Criminal Defenses

JUSTIFICATIONS AND EXCUSES

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WAS OFFICER HYMON JUSTIFIED IN KILLING EDWARD GARNER?

At about 10:45 p.m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene, they saw a woman standing on her porch. . . . She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. . . . Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was . . . Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5' 5" or 5' 7" tall. While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that, if Garner made it over the fence, he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body. (*Tennessee v. Garner*, 471 U.S. 1 [1985])

In this chapter, you will learn about the law on police use of deadly force.

INTRODUCTION

The Prosecutor's Burden

The American legal system is based on the **presumption of innocence**. A defendant may not be compelled to testify against himself or herself, and the prosecution is required as a matter of the due process of law to establish every element of a crime beyond a reasonable doubt to prove a defendant's guilt. This heavy prosecutorial burden also reflects the fact that a criminal conviction carries severe consequences and individuals should not be lightly deprived of their liberty. Insisting on a high standard of guilt assures the public that innocents are not being falsely convicted and that individuals need not fear that they will suddenly be snatched off the streets and falsely convicted and incarcerated.[1]

The prosecutor presents his or her witnesses in the **case-in-chief**. These witnesses are then subject to cross-examination by the defense attorney. The defense also has the right to introduce evidence challenging the prosecution's case during the **rebuttal** stage at trial. A defendant, for instance, may raise doubts about whether the prosecution has established that the defendant committed the crime beyond a reasonable doubt by presenting alibi witnesses.

A defendant is to be acquitted if the prosecution fails to establish each element of the offense beyond a reasonable doubt. Judges have been reluctant to reduce the beyond

TEST YOUR KNOWLEDGE: TRUE OR FALSE?

1. An individual who reasonably believes that another individual presents a future threat of serious physical harm to him or her would be successful in most states in relying on self-defense.
2. A police officer who identifies him- or herself as a law enforcement officer may use deadly force against any fleeing felon who disregards a police command to "halt" and continues his or her flight.
3. An individual under the law in every state may use physical force to resist an unlawful arrest.
4. The defense of necessity allows an individual who is drowning to take the life of another person to save his or her own life.
5. An individual in most instances may not be held criminally liable if the "victim" consents to the crime.
6. An individual who is found not guilty of a crime by reasons of insanity is not sentenced to prison and is released on the condition that he or she will seek psychiatric treatment.
7. Alcohol or narcotics intoxication never constitutes a criminal defense.
8. Individuals younger than fourteen under the common law cannot be held criminally liable because of their status as juveniles.
9. An individual who is able to demonstrate that he or she was paid a significant amount of money by a government informant to commit a crime will be successful in relying on the

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defense of entrapment based on this fact alone.

10. Individuals who recently immigrated to the United States will be successful in relying on the defense that although they broke American law, their criminal conduct was considered lawful in the country from which they immigrated.

Check your answers on page 152.

a reasonable doubt standard to a mathematical formula and stress that a "high level of probability" is required and that jurors must reach a "state of near certitude" of guilt.[2]

The classic definition of reasonable doubt provides that the evidence "leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge."[3]

A defendant may present an **alibi** and claim that he or she did not commit the crime because the defendant was somewhere else at the time the crime was committed. A defense attorney is required to notify the prosecutor that the defendant will rely on the defense and provide the names of the witnesses that will testify. The Supreme Court has held that fairness dictates that the prosecutor disclose the witnesses that he or she plans to present to rebut the defendant's alibi defense.[4]

A defendant is entitled to file a motion for judgment of acquittal at the close of the prosecution's case or prior to the submission of the case to the jury. This motion will be granted if the judge determines that the evidence does not support any verdict other than acquittal, viewing the evidence as favorably as possible for the prosecution. The judge, in the alternative, may adhere to the standard procedure of submitting the case to the jury following the close of the evidence and instructing the jurors to acquit if they have a reasonable doubt concerning one or more elements of the offense.[5]

Affirmative Defenses

In addition to attempting to demonstrate that the prosecution's case suffers from a failure of proof beyond a reasonable doubt, defendants may present **affirmative defenses**, or defenses in which the defendant typically possesses the **burden of production** as well as the **burden of persuasion**.

Justifications and **excuses** are both affirmative defenses. The defendant possesses the burden of producing "some evidence in support of his defense." In most cases, the defendant then also has the burden of persuasion by a preponderance of the evidence, which is a balance of probabilities, or slightly more than 50 percent. In some jurisdictions, the prosecution retains the burden of persuasion and is responsible for negating the defense by a reasonable doubt.[6]

Assigning the burden of production to the defendant is based on the fact that the prosecution cannot be expected to anticipate and rebut every possible defense that might be raised by a defendant. The burden of rebutting every conceivable defense ranging from insanity and intoxication to self-defense would be overwhelmingly time-consuming and inefficient. Thus, it makes sense to assign responsibility for raising a defense to the defendant. The U.S. Supreme Court has issued a series of rather technical judgments on the allocation of the burden of persuasion. In the last analysis, states are fairly free to place the burden of persuasion on either the defense or the prosecution. As noted, in most instances, the prosecution has the burden of persuading the jury beyond a reasonable doubt to reject the defense.

There are two types of affirmative defenses that may result in acquittal:

1. ***Justifications.*** These are defenses to otherwise criminal acts that society approves and encourages under the circumstances. An example is self-defense.
2. ***Excuses.*** These are defenses to acts that deserve condemnation, but for which the defendant is not held criminally liable because of a personal disability such as infancy or insanity.

Professors Richard Singer and John La Fond illustrate the difference between these concepts by noting that justification involves illegally parking in front of a hospital in an effort to rush a sick infant into the emergency room, and an excuse entails illegally parking in response to the delusional demand of "Martian invaders."[7] In the words of Professor George Fletcher, "Justification speaks to the rightness of the act; an excuse, to whether the actor is [mentally] accountable for a concededly wrongful act."[8]

In the common law, there were important consequences resulting from a successful plea of justification or excuse. A justification resulted in an acquittal, whereas an excuse provided a defendant with the opportunity to request that the king exempt him or her from the death penalty. Eventually, there came to be little practical difference between being acquitted by reason of a justification and being acquitted by reason of an excuse.[9]

Scholars continue to point to differences between categorizing an act as justified and categorizing an act as excused, but these have little practical significance for most defendants.

