide Material Support to a Terrorist Organization?” *Holder v. Humanitarian Law Project* (2010); U.S. Supreme Court case
- **Ethical Dilemma** “Which of the following actions is it ethical to ban as ‘material support and resources’ to terrorists?”
- **Table** Statute “Attempted Intentional Damage to Protected Computer”

REVISED Sections

- “Espionage” Major rewrite includes:
 - **New Subsection** “The History of the Espionage Act” Discussion of leading cases of the WWI era
 - **New Subsection** “The Espionage Act Today” Includes analysis of major cases
 - Bradley Manning and WikiLeaks
 - Thomas Drake, former executive in the NSA, whistleblower charged with transferring top secret national defense documents
 - Jeffrey Sterling, former CIA agent who disclosed secret national defense information to the *New York Times* reporter James Risen, which later appeared in Risen’s *Secret History of the CIA* book
 - John Kiriaku, former CIA officer and member of the team that captured and “waterboarded” the top Al Qaeda hierarchy, who disclosed the identity of a CIA analyst that interrogated Zubaydah
- “Antiterrorist Crimes” Major rewrite includes:
 - **New Subsections** All new text for “The Top Terrorist Plot Cases,” which discusses cases since 9/11, and “‘Homegrown’ Terrorists”
 - **Table** “Statutes Charged in Top 50 Terrorist Plots, 2001–2010”
 - **Figures** “Top 50 Plot Prosecutions, 2001–2010” and “Homegrown Terrorist Defendants Born in the United States, 2001–2010”
- “Material Support to Terrorists and Terrorist Organizations” Major rewrite places special emphasis on constitutional challenges on First Amendment speech and assembly rights
- “Sabotage” Expanded explanation of its use and added an extended analysis of the case of Douglas James Duchak, a computer analyst responsible for updating the TSA “No Fly List” who tried to destroy it because he was laid off
- **NEW U.S. Supreme Court Case** *Holder v. Humanitarian Law Project* (2010), upholding “material support” provisions of the USA Patriot Act

Supplements

RESOURCES FOR INSTRUCTORS

- **Instructor’s Resource Manual with Test Bank** The manual, which has been updated and revised by Valerie Bell of Loras College, includes learning objectives, key terms, a detailed chapter outline, a chapter summary, discussion topics, student activities, media tools, and a newly expanded test bank. The learning objectives are correlated with the discussion topics, student activities, and media tools. Each

chapter's test bank contains questions in multiple-choice, true–false, completion, and essay formats, with a full answer key. The test bank is coded to the learning objectives that appear in the main text and includes the page numbers in the main text where the answers can be found. Finally, each question in the test bank has been carefully reviewed by experienced criminal justice instructors for quality, accuracy, and content coverage. Our Instructor Approved seal, which appears on the front cover, is our assurance that you are working with an assessment and grading resource of the highest caliber. The manual is available for download on the password-protected website and can also be obtained by e-mailing your local Cengage Learning representative.

- **ExamView® Computerized Testing** The comprehensive Instructor's Manual is backed up by ExamView, a computerized test bank available for PC and Macintosh computers. With ExamView, you can create, deliver, and customize tests and study guides (both print and online) in minutes. You can easily edit and import your own questions and graphics, change test layouts, and reorganize questions. And using ExamView's complete word-processing capabilities, you can enter an unlimited number of new questions or edit existing questions.
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- **Lesson Plans** The Lesson Plans, which were updated by Valerie Bell of Loras College, bring accessible, masterful suggestions to every lesson. This supplement includes a sample syllabus, learning objectives, lecture notes, discussion topics and in-class activities, a detailed lecture outline, assignments, media tools, and “What if...” scenarios. The learning objectives are integrated throughout the Lesson Plans, and current events and real-life examples in the form of articles, websites, and video links are incorporated into the class discussion topics, activities, and assignments. The lecture outlines are correlated with PowerPoint slides for ease of classroom use. Lesson Plans are available on the instructor website.
- **Real-World Resources: Tools to Enhance Relevancy** The media tools from across all the supplements are gathered into one location and organized by chapter and learning objective. Each item has a description of the resource and a directed learning activity. Available on the instructor website, WebTutor and CourseMate, these can be used as resources for additional learning or as assignments.
- **Wadsworth Criminal Justice Video Library** So many exciting new videos—so many great ways to enrich your lectures and spark discussion of the material in this text. Your Cengage Learning representative will be happy to provide details on our video policy by adoption size. The library includes these selections and many others.
 - **ABC® Videos.** ABC videos feature short, high-interest clips from current news events as well as historic raw footage going back forty years. Perfect for discussion starters or to enrich your lectures and spark interest in the material in the text, these brief videos provide students with a new lens through which to view the past and present, one that will greatly enhance their knowledge and