JUSTIFICATIONS AND EXCUSES

Defenses categorized as justifications typically include necessity, consent, self-defense, defense of others, defense of habitation and property, execution of public duties, and resisting unlawful arrest. There are various theories for the defense of justification, none of which fully account for each and every justification defense.[10]

- ***Moral Interest.*** An individual's act is justified based on the protection of an important moral interest. An example is self-defense and the preservation of an individual's right to life.
- ***Superior Interest.*** The interests being preserved outweigh the interests of the person who is harmed. The necessity defense authorizes an individual to break the law to preserve a more compelling value. An example might be the captain of a ship in a storm who throws luggage overboard to lighten the load and preserve the lives of those on board.
- ***Public Benefit.*** An individual's act is justified on the grounds that it is undertaken in service of the public good. This includes a law enforcement officer's use of physical force against a fleeing felon.
- ***Moral Forfeiture.*** An individual perpetrating a crime has lost the right to claim legal protection. This explains why a dangerous aggressor may justifiably be killed in self-defense.

A defendant who establishes a perfect defense is able to satisfy each and every element of a justification defense and is acquitted. An imperfect defense arises in those instances in which the requirements of the defense are not fully satisfied. For instance, a defendant may use excessive force in self-defense or possess a genuine, but unreasonable, belief in the need to act in self-defense. A defendant's liability in these cases is typically reduced, for example, in the case of a homicide to manslaughter and to a lower level of guilt in the case of other offenses.[11]

Excuses, in contrast, provide a defense based on the fact that although a defendant committed a criminal act, he or she is not considered responsible. The defendant claims that although "I broke the law and my act was wrong, I am not responsible. I am not morally blameworthy." This is illustrated by legal insanity that excuses criminal liability based on a mental disease or defect. Individuals are also excused due to youth or intoxication or in those instances when they lack a criminal intent as a result of a mental disease or defect. Defendants are further excused in those instances when they commit a criminal act in response to a threat of imminent harm or a mistake of fact or are manipulated and entrapped into criminal conduct.

Excuses are very different from one another, and each requires separate study. The common denominator of excuses is that the defendants are not morally blameworthy and therefore are excused from criminal liability. The defenses categorized as excuses typically include insanity, intoxication, age, duress, mistake of law, mistake of fact, and entrapment.

The difference between justifications and excuses no longer has a great deal of importance. In this chapter, defenses are divided into five categories.

1. ***Lack of Capacity.*** Individuals claim a lack of mental capacity to commit a crime (insanity, intoxication, age).
2. ***Justification and Excuse Defenses.*** Individuals contend that under the circumstances, their criminal act was justified or excused (necessity, duress, consent, mistake of law, mistake of fact).
3. ***Defenses Justifying the Use of Force.*** Individuals confronting a threat to their person or property claim a right to resort to armed force (self-defense, defense of others, defense of habitation and of property, resisting an arrest).
4. ***Governmental Misconduct.*** Individuals claim a defense based on governmental misconduct (entrapment, selective prosecution).
5. ***New Defenses.*** Defendants have attempted to persuade judges to accept previously unrecognized defenses based on biology, psychology, and culture.

DEFENSES BASED ON A LACK OF CAPACITY TO COMMIT A CRIME

A defendant invoking a defense based on a lack of capacity to commit a crime concedes that he or she committed the required *actus reus*. The defendant, however, claims an inability to form the *mens rea* for the crime. The three primary defenses based on a lack of capacity to commit a crime are insanity, inebriation, and infancy.

The Insanity Defense

English common law initially did not consider a mental disturbance or insanity as relevant to an individual's guilt. In the thirteenth century, it was recognized that a murderer of "unsound mind" was deserving of a royal pardon, and as the century drew to a close, "madness" was recognized as a complete defense.[12] This more humanistic approach reflected the regrettable "wild beast" theory that portrayed "madmen" as barely removed from "the brutes who are without reason."[13]

The **insanity defense** is one of the most thoroughly studied and hotly debated issues in criminal law. The debate is not easy to follow because the law's reliance on concepts drawn from mental health makes this a difficult area to

understand. Texas residents must have scratched their heads in 2004 when Deanna Laney was acquitted by reason of insanity for crushing the skulls of her three sons with heavy stones. She then proceeded to call the police and informed them that "I just killed my boys." The youngest at the time was a fourteen-month-old who was left-brain injured and nearly blind. Two years earlier, another Texas mother, Andrea Yates, received a life sentence for drowning her five children in the bathtub. Yates told the police that the devil had told her to kill her children; and despite Yates's history of mental problems and claim of insanity, the jury found that she was able to distinguish right from wrong. Yates's conviction was overturned on appeal, and in July 2006, a Texas jury ruled Yates not guilty by reason of insanity (NGRI). Laney reportedly believed that she and Yates had been selected by God to be witnesses to the end of the world.

In 2015, military veteran Eddie Ray Routh was convicted of the murder of famed Navy SEAL Chris Kyle and Kyle's friend Chad Littlefield. The jury rejected Routh's insanity defense because they determined that he knew the difference between right and wrong at the time of the murder. The prosecution expert witnesses testified that Routh was an alcohol and drug abuser who feigned post-traumatic stress disorder (PTSD) whenever he got in trouble with the law. He was sufficiently coherent to stop at a fast-food restaurant following the killings.

In another 2015 case, twenty-seven-year-old James Holmes entered an Aurora, Colorado, movie theater showing the film *The Dark Knight*. Holmes was equipped with protective gear and carried an AR-15, a shotgun, and two Glock pistols and opened fire on a crowd of midnight moviegoers, killing twelve and wounding seventy. The prosecution alleged that Holmes had engaged in meticulous planning in carrying out the attack, which was inconsistent with his claim of legal insanity. Defense attorneys, on the other hand, noted that Holmes had a history of mental illness in his family and that as a child and as an adult he had engaged in bizarre behavior and at age eleven he had attempted suicide. The jury found Holmes guilty on all 165 counts although one juror refused to endorse capital punishment and, as a result, Holmes was sentenced to life imprisonment.

In 2018, a New York jury rejected the insanity defense of Yoselyn Ortega, a nanny, who used a kitchen knife to kill two-year-old Leo Krim and six-year-old Lucia Krim. Ortega claimed that she heard voices instructing her to kill the children. In New York state between 2007 and 2016, there were 5,111 murder cases; only six murder defendants were found to be legally insane.[14]

Defendants who rely on the insanity defense are typically required to provide notice to the prosecution. They are then subject to examination by a state-appointed mental health expert, and they will usually hire one or more of their own "defense experts." These experts will interview the defendant and conduct various psychological tests. The prosecution and defense experts will then testify at trial, and additional testimony is typically offered on behalf of the defendant by people who are able to attest to his or her mental disturbance. The nature of a defendant's criminal conduct is also important. The prosecutor may argue that a well-planned crime is inconsistent with a claim of insanity. The jury is then asked to return a verdict of either guilty, not guilty, or NGRI. In some jurisdictions, the jury considers the issue of insanity in a separate hearing in the event that the defendant is found guilty.

Keep in mind that the jury typically will hear testimony from psychiatrists and other health professionals who examined the defendant on behalf of the prosecution, and from psychiatrists and other health professionals who examined the defendant on behalf of the defense. There also likely will be testimony about the defendant's statements and actions before and after his or her criminal act from eyewitnesses and from the police and from the defendants' friends and family. The jurors will be required to determine which witnesses they find most credible and to reach a verdict as to whether the defendant is legally sane or insane. In *Moler v. State*, Michael L. Moler suffered from schizophrenia and after returning from receiving an injection of antipsychotic medication was left alone with the elderly Ethel Cummins. Moler believed that Cummins had "turned into a witch" and beat her to death. Although the medical evidence was that Moler was insane at the time of the killing, the jury believed the lay witnesses, all of whom testified that Moler was "perfectly normal" at the time of the crime and at the time of his arrest by the police.[15]

A defendant found NGRI in some states is subject to immediate committal to a mental institution until he or she is determined to be sane and no longer poses a threat to society. In most states, a separate **civil commitment** hearing is conducted to determine whether the defendant poses a danger and should be interned in a mental institution. Keep in mind that this period of institutionalization may last longer than a criminal sentence for the crime for which the defendant was convicted.

Why do we have an insanity defense? Experts cite three reasons:

1. ***Free Will.*** The defendant did not make a deliberate decision to violate the law. His or her criminal act resulted from a disability.
2. ***Theories of Punishment.*** A defendant who is unable to distinguish right from wrong or to control his or her conduct cannot be deterred by criminal punishment, and it would be cruel to seek retribution for acts that result from a disability.
3. ***Humanitarianism.*** An individual found NGRI may pose a continuing danger to society. He or she is best incapacitated and treated by doctors in a noncriminal rather than criminal environment.

In the United States, courts and legislators have struggled with balancing the protection of society against the humane treatment of individuals determined to be NGRI. There have been several tests for insanity:

- *M'Naghten* (twenty-eight states and the federal government recognize all or a part of this test)
- Irresistible impulse (seventeen states recognize this test in conjunction with another test)
- *Durham* product test (New Hampshire)
- American Law Institute, Model Penal Code (MPC) standard (fourteen states)

The fundamental difference among these tests is whether the emphasis is placed on a defendant's ability to know right from wrong or whether the stress is placed on a defendant's ability to control his or her behavior. You might gain some sense of what is considered an inability to tell right from wrong by considering a young child who has not been taught right from wrong and takes an object from a store without realizing that this is improper. As an example of an inability to control behavior, think about a motorist who suddenly erupts in "road rage" and violently threatens you for driving too slowly.

Keep in mind that an individual who is "mentally challenged" may not necessarily meet the legal standard for insanity. A serial killer, for instance, may be mentally disturbed but still not considered to be so impaired by a mental illness or so retarded as to be considered legally insane. The question is whether the individual was legally insane at the time that he or she committed the crime. Juries generally find the determination of insanity to be highly complicated, and they experience difficulty in following the often technical testimony of experts. As a result, jurors often follow their own judgment in determining whether a defendant should be determined to be NGRI.

You also should be aware that insanity is distinct from **competence to stand trial**. Due process of law requires that defendants should not be subjected to a criminal trial unless they possess the ability to intelligently assist their attorney and to understand and follow the trial. The prosecution of an individual who is found incompetent is suspended until he or she is found competent.

The Right–Wrong Test

Daniel M'Naghten was an ordinary English citizen who was convinced that British prime minister Sir Robert Peel was conspiring to kill him. In 1843, M'Naghten retaliated by attempting to assassinate the British leader and, instead, mistakenly killed Sir Robert's private secretary. The jury acquitted M'Naghten after finding that he "had not the use of his understanding, so as to know he was doing a wrong or wicked act." This verdict sent shock waves of fright through the British royal family and political establishment, and the judges were summoned to defend the verdict before the Parliament. The judges articulated a test that continues to be followed by a majority of American states and by the federal government. The ***M'Naghten* test** requires that at the time of committing the act, the party accused must have been suffering from such a defect of reason or a disease of the mind that he or she "did not know what he [or she] was doing" (did not know the "nature and quality of his or her act"); or the defendant "did not know he [or she] was doing wrong."[16]

The requirement that the defendant did not know the *"nature and quality of his or her act"* is extremely difficult to satisfy. The common example is that an individual squeezing the victim's neck must be so detached from reality that he or she believes that he or she is squeezing a lemon. Individuals suffering this level of mental disturbance are extremely rare, and the *M'Naghten* test assumes that these individuals should be detained and receive treatment and that criminal incarceration serves no meaningful purpose and is inhumane.[17]

There also is an ongoing debate whether a defendant must know that an act is a "legal wrong" or whether the defendant must know that the act is a "moral wrong." *State v. Crenshaw* attempted to resolve this conflict.[18] The defendant Rodney Crenshaw was honeymooning with his wife in Canada and suspected that she was unfaithful. Crenshaw beat his wife senseless, stabbed her twenty-four times, and then decapitated the body with an axe. He then drove to a remote area and disposed of his wife's body and cleaned the hotel room. Crenshaw claimed to be a member of the Moscovite faith, a religion that required a man to kill a wife guilty of adultery. He claimed he believed that his act, although illegal, was morally justified. Was Crenshaw insane based on his belief that his act was morally justified? Did he possess the capacity to distinguish between right and wrong?

Crenshaw was convicted and appealed on the grounds that the judge improperly instructed the jury that insanity required a finding that as a result of a mental defect or disease, Crenshaw believed that his act was lawful rather than moral. The Washington Supreme Court, however, concluded that under either a legal or moral wrongfulness test, Crenshaw was legally sane. The court noted that Crenshaw's effort to conceal the crime indicated that he was aware that killing his wife was contrary to society's morals as well as the law. The Washington Supreme Court ruled that in the future, courts should not define "wrongfulness," and that jurors should be left free to apply either a societal morality or legal wrongfulness approach.

It's likely you are fairly confused at this point. The right–wrong test is clearly much too difficult to be easily applied by even the most educated and sophisticated juror. In the end, juries tend to follow their commonsense notion of whether the defendant was legally sane or insane.