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RESOURCES FOR STUDENTS

- **Study Guide** An extensive student guide has been developed for this edition by Mark Brown of the University of South Carolina. Because students learn in different ways, the guide includes a variety of pedagogical aids to help them. Each chapter is outlined and summarized, major terms and figures are defined, plus media tools for directed learning and self-tests are provided.
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- **Current Perspectives: Readings from Infotrac® College Edition** These readers, designed to give students a closer look at special topics in criminal justice, include free access to InfoTrac College Edition. The timely articles are selected by experts in each topic from within InfoTrac College Edition. They are available free when bundled with the text and include the following titles:
 - Introduction to Criminal Justice
 - Community Corrections
 - Cyber Crime
 - Victimology
 - Juvenile Justice
 - Racial Profiling
 - White-Collar Crime
 - Terrorism and Homeland Security
 - Public Policy and Criminal Justice
 - Technology and Criminal Justice
 - Ethics in Criminal Justice
 - Forensics
 - Corrections
 - Law and Courts
 - Policy in Criminal Justice

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What would I do without Doug and Steve? Doug takes me there and gets me here and everywhere, day in and day out, days that now have stretched into years. And my old and dearest friend Steve, who from the days when he watched over our Irish Wolfhounds in the 1970s, to now decades later when he keeps “Frankie” the Standard Poodle, “Kitty Cat,” the Siamese, me, and a lot more around here in order. And they do it all while putting up with what my beloved mentor at Cambridge, the late Sir Geoffrey Elton, called “Joel’s mercurial temperament.” Only those who really know me can understand how I can try the patience of Job! Friends and associates like these have given *Criminal Law*, Eleventh Edition whatever success it enjoys. As for its faults, I own them all.