The Legal Equation 6.1: *M'Naghten* Right–Wrong Test

The Irresistible Impulse Test

The *M'Naghten* test is criticized for focusing on the mind and failing to consider emotions. Critics point out that an individual may be capable of distinguishing between right and wrong and still may be driven by emotions to steal or to kill. Many of us are aware of the dangers of smoking, drinking, or eating too much and yet continue to indulge in this behavior. Various states responded to this criticism by broadening the *M'Naghten* standard and adopting the irresistible impulse test. This is often referred to as the "third branch of *M'Naghten*."[19]

The **irresistible impulse test** requires the jury to find a defendant NGRI in the event that the jurors find that the defendant possessed a mental disease that prevented him or her from curbing his or her criminal conduct. A defendant may be found legally insane under this test despite the fact that he or she is able to tell right from wrong. The central consideration is whether the disease overcame his or her capacity to resist the impulse to kill, rape, maim, or commit any other crime.[20]

John Hinckley's acquittal by reason of insanity for the attempted assassination of Ronald Reagan sparked a reconsideration and rejection of the irresistible impulse test. After all, why should Hinckley be ruled legally insane because he attempted to kill President Reagan to fulfill an uncontrollable impulse to attract the attention of Jodie Foster, a young female film star? There was also a recognition that psychiatrists simply were unable to determine whether an individual experienced an irresistible impulse.

As a result, several jurisdictions abolished the irresistible impulse defense.[21] The U.S. Congress adopted the so-called John Hinckley Amendment that eliminated the defense in federal trials and adopted a strict *M'Naghten* standard.

The Legal Equation 6.2: Irresistible Impulse Test

The *Durham* Product Test

The ***Durham* product test** was intended to simplify the determination of legal insanity by eliminating much of the confusing terminology. The "product" test was first formulated by the New Hampshire Supreme Court in *State v. Pike* in 1869.[22] This standard was not accepted or even considered by any other jurisdiction until it was adopted in 1954 by the U.S. Court of Appeals for the District of Columbia.[23]

Durham provided that an accused is "not criminally responsible if his unlawful act was the product of mental disease or mental defect." Jurors were asked to evaluate whether the accused was suffering from a disease or defective mental condition at the time he or she committed the criminal act and whether the criminal act was the product of such mental abnormality. However, the decision left the definition of a mental disease or defect undefined.

The Court of Appeals for the District of Columbia abandoned this experiment after eighteen years, in 1972, after realizing that the "product test" had resulted in expert witnesses playing an overly important role at trial in determining what qualified as a mental disease or defect.[24]

The Legal Equation 6.3: *Durham* Product Test

The Substantial Capacity Test

Psychiatric experts urged the American Law Institute (ALI) to incorporate the *Durham* product test into the MPC. The ALI, instead, adopted a modified version of the *M'Naghten* and irresistible impulse tests, known as the **substantial capacity test**. Section 4.01(1)(2) provides that

> [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. . . . The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The ALI test modifies *M'Naghten* by providing that a defendant may lack a substantial capacity to appreciate rather than know the criminality of his or her conduct. This is intended to highlight that a defendant may be declared legally insane and still know that an act is wrong because he or she still may not appreciate the full harm and impact of his or her criminal conduct. In other words, a defendant may know that sexual molestation is wrong without appreciating the harm a sexual attack causes to the victim.

The ALI's more tolerant and broader view of legal insanity was adopted by a number of states and by the federal judiciary. The test later was abandoned by all but a handful of state and federal courts following Hinckley's successful reliance on the insanity defense in his attempted assassination of President Reagan in 1981. The trend is to follow the lead of the U.S. Congress and to adopt the standard articulated in the Insanity Defense Reform Act of 1984.

The Legal Equation 6.4: Substantial Capacity Test

Federal Standard

The U.S. Congress in the **Insanity Defense Reform Act of 1984** returned to the *M'Naghten* standard and abandoned the volitional prong of the ALI test. The act states that in federal courts

> [i]t is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[25]

In *United States v. Duran*, in 1996, the District of Columbia Court of Appeals applied this new standard in upholding a jury's rejection of the insanity defense of Francisco Martin Duran, who had attempted to assassinate President Bill Clinton.[26]

Burden of Proof

The defendant possesses the initial burden of going forward in every state. The defendant is presumed sane until evidence is produced challenging this assumption. The defendant's burden varies and ranges from a "reasonable doubt" to "some evidence," "slight evidence," or a "scintilla of evidence."[27]

The prosecution at this point in a number of states is required to establish the defendant's sanity beyond a reasonable doubt. In roughly half of the states, however, the defendant possesses the burden of proving his or her insanity by the civil standard of a preponderance of the evidence. In the federal system and in a small number of states, the defendant has the burden of establishing insanity by "clear and convincing evidence." Clear and convincing evidence requires the defendant to establish that it is "substantially more likely than not that it is true." This is a higher standard than a preponderance of the evidence and a slightly less demanding standard than beyond a reasonable doubt, which is the test required for a criminal conviction. Although placing this burden of proof on the defendant is controversial, the federal courts have held that this is constitutional.[28]

The Future of the Insanity Defense

Defenders of the insanity defense point out that critics exaggerate the significance of the insanity defense for the criminal justice system and that only a small number of deserving defendants are evaluated as legally insane. Statistics indicate that the defense results in an acquittal by reason of insanity in less than 1 percent of all criminal trials per year. This translates into an average of thirty-three defendants. These individuals may also spend more time institutionalized in a mental institution than they would serve were they criminally convicted.

Idaho, Montana, Kansas, and Utah have abolished the insanity defense and, instead, permit defendants to introduce evidence of a mental disease or defect that resulted in a lack of criminal intent. Idaho, for example, provides that a "[m]ental condition shall not be a defense to any charge of criminal conduct." Evidence of state of mind is admissible in Idaho to negate criminal intent, and a judge who finds that a defendant convicted of a crime suffers from a mental condition requiring treatment shall incarcerate the defendant in a facility where he or she will receive treatment. State supreme courts have ruled that the insanity defense is not fundamental to the fairness of a trial and that the alternative of relying on evidence of a mental disease or defect to negate criminal intent is consistent with due process. Defendants under this alternative approach, however, continue to rely on experts and highly technical evidence.

At least thirteen states have adopted a verdict of **guilty but mentally ill (GBMI)**. Ten of these states continue to retain the insanity defense, and in these states, jurors may select from among four verdicts: guilty, not guilty, NGRI, and GBMI. A verdict of GBMI applies where the jury determines beyond a reasonable doubt that a defendant was mentally ill, but not legally insane, at the time of his or her criminal act. The defendant receives the standard criminal sentence of confinement and is provided with psychiatric care while interned. The intent is to provide jurors with an alternative to the insanity defense that affords greater protection to the public.

The GBMI verdict has thus far not decreased findings of legal insanity. Nevertheless, advocates of the insanity defense remain fearful that jurors will find the GBMI verdict more attractive than verdicts of NGRI.

YOU DECIDE 6.1

Andrea Yates, in February 1999 after six years of marriage, gave birth to her fourth child. She suffered severe depression and in June 1999 tried to commit suicide by taking an overdose of antidepressants. Yates was

admitted to a psychiatric unit and released after six days. A month later, her husband discovered Yates in the bathroom holding a knife to her neck. Yates again was admitted to a psychiatric hospital against her wishes. She told a psychologist that she had visions and had heard voices since the birth of her first child in 1994. The therapist ranked her at the time among the five "sickest" patients he had ever examined, and on her release, Yates's husband was told that Yates had a high risk of another psychotic episode if she had another child. In January 2000, she told her therapist that she had not taken the medication he prescribed since November 1999. In November 2000, Yates gave birth to her fifth child. In March 2001, Yates's father died, causing a severe depression. At the end of March 2001, Yates was again admitted to a psychiatric hospital and was analyzed as being "catatonic or nearly catatonic and possibly delusional or having bizarre thoughts," and she was placed on suicide watch. Roughly two weeks later, Yates was released at her request and at the request of her husband. The therapist recommended that Yates not be left alone with her children. In April 2001, Yates's mother observed that Yates was almost catatonic, "stared into space, trembled, scratched her head until she created bald spots, and did not eat." On May 3, 2001, Yates filled a bathtub with water for no apparent reason and explained that she "might need it." On May 4, Yates was once again admitted to the hospital and released ten days later with prescribed medication. Although she remained uncommunicative and withdrawn and smiled infrequently and appeared to have no emotion, Yates assured her doctor on June 4 and again on June 18 that she did not harbor suicidal thoughts. On June 20, 2001, Yates called 9-1-1 and requested that the police come to her home. She also called her husband and told him it was important that he come home because all of the kids were hurt. The police "discovered four dead children, soaking wet, and covered with a sheet" lying on Yates's bed. A fifth child was floating face down in the bathtub. Yates according to testimony was a "wonderful mother" although she believed that her children were not developing mentally, were destined for horrible fates later in their life, "were not righteous," and would "burn in hell." She reportedly had considered killing her kids for at least two months. There also was testimony that Yates was fixated on a biblical verse from Luke 17:2 that "it would be better for him if a milstone was hung around his neck and he were thrown in the sea than that he should cause one of the little ones to stumble." Was Andrea Yates legally insane under the *M'Naghten* test? See *Yates v. State*, 171 S.W.3d 215 (Tex. App. 2005).

***You can find the answer* at edge.sagepub.com/lippmaness3e**

Diminished Capacity

Diminished capacity is recognized in roughly fifteen states. This permits the admission of psychiatric testimony to establish that a defendant suffers from a mental disturbance that *diminishes* the defendant's capacity to form the required criminal intent. The diminished capacity defense merely recognizes that an individual has the right to demonstrate that he or she was incapable of forming the intent required for the offense and should be held culpable for a lesser offense. This is a compromise between finding an individual NGRI and finding him or her criminally liable. Some states confine diminished capacity to intentional murder and provide that an accused may still be convicted of second-degree murder or in some cases manslaughter, which does not require premeditation. Keep in mind that this rarely is successfully invoked.[29]

The far-reaching implications of the diminished capacity defense became apparent when a San Francisco jury convicted city official Dan White of manslaughter for the killings of his colleague Harvey Milk and Mayor George Moscone. The defense argued that White's depressions were exaggerated by junk food, which caused biochemical reactions in his brain, diminishing his capacity to control his behavior and to form a specific intent to kill, and he was convicted of voluntary manslaughter rather than intentional murder. In reaction to this "Twinkie defense," California voters adopted a statute that provides that the "defense of diminished capacity is hereby abolished" and shall not be admissible "to show or negate capacity to form the . . . intent . . . required for the commission of the crime charged." Evidence of diminished capacity or a mental disorder may be considered in California at sentencing.[30]

In *State v. Joseph*, the West Virginia Supreme Court held that the trial court was in error when the judge excluded the testimony of a doctor who was available to testify that Joseph had suffered an injury to his frontal lobe that resulted in his inability to form a criminal intent to kill. The injury according to the doctor diminished Joseph's "executive function," which includes the "ability to plan and carry out a premeditated plan of action."[31]

Criminal Law in the News

On May 31, 2014, two 12-year-old females, Anissa Weier and Morgan Geyser, went with classmate Payton Leutner into a suburban Milwaukee, Wisconsin, park where Geyser, urged on by Weier, stabbed Leutner nineteen times. One wound missed Leutner's heart by less than a millimeter, and another penetrated her diaphragm and cut her liver and stomach. Weier and Geyser then left Leutner for dead. The stabbing was an effort to impress the fictional character Slender Man; Weier and Geyser were subsequently located by the police on a three-hundred-mile trek in the woods to Slender Man's mansion.

Leutner survived the attack but was left with significant physical and emotional injuries, and Weier and Geyser later were found not guilty by reason of insanity and were sentenced to institutionalization in mental health facilities.

Slender Man was first created in 2009 for an online forum contest involving the creation of paranormal images. Eric Knudsen, the originator of Slender Man, intended to "formulate something whose motivations can barely be comprehended, and [which caused] unease and terror in a general population." The original rendition of Slender Man subsequently was refined by other individuals' version of Slender Man. He typically is pictured as a tall, thin, and faceless male dressed in black with tentacles on his back that he uses to capture children. Slender Man, in most instances, is portrayed in the woods or stalking children and is described as being able to cause memory loss, insomnia, and paranoia.

Weier and Geyser first encountered Slender Man on the Creepypasta Wiki. Following the stabbing, they said that they believed that Slender Man was real and that the only way they could protect their families from him was to kill a victim and become his servants and live in his mansion in Nicolet National Forest in the Wisconsin Northwoods. Weier and Geyser reportedly reinforced one another's delusions.

Both Weier and Geyser were tried as adults in a Wisconsin court. Weier was diagnosed with a delusional disorder and schizotypy, or a diminished ability to distinguish what is real from what is unreal. Although Weier underwent therapeutic treatment and reportedly made good progress toward improving her mental health, she continued to believe in delusions such as that an "evil spirit" had escaped a homemade Ouija board and at one point had pushed her onto her bed.

Geyser was found to have the early onset of schizophrenia and reportedly continued to believe that Slender Man was a real figure. There was testimony that Geyser heard voices from someone named "Maggie." A psychiatrist retained by her attorney testified that Geyser believed she could telepathically communicate with Slender Man and was able to see and hear characters from the Harry Potter books and from the Teenage Mutant Ninja Turtles. She also claimed to have "Vulcan mind control."

Payton Leutner's mother, Stacie Leutner, wrote the judge that the trauma of the attack "has defined our lives" and that her daughter still feared for her life. Payton, according to her mother, slept with scissors under her pillow for protection and kept her bedroom windows closed and locked. Stacie wrote that Payton "will struggle with the events of that day and physical and emotional scars it left for the rest of her life."