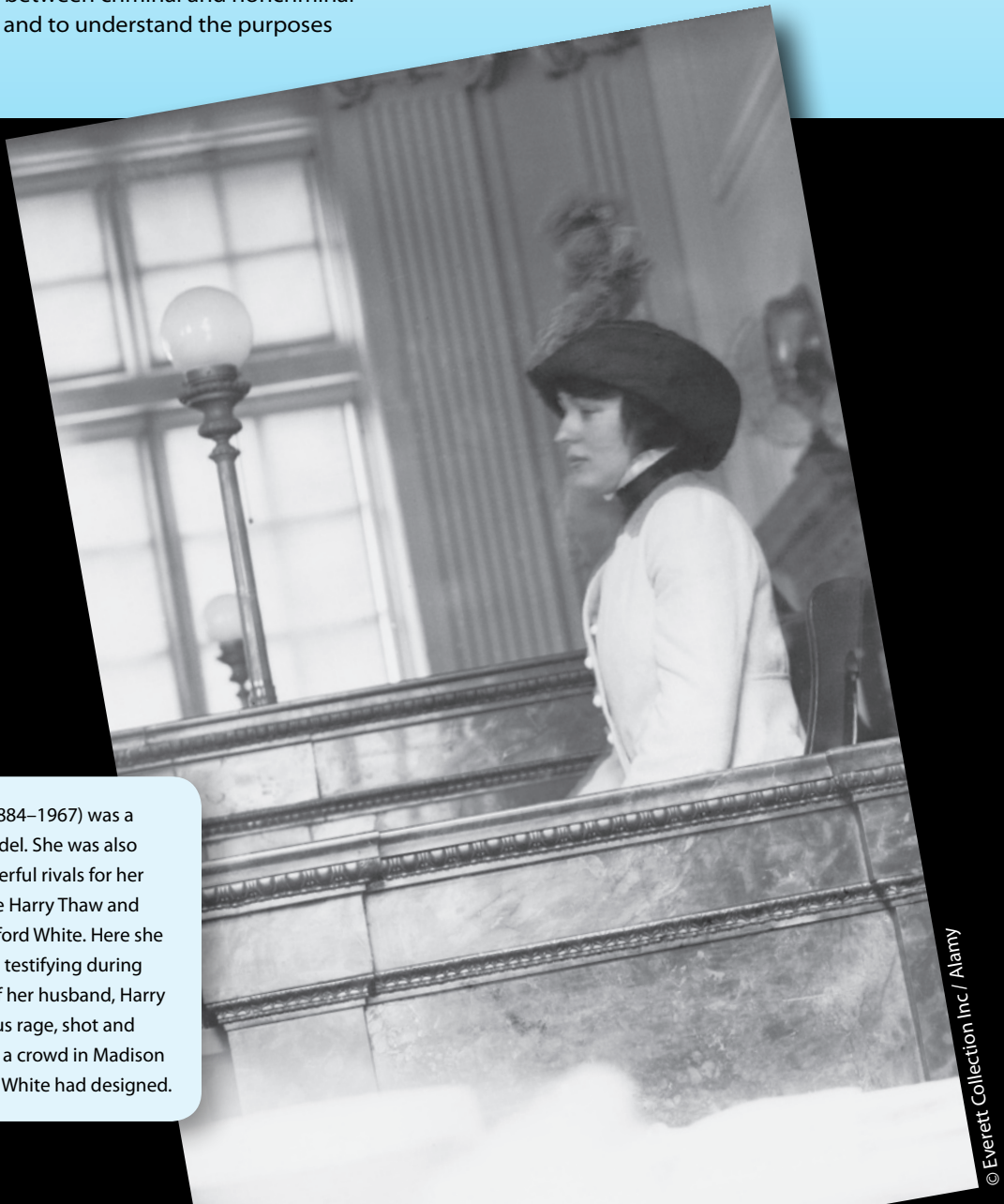
Joel Samaha
Minneapolis

CRIMINAL LAW

LEARNING OBJECTIVES

1. To define and understand what behavior deserves criminal punishment.
2. To understand and appreciate the relationship between the general and special parts of criminal law.
3. To identify, describe, and understand the main sources of criminal law.
4. To define criminal punishment, to know the difference between criminal and noncriminal sanctions, and to understand the purposes of each.
5. To define and appreciate the significance of the presumption of innocence and the burden of proof as they relate to criminal liability.
6. To understand the role of informal discretion and appreciate its relationship to formal criminal law.
7. To understand the text-case method and how to apply it to the study of criminal law.

Evelyn Nesbit Thaw (1884–1967) was a celebrity teen-age model. She was also the object of two powerful rivals for her affections—millionaire Harry Thaw and famous architect Stanford White. Here she is on February 7, 1907, testifying during the first murder trial of her husband, Harry Thaw. Thaw, in a jealous rage, shot and killed White in front of a crowd in Madison Square Garden, which White had designed.



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CRIMINAL LAW AND CRIMINAL PUNISHMENT

1

An Overview

CHAPTER OUTLINE

WHAT BEHAVIOR DESERVES CRIMINAL PUNISHMENT?

CRIMES AND NONCRIMINAL WRONGS

CLASSIFYING CRIMES

THE GENERAL AND SPECIAL PARTS OF CRIMINAL LAW

The General Part of Criminal Law
The Special Part of Criminal Law

THE SOURCES OF CRIMINAL LAW

Common Law Crimes
 State Common Law Crimes
 Federal Common Law Crimes
State Criminal Codes
The Model Penal Code (MPC)
Municipal Ordinances
Administrative Agency Crimes

CRIMINAL LAW IN THE U.S. FEDERAL SYSTEM

WHAT'S THE APPROPRIATE PUNISHMENT FOR CRIMINAL BEHAVIOR?