In 2017, Weier pled guilty to being an accessory to attempted second-degree murder, and a jury found her "not guilty by mental disease or defect." She was sentenced to twenty-five years in a state mental institution and after three years will be eligible to petition to spend the remainder of her sentence under supervised release. Judge Michael Bohren in sentencing Weier in December 2017 rejected the defense plea that she should not be institutionalized or under supervision beyond her twenty-fifth birthday and stated that "[c]onsidering the nature and gravity of this offense, being supervised until the age of 37 is not all that long . . . in terms of the fact that Payton is looking at a lifetime of scars, physical scars and psychological scarring."

Geyser agreed to waive a criminal trial and to be evaluated by a psychiatrist to determine the appropriate time she should spend in a mental institution. Geyser subsequently pled guilty and was determined to be not guilty as a result of a mental disease or defect and in February 2018 was sentenced to a maximum of forty years in a state mental institution. Geyser will be eligible for a conditional release before completing her sentence.

The Waukesha, Wisconsin, School District following the stabbing blocked access to the Creepypasta Wiki. Knudsen, the creator of Slender Man, extended his condolences, and the administrator of the Creepypasta Wiki stated that the stabbing did not represent the Creepypasta community, which held a streaming event to raise money for Payton Leutner. The city of Madison, Wisconsin, also held a fund-raising event.

In the aftermath of the Slender Man stabbing, local law enforcement said that the stabbing of Payton Leutner was a wake-up call for parents on the danger of the internet. Other individuals asserted that Creepypasta is no more threatening than stories about zombies or vampires.

Intoxication

Voluntary Intoxication

Voluntary intoxication was not recognized as a defense under the early common law in England. Lord Hale proclaimed that the intoxicated individual "shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." William Blackstone went beyond this neutral stance and urged that intoxication should be viewed "as an aggravation of the offense, rather than as an excuse for any criminal behavior." The common law rule was incorporated into American law. An 1847 textbook recorded that this was a "long established maxim of judicial policy, from which perhaps a single dissenting voice cannot be found."[32]

The rule that intoxication was not a defense began to be transformed in the nineteenth century. Judges attempted to balance their disapproval toward alcoholism against the fact that inebriated individuals often lacked the mental capacity to formulate a criminal intent. Courts created a distinction between offenses involving a specific intent for which voluntary intoxication was an excuse and offenses involving a general intent for which voluntary intoxication was not recognized as an excuse. An individual charged with a crime requiring a specific intent was able to introduce evidence that the use of alcohol prevented him or her from forming a specific intent to assault an individual with the intent to kill. A defendant who proved successful would be held liable for the lesser offense of simple assault. As noted by the California Supreme Court, the difference between an intent to commit a battery and an intent to commit a battery for the purpose of raping or killing "may be slight, but it is sufficient to justify drawing a line between them and considering evidence of intoxication in the one case and disregarding it in the other."[33]

MPC Section 2.08(1)(2) accepts the common law's distinction between offenses based on intent and substitutes "knowledge" or "purpose" for a specific intent and "negligence or recklessness" for a general intent. The commentary to the code notes that it would be unfair to punish an individual who, due to inebriation, lacks "knowledge or purpose," even when this results from voluntary intoxication.[34]

Professor Jerome Hall observes that *in practice*, the hostility toward the inebriated defendant has resulted in the voluntary intoxication defense only being recognized in isolated instances, typically involving intentional killing.[35] Courts have placed a heavy burden on defendants seeking to negate a specific intent. Even the consumption of large amounts of alcohol is not sufficient. The New Jersey Supreme Court observed that there must be a showing of such a "great prostration of the faculties that the requisite mental state was totally lacking. . . . [A]n accused must show that he was so intoxicated that he did not have the intent to commit an offense. Such a state of affairs will likely exist in very few cases." This typically requires an evaluation of the quantity and period of time that an intoxicant was consumed, blood alcohol content, and the individual's conduct and ability to recall events.[36]

In *State v. Merrell*, Lee Robert Merrell appealed his conviction for attempted first-degree rape of a female under the age of thirteen and five counts of taking indecent liberties with a child. Merrell argued that "alcohol was his job, his hobby, and his life" and that he had "blacked out" when he touched his niece. A North Carolina appellate court, however, found that the evidence showed that Merrell carefully planned and carried out his acts of sexual molestation. There was no evidence that "at the time the acts were committed, his mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming the requisite intent."[37]

The contemporary trend is to return to the original common law rule and refuse to recognize a defense based on voluntary alcoholism. Twelve states do not recognize the alcoholism defense: Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Missouri, Montana, Ohio, Oklahoma, Pennsylvania, and Texas. The thinking is that the defendant voluntarily created a situation in which he or she was unable to form a specific criminal intent.

The Arizona Criminal Code, in Section 13-503 of the Arizona Revised Statutes Annotated, provides that "[t]emporary intoxication resulting from the voluntary ingestion . . . of alcohol . . . or other psychoactive substances or the abuse of prescribed medications . . . is not a defense for any criminal act or requisite state of mind." Texas Penal Code Annotated Section 8.04 provides that "[v]oluntary intoxication does not constitute a defense to the commission of crime." The right of states to deny defendants the intoxication defense was affirmed by the U.S. Supreme Court in 1996, in *Montana v. Egelhoff*; Justice Antonin Scalia noted that Montana was merely returning to the law at the time of the drafting of the U.S. Constitution and that this rule served to deter excessive drinking.[38]

Involuntary Intoxication

Involuntary intoxication is a defense to any and all criminal offenses in those instances in which the defendant's state of mind satisfies the standard for the insanity defense in the state. MPC Section 2.08(4) requires that the individual "lacks substantial capacity" to distinguish right from wrong or to conform his or her behavior to the law. The code also recognizes "pathological intoxication." This arises in those instances when an individual voluntarily consumes a substance and experiences an extreme and unanticipated reaction. Involuntary intoxication from alcohol or narcotics can occur in any of four ways:[39]

1. ***Duress.*** An individual is coerced into consuming an intoxicant.
2. ***Mistake.*** An individual mistakenly consumes a narcotic rather than his or her prescribed medicine.
3. ***Fraud.*** An individual consumes a narcotic as a result of a fraudulent misrepresentation of the nature of the substance.
4. ***Medication.*** An individual has an extreme and unanticipated reaction to medication prescribed by a doctor.

A Wisconsin statute provides that an intoxicated or drugged condition is a defense only if it is "involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed." Involuntary intoxication under Wisconsin law also may be used to negate a criminal intent other than recklessness.[40]

Age

In 2000, on the last day of the school year, thirteen-year-old Nathaniel Brazill shot and killed one of his favorite teachers at his middle school, Barry Grunow. Brazill was prosecuted as an adult and convicted of first-degree murder and sentenced to twenty-eight years in prison. "As Grunow attempted to close the classroom door, Brazill pulled the trigger and Grunow fell to the floor, with a gunshot wound between the eyes. A school surveillance videotape of the hallway revealed that Brazill had pointed the gun at Grunow for nine seconds before shooting. Brazill exclaimed: 'Oh s--t,' and fled."[41] In a second Florida case, twelve-year-old Lionel Tate wrestled and killed his six-year-old friend. He was convicted of first-degree murder and was sentenced to life imprisonment without parole. His sentence was overturned on appeal; he pled guilty to second-degree murder and was released in 2004. One year later, Tate committed an armed robbery and was sentenced to a thirty-year prison term.[42] Should juveniles like Brazill and Tate be punished as adults?

The early common law did not recognize **infancy** as a defense to criminal prosecution. Youthful offenders, however, were typically pardoned. A tenth-century statute softened the failure to recognize infancy as a defense by providing that an individual younger than the age of fifteen was not subject to capital punishment unless he or she made an effort to elude authorities or refused to surrender. A further refinement occurred in the fourteenth century when children younger than seven were declared to be without criminal capacity.

The common law continued to develop and reached its final form by the seventeenth century. Juveniles were divided into three categories based on the capacity of adolescents at various ages to formulate a criminal intent. Individuals were categorized on the basis of their actual rather than their mental age at the time of the offense.[43]

- *Children younger than seven lack a criminal capacity.* There was an *irrebuttable presumption*, an assumption that cannot be overcome by facts, that children younger than seven lack the ability to formulate a criminal intent.
- *Children older than seven and younger than fourteen* were presumed to be without capacity to form a criminal intent. This was a *rebuttable presumption*; the prosecution could overcome the presumption by evidence that the juvenile knew what he or she was doing was wrong. The older the child and the more atrocious the crime, the easier to overcome the presumption. Factors to be considered include the age of the child, efforts to conceal the crime and to influence witnesses, and the seriousness of the crime.
- *Children fourteen and older* possessed the same criminal capacity as adults. Juveniles capable of forming a criminal intent may be prosecuted as adults rather than remain in the juvenile system. Today, the age when a juvenile may be criminally prosecuted as an adult rather than being brought before a juvenile court is determined by state statute. There is no standard approach. One group of states maintains a conclusive presumption of incapacity for juveniles younger than a particular age (usually fourteen); however, other states provide that juveniles regardless of age may be treated as adults. A third group of states provide that juveniles charged with serious offenses may be treated as adults.

The common law presumptions of incapacity are not applicable to proceedings in juvenile court because the purpose of the court is treatment and rehabilitation rather than the adjudication of moral responsibility and punishment.[44]

There is a growing trend for state statutes to permit the criminal prosecution of any juvenile as an adult who is charged with a serious offense. These "transfer statutes" adopt various schemes, vesting "waiver authority" in juvenile judges or prosecutors or providing for automatic transfer for specified crimes.[45] The standard to be applied by judges was articulated by the U.S. Supreme Court in *Kent v. United States.* The factors to be considered in the decision whether to prosecute a juvenile as an adult include the seriousness and violence of the offense, the background and maturity of the juvenile, and the ability of the juvenile justice system to protect the public and rehabilitate the offender.[46]

A handful of states have raised or are considering raising the age at which a juvenile charged with misdemeanors and/or minor felonies may be prosecuted as an adult offender. New York and North Carolina, for example, provide that sixteen- and seventeen-year-old individuals charged with misdemeanors and minor felonies no longer will be treated as adult offenders.

YOU DECIDE 6.2

Eleven-year-old Andrew Ramer; his nine-year-old sister, Kensie; and his mother, Dina Lawrence, were temporarily living with their friends, the Briscoes. Another child in the home told Deanna Briscoe that Ramer was in the bathroom with his arm around her seven-year-old son, ZPG. Briscoe asked Ramer what happened, and Ramer "basically said 'nothing.'" When ZPG was asked about the incident, he told his mother that Ramer had "rubbed his butt."

Later that evening when Deana Briscoe resumed her inquiry, ZPG told her that, in addition to "rubbing his butt," Ramer had "placed his penis inside of [ZPG's] butt." Ramer admitted that he had committed these acts.

Ramer told the police that he had sexual contact with ZPG about twice a week for the past two weeks. Ramer also stated that he had sexual contact with ZPG several years earlier. He was asked if he thought what he had done to ZPG was wrong. First, Ramer responded "kind of sort of wrong." He then added that "it wasn't wrong because he was into it too." When asked to give examples of wrong behavior, Ramer said it would be wrong "to steal, murder, or poach." Ramer also said that he had sexual contact a "few times" with his sister. At the end of the conversation with the police, Ramer was arrested and charged with two counts of first-degree rape of a child.

Under Washington law, a child under twelve is presumed incapable of a criminal intent. The state in rebutting this presumption is required to establish by clear and convincing evidence that a child knew his or her act was wrong at the time it was committed. It is not necessary to establish that the child knew his or her act was criminal. The court considers the following in determining whether a child is capable of harboring a criminal intent: (1) the nature of the crime, (2) the child's age and maturity, (3) whether the child evidenced a desire for secrecy, (4) whether the child told the victim (if any) not to tell about the event, (5) prior conduct similar to that charged, (6) any consequences that attached to that prior conduct, and (7) whether the child had made an acknowledgment that the behavior is wrong and could lead to detention. Also relevant is testimony from those acquainted with the child and the testimony of experts.

There was evidence that Ramer had been told by his parents that "sexual contact with each other in the home or with anyone else" was wrong. Ramer's biological father was currently incarcerated for sexually molesting his sister. Following his father's incarceration, Ramer's mother remarried, and his stepfather committed suicide after finding out that he was going to be prosecuted for molesting Ramer's sister. Would you hold Ramer responsible as an adult for the rape of a child? See *State v. Ramer*, 86 P.3d 132 (Wash. 2004).

***You can find the answer at* edge.sagepub.com/lippmaness3e**

DEFENSES BASED ON JUSTIFICATION OR EXCUSE

As previously pointed out, justification defenses are based on the circumstances confronting an individual and may be invoked by any individual in similar circumstances. Excuse defenses generally are available to individuals who lack the capacity to form a criminal intent.