The Definition of "Criminal Punishment"
The Purposes of Criminal Punishment
 Retribution
 Prevention

TRENDS IN PUNISHMENT

THE PRESUMPTION OF INNOCENCE AND PROVING CRIMINAL LIABILITY

The Burden of Proof of Criminal Conduct
Proving the Defenses of Justification and Excuse

DISCRETIONARY DECISION MAKING

THE TEXT-CASE METHOD

The Parts of the Case Excerpts
Briefing the Case Excerpts
Finding Cases

Two Years in Prison for the Unlawful Sale of Liquor?

Joseph Pete sold a bottle of Gilbey's vodka and a bottle of Seagram's Seven Crown whiskey to Edward N. Sigvayugak. The prosecuting witness, Edward N. Sigvayugak, had been engaged by a state police officer to buy liquor from Pete with money provided by the officer, and was paid for his services by the officer.

(State v. Pete 1966)

"Every known organized society has, and probably must have, some system by which it punishes those who violate its most important prohibitions" (Robinson 2008, 1). This book explores, and invites you to think critically about, the answers to the two questions implied in Professor Robinson's quote:

1. What behavior deserves criminal punishment?
2. What's the appropriate punishment for criminal behavior?

Criminal law, and most of what you'll read about it in this book, boils down to varying answers to these questions. To introduce you to the possible answers, read the brief summaries presented from real cases that we'll examine deeper in the remaining chapters. After you read each summary, assign the case to one of the five following categories. Don't worry about whether you know enough about criminal law to decide which category it belongs in. In fact, try to ignore what you already know; just choose the category you believe best describes the case.

1. **CRIME.** If you put the case into this category, then grade it as very serious, serious, or minor. The idea here is to stamp it with both the amount of disgrace (stigma) you believe a convicted "criminal" should suffer and roughly the kind and amount of punishment you believe the person deserves.
2. **NONCRIMINAL WRONG.** This is a legal wrong that justifies suing someone and getting money, usually for some personal injury. In other words, name a price that the wrongdoer has to pay to another individual, but don't stamp it "criminal" (Coffee 1992, 1876–77).
3. **REGULATION.** Use government action—for example, a heavy cigarette tax to discourage smoking—to discourage the behavior (Harcourt 2005, 11–12). In other words, make the price high, but don't stamp it with the stigma of "crime."
4. **LICENSE.** Charge a price for it—for example, a driver's license fee for the privilege to drive—but don't try to encourage or discourage it. Make the price affordable, and attach no stigma to it.
5. **LAWFUL.** Let individual conscience and/or social disapproval condemn it, but create no legal consequences.

HERE ARE THE CASES

1. A young man beat a stranger on the street with a baseball bat for "kicks." The victim died. (*Commonwealth v. Golston* 1977, "Atrocious Murder" in Chapter 9, p. 318)
2. A husband begged his wife, who had cheated on him for months, not to leave him. She replied, "No, I'm going to court, and you're going to have to give me all the furniture. You're going to have to get the hell out of here; you won't have nothing." Then, pointing to her crotch, she added, "You'll never touch this again, because I've got something bigger and better for it."

Breaking into tears, he begged some more, "Why don't you try to save the marriage? I have nothing more to live for."

"Never," she replied. "I'm never coming back to you."

He "cracked," ran into the next room, got a gun, and shot her to death. (*Commonwealth v. Schnopps* 1983, Chapter 9, "Voluntary Manslaughter," p. 335)
3. Two robbers met a drunk man in a bar, displaying a wad of money. When the man asked them for a ride, they agreed, drove him out into the country, robbed him, forced him out of the car without his glasses, and drove off. A college student, driving at a reasonable speed, didn't see the man standing in the middle of the road waving him down, couldn't stop, and struck and killed him. (*People v. Kibbe* 1974, Chapter 4, "Proximate Cause," p. 147)
4. During the Korean War, a mother dreamed that an enemy soldier was on top of her daughter. In her sleep, she got up, walked to a shed, got an ax, went to her daughter's room, and plunged the ax into her, believing she was killing the enemy soldier. The daughter died instantly; the mother was beside herself with grief. (*King v. Cogdon* 1951, Chapter 3, "Voluntary Act," p. 100)
5. A neighbor told an eight-year-old boy and his friend to come out from behind a building, and not to play there, because it was dangerous. The boy answered belligerently, "In a minute."

Losing patience, the neighbor said, “No, not in a minute; get out of there now!”

A few days later, he broke into her house, pulled a goldfish out of its bowl, chopped it into little pieces with a steak knife, and smeared it all over the counter. Then, he went into the bathroom, plugged in a curling iron, and clamped it onto a towel. (*State v. K.R.L.* 1992, Chapter 6, “The Excuse of Age,” p. 212)

6. A young man lived in a ground-level apartment with a large window opening onto the building parking lot. At eight o’clock one morning, he stood naked in front of the window eating his cereal in full view of those getting in and out of their cars. (*State v. Metzger* 1982, Chapter 2, “Defining Vagueness,” p. 46)
7. A man knew he was HIV positive. Despite doctors’ instructions about safe sex and the need to tell his partners before having sex with them, he had sex numerous times with three different women without telling them. Most of the time, he used no protection, but, on a few occasions, he withdrew before ejaculating. He gave one of the women an anti-AIDS drug, “to slow down the AIDS.” None of the women contracted the HIV virus. (*State v. Stark* 1992, Chapter 4, “MPC Mental Attitudes: Purpose,” p. 132)
8. A woman met a very drunk man in a bar. He got into her car, and she drove him to her house. He asked her for a spoon, which she knew he wanted to use to take drugs. She got it for him and waited in the living room while he went into the bathroom to “shoot up.” He came back into the living room and collapsed; she went back to the bar. The next morning she found him “purple, with flies flying around him.” Thinking he was dead, she told her daughter to call the police and left for work. He was dead. (*People v. Oliver* 1989, Chapter 3, “Omissions as Acts,” p. 109)

WHAT BEHAVIOR DESERVES CRIMINAL PUNISHMENT?

“Welcome to Bloomington, you’re under arrest!” This is what a Bloomington, Minnesota, police officer, who was a student in my criminal justice class, told me that billboards at the city limits of this Minneapolis suburb should read.

“Why,” I asked?

“Because everything in Bloomington is a crime,” he replied, laughing.

Although his comments were exaggerated, the officer spoke the truth. Murders, rapes, robberies, and other “street crimes” have always filled the news and stoked our fears. “White-collar crimes” have also received attention in these early years of the twenty-first century. And, of course, since 9/11, crimes committed by terrorists have also attracted considerable attention. These types of crimes will also receive most of our attention in this book—at least until Chapter 12, when we turn to the “crimes against public order and morals.” In numbers, crimes against public order and morals dwarf all the others combined (see Table 1.1). But from now until Chapter 12, you’ll read about the 600,000 violent and 2.5 million property crimes in Table 1.1, not the 17.7 million minor offenses.