Necessity

The **necessity defense** recognizes that conduct that would otherwise be criminal is justified when undertaken to prevent a significant harm. This is commonly called the "**choice of evils**" because individuals are confronted with the unhappy choice between committing a crime and experiencing a harmful event. The harm to be prevented was traditionally required to result from the forces of nature. A classic example is the boat captain caught in a storm who disregards a "no trespassing" sign and docks his or her boat on an unoccupied pier. Necessity is based on the assumption that had the legislature been confronted with this choice, the legislators presumably would have safeguarded the human life of sailors over the property interest of the owner of the dock. As a result, elected officials could not have intended that the trespass statute would be applied against a boat captain in this situation.[47]

The limitation of necessity to actions undertaken in response to the forces of nature has been gradually modified, and most modern cases arise in response to pressures exerted by medical emergencies and other situations in which individuals must act immediately to avert harm. *State v. Salin* is representative of this trend. Benjamin Salin, an emergency medical services technician, was arrested for speeding while responding to a call to assist a two-year-old child who was not breathing. The Delaware court agreed that Salin reasonably assumed that the child was in imminent danger and did not have time to use his cell phone to check on the child's progress. His criminal conviction was reversed on the grounds of necessity. Judge Charles Welch concluded that Salin was confronted by a choice of evils and that his "slightly harmful conduct" was justified in order to "prevent a greater harm."[48]

In *State v. Cole*, Roger Cole was concerned about his pregnant wife who was suffering pain in her back and stomach. He did not have a telephone to call for help, and a nearby neighbor was not home. Cole drove to the nearest phone booth to ask a relative to take his wife to the hospital. After making the phone call, Cole was stopped for driving with a broken taillight, and the police officer discovered that Cole was driving on a suspended license. The South Carolina Supreme Court determined that the trial court judge had been in error in holding that Cole was not entitled to rely on the necessity defense to justify his driving without a license. What is your view?[49]

Roughly half of the states possess necessity statutes, and the other jurisdictions rely on the common law defense of necessity. There is agreement on the central elements of the defense.[50]

Model Penal Code

Section 3.02. Justification Generally: Choice of Evils

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

Analysis

The commentary to the MPC observes that the letter of the law must be limited in certain circumstances by considerations of justice. The commentary lists some specific examples:

1. Property may be destroyed to prevent the spread of a fire.
2. The speed limit may be exceeded in pursuing a suspected criminal.
3. Mountain climbers lost in a storm may take refuge in a house or seize provisions.
4. Cargo may be thrown overboard or a port entered to save a vessel.
5. An individual may violate curfew to reach an air-raid shelter.
6. A druggist may dispense a drug without a prescription in an emergency.

Several steps are involved under the MPC:

- *A Belief That Acts Are Necessary to Avoid a Harm*. The actor must "actually believe" the act is necessary or required to avoid a harm or evil to him- or herself or to others. A druggist who sells a drug without a prescription must be aware that this is an act of necessity rather than ordinary lawbreaking.
- *Comparative Harm or Evils.* The harm or evil to be avoided is greater than that sought to be prevented by the law defining the offense. Human life generally is valued above property. A naval captain may enter a port from which the vessel is prohibited to save the life of a crew member. The question of whether an individual has made the proper choice is determined by the judge or jury rather than by the defendant's subjective belief.
- *Legislative Judgment.* A statute may explicitly preclude necessity; for instance, prohibiting abortions to save the life of the mother.
- *Creation of Harm.* The individual did not intentionally, negligently, or recklessly create the harm or negligently or recklessly misperceive the necessity to act. The boat captain who knowingly sets sail in a severe storm cannot rely on the necessity defense to justify docking the boat on a stranger's pier.
- *Alternatives.* An absence of legal alternatives.

The Legal Equation 6.5: Necessity

YOU DECIDE 6.3

Matthew Ducheneaux was charged with possession of marijuana. He was arrested on a bike path in Sioux Falls, South Dakota, during the city's annual "Jazz Fest" in July 2000. He falsely claimed that he lawfully possessed the two ounces of marijuana as a result of his participation in a federal medical research project. Ducheneaux is thirty-six and was rendered quadriplegic by an automobile accident in 1985. He is almost completely paralyzed other than some movement in his hands. Ducheneaux suffers from spastic paralysis that causes unpredictable spastic tremors and pain throughout his body. He testified that he had not been able to treat the symptoms with traditional drug therapies and these protocols resulted in painful and potentially fatal side effects. One of the prescription drugs for spastic paralysis is Marinol, a synthetic tetrahydrocannabinol (THC). THC is the essential active ingredient of marijuana. Ducheneaux has a prescription for Marinol, but testified it causes dangerous side effects that are absent from marijuana. The South Dakota legislature has provided that "no person may knowingly possess marijuana" and has declined on two occasions to create a medical necessity exception. Would you convict Ducheneaux of the criminal possession of marijuana? The statute provides that the justification defense is available when a person commits a crime "because of the use or threatened use of unlawful force upon him or upon another person." See *State v. Ducheneaux*, 671 N.W.2d 841 (S.D. 2003).

You can find the answer at **edge.sagepub.com/lippmaness3e**

Duress

The common law excused an individual from guilt who committed a crime to avoid a threat of imminent death or bodily harm. In several seventeenth- and eighteenth-century cases involving treason or rebellion against the king, defendants were excused who joined or assisted the rebels in response to a threat of injury or death. The common law courts stressed that individuals were obligated to desert the rebels as soon as the threat of harm was removed.[51]

Duress differs from necessity in that an individual commits a crime because of an immediate threat from another individual rather than because of the situation confronting the individual.

Read *Commonwealth v. Kendall* and *People v. Michael S.* on the study site: **edge.sagepub.com/lippmaness3e.**

Realism may be the most persuasive justification for duress. An English court nicely captured this concern in the observation that in the "calm of the courtroom, measures of fortitude or of heroic behavior are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well-disposed."[52]

The defense of duress raises the difficult question whether the law should excuse the criminal acts of an individual who is forced to commit a crime in order to avoid the infliction of death or serious bodily harm to him- or herself. The individual was compelled against his or her will to act. On the other hand, why should we allow an individual who harms another to escape punishment? This debate is at the core of the defense of duress.

The defense of duress involves several central elements:

- The defendant's actions are to be judged in accordance with a reasonable person standard.
- There must be a threat of death or serious bodily harm from another individual that causes an individual to commit a crime. Most states also recognize that a threat directed against a member of the defendant's family or a third party may constitute duress. Psychological pressure or blackmail does not amount to a threat for purposes of duress.
- Duress does not excuse the intentional taking of the life of another.
- The threat must be immediate and imminent.
- An individual must have exhausted all reasonable and available alternatives to violating the law.
- The defendant must not create or assist in creating the circumstances leading to the claim of duress.

The most controversial duress cases involve prison escapes, in which inmates threatened with physical assault have been held to be entitled to rely on the defense of duress to excuse their escape. In *People v. Unger*, the defendant Francis Unger, a twenty-two-year-old American Indian, pled guilty to a theft charge and was imprisoned in Stateville Penitentiary in Joliet, Illinois.[53] During the first two months of Unger's imprisonment, he was threatened by an inmate wielding a six-inch knife who demanded that the defendant engage in homosexual activity. Unger was transferred to a minimum-security honor farm and, one week later, was beaten and sexually assaulted