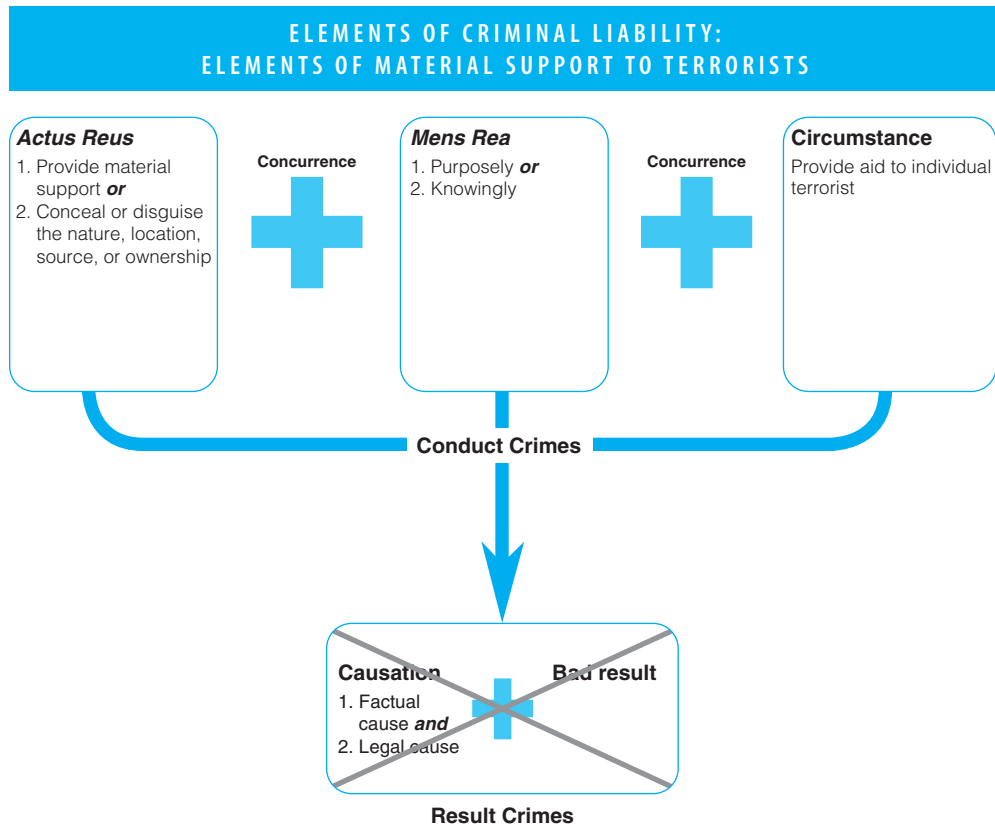
Let’s look briefly at the American Law Institute’s (ALI) Model Penal Code (MPC) definition of behavior that deserves punishment. It’s the framework we’ll use to guide our analysis of **criminal liability**, “conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests” (ALI 1985, § 1.02(1)(a)).

Here’s a breakdown of the words and phrases in the definition:

1. Conduct that
2. Unjustifiably and inexcusably
3. Inflicts or threatens substantial harm
4. To individual or public interests

LO 1

criminal liability,
conduct that
unjustifiably and
inexcusably inflicts or
threatens substantial
harm to individual or
public interests



The Elements of Criminal Liability figure illustrates these elements as they apply to the crime of providing support to terrorists (which we'll discuss in Chapter 13).

These few words and phrases are the building blocks of our whole system of criminal law and punishment. We'll spend the rest of the book exploring and applying them to a wide range of human behavior in an equally wide range of circumstances. But, first, let's examine some propositions that will help prepare you to follow and understand the later chapters. Let's begin by looking at the difference between criminal wrongs and other legal wrongs that aren't criminal.

LO 4

CRIMES AND NONCRIMINAL WRONGS

The opening case summaries demonstrate that criminal law is only one kind of social control, one form of responsibility for deviating from social norms. So in criminal law, the basic question boils down to "Who's criminally responsible for what crime?" We won't often discuss the noncriminal kinds of responsibility in this book. But you should keep them in mind anyway, because in the real world, criminal liability is the exceptional form of social control. The norm is the other four categories mentioned in the beginning of the chapter (p. 4). And they should be, because criminal liability is the harshest and most expensive form of social control.

In this section, we'll concentrate on the noncriminal wrongs called **torts**, private wrongs for which you can sue the party who wronged you and recover money.

Crimes and torts represent two different ways our legal system responds to social and individual harm (Table 1.2). Before we look at their differences, let's look at how they're similar. First, both are sets of rules telling us what we can't do ("Don't steal") and what we must do ("Pay your taxes"). Second, the rules apply to everybody in the

torts, private wrongs for which you can sue the party who wronged you and recover money

Estimated Number of Arrests, United States, 2010		TABLE 1.1
CRIME	ARRESTS*	
Murder and nonnegligent manslaughter	11,201	
Forcible rape	20,088	
Robbery	112,300	
Aggravated assault	408,488	
Burglary	289,769	
Larceny-theft	1,271,410	
Motor vehicle theft	71,487	
Arson	11,296	
Violent crime [†]	552,077	
Property crime [†]	1,643,962	
Other assaults	1,292,449	
Forgery and counterfeiting	78,101	
Fraud	187,887	
Embezzlement	16,616	
Stolen property; buying, receiving, possessing	94,802	
Vandalism	252,753	
Weapons; carrying, possessing, etc.	159,020	
Prostitution and commercialized vice	62,668	
Sex offenses (except forcible rape and prostitution)	72,628	
Drug abuse violations	1,638,846	
Gambling	9,941	
Offenses against the family and children	111,062	
Driving under the influence	1,412,223	
Liquor laws	512,790	
Drunkenness	560,718	
Disorderly conduct	615,172	
Vagrancy	32,033	
All other offenses	3,720,402	
Suspicion	1,166	
Curfew and loitering law violations	94,797	

*Total 13,120,947. Does not include suspicion.

[†]Violent crimes are offenses of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. Property crimes are offenses of burglary, larceny-theft, motor vehicle theft, and arson.

Source: FBI Uniform Crime Report 2011 (Sept.), Table 29.

ETHICAL DILEMMA

Are the private paparazzi informants doing ethical work?

With his dapper red scarf and orange-tinted hair, Kim Rae-in is a card-carrying member of the “paparazzi” posse, cruising Seoul on his beat-up motorcycle on the lookout for the next “gotcha” moment. He’s not stalking starlets or pop singers. He’s after moneymaking snapshots: the salary man lighting up in a no-smoking area, the homeowner illegally dumping trash, the merchant selling stale candy to kids. Kim, 34, a former gas-station attendant, isn’t choosy. Even small crime pays big time—more than \$3,000 in January alone. “It’s good money,” he says. “I’ll never go back to pumping gas. I feel free now.”

Kim is among a new breed across South Korea—referred to as “paparazzi,” although their subjects are not the rich and famous but low-grade lawbreakers whose actions caught on film are peddled as evidence to government officials. In recent years, officials have enacted more than 60 civilian “reporting” programs that offer rewards ranging from 50,000 won, or about \$36, for the smallest infractions to 2 billion won, or \$1.4 million, for a large-scale corruption case involving government officials. (That one has yet to be made.) The paparazzi trend even has inspired its own lexicon. There are “seon-parazzi,” who pursue election-law violators; “ssu-parazzi,” who target illegal acts of dumping garbage, and “seong-parazzi,” who target prostitution, which is illegal.

Amid the nation’s worsening economic crisis, officials say there are fewer government investigators to maintain public order. So they increasingly rely on a bounty-hunter style of justice. Many paparazzi are out-of-work salary men, bored homemakers, and college students who consider themselves deputized agents of the government.

To meet a growing demand, scores of paparazzi schools have sprung up, charging students \$250 for three-day courses on how to edit film, tail suspected wrongdoers, and operate button-sized cameras. Schools estimate 500 professional paparazzi now work in South Korea. Few officials question the ethics of arming a citizenry against itself with zoom video and long-range lenses. “They don’t

violate any laws, so there’s no reason to restrict them,” said a National Tax Service official, who declined to give his name.

Some paparazzi students say they hate ratting out their neighbors, but the money is too good to resist. “It’s shameful work—I’m really not proud of it,” said one student who declined to give her name. Said another, who also asked to remain anonymous, “Let’s put it this way: I don’t want to be called a paparazzi; I’m a public servant” (Glionna 2009).

Others disagree.

Bang Jae-won, 56, an eight-year veteran of the trade, said he felt proud of the times he caught people dumping garbage at a camping site or exposed marketing frauds, one of which once bankrupted him. “I regret the early, desperate days when I reported the misdemeanors of people as poor as I was,” said Mr. Bang, who turned to this work after he was told he was too old by prospective employers. “I don’t tell my neighbors what I do because it might arouse unnecessary suspicions,” he said. “But, in general, I am not ashamed of my work. To those who call us snitches, I say, “Why don’t you obey the law?””

Critics, however, say the reward program has undermined social trust. “The idea itself is good, but when people make a full-time job of this, it . . . raises ethical questions,” said Lee Yoon-ho, a professor of police administration at Dongguk University in Seoul (Sang-Hun 2011).

Instructions

1. List all the crimes the paparazzi report.
2. Which, if any, do you consider it ethical to report?
3. Which, if any, do you consider it unethical to report?
4. Would you recommend that your state adopt a reporting reward policy? Why would it be ethical (or unethical)?

Sources: Glionna, John. 2009. “South Korean Cameras Zero in on Crime.” *Los Angeles Times*, February 17. Accessed October 13, 2011. http://seattletimes.nwsourc.com/html/nationworld/2008751061_korea17.html.

Sang-Hun, Choe. 2011. “Help Wanted: Busybodies with Cameras.” *New York Times*, September 28. Accessed October 13, 2011. http://www.nytimes.com/2011/09/29/world/asia/in-south-korea-where-digital-tattling-is-a-growth-industry.html?_r=1&scp=1&sq=Bang%20Jae-won&st=cse.

Crimes and Torts: Similarities and Differences	
CRIMES	TORTS (PRIVATE WRONGS)
Crimes originate from a list of “can’t’s” and “must’s.”	Torts originate from a list of “can’t’s” and “must’s.”
The list applies to everybody.	The list applies to everybody.
Crimes injure another individual and the whole community.	Torts injure another individual and the whole community.
Criminal prosecutions are brought by the state against individuals.	Private parties bring tort actions against other parties.
Convicted offenders pay money to the state or serve time in the custody of the state.	Defendants who lose in tort cases pay money to the plaintiff who sued.
Criminal conviction is the condemnation by the whole community, the expression of its “hatred, fear, or contempt for the convict.”	The tort award compensates the plaintiff who brought the suit.
The state has to prove all elements of the crime by “proof beyond a reasonable doubt.”	The burden on the plaintiff is to prove responsibility by a preponderance of the evidence.

TABLE 1.2

community, and they speak on behalf of everybody, with the power and prestige of the whole community behind them. Third, the power of the law backs up the enforcement of the rules (Hart 1958, 403).

How are they different? Some believe that crimes injure the whole community, whereas torts harm only individuals. But that’s not really true. Almost every crime is also a tort. Many crimes and torts even have the same name (there’s a crime and a tort called “assault”). Other crimes are torts even though they don’t have the same names; for example, the crime of murder is also the tort of wrongful death. In fact, the same killing sometimes is tried as murder and later as a civil wrongful death suit.

One famous example is in the legal actions against the great football player O. J. Simpson. He was acquitted in the murder of his ex-wife and her friend in a criminal case but then lost in a tort case for their wrongful deaths. Also, torts don’t just harm other individuals; they can also harm the whole community. For example, breaches of contract don’t just hurt the parties to the contract. Much of what keeps daily life running depends on people keeping their word when they agree to buy, sell, perform services, and so on.

Are crimes just torts with different names? No. One difference is that criminal prosecutions are brought by the government against individuals; that’s why criminal cases always have titles like “*U.S. v. Rasul*,” “*People v. Menendez*,” “*State v. Erickson*,” or “*Commonwealth v. Wong*.” (The first name in the case title is what that government entity calls itself, and the second name, the defendant’s, is the individual being prosecuted.) Nongovernment parties bring tort actions against other parties who may or may not be governments.

A second difference is that injured plaintiffs (those who sue for wrongs in tort cases) get money (called *damages*) from defendants for the injuries they suffer. In criminal actions, defendants pay fines to the state and/or serve time doing community service, in jail, or in prison.

The most important difference between torts and crimes is the conviction itself. It’s “the expression of the community’s hatred, fear, or contempt for the convict . . .” (Hart 1958). Professor Henry M. Hart sums up the difference this way:

[Crime] . . . is not simply anything which a legislature chooses to call a “crime.” It is not simply antisocial conduct which public officers are given a responsibility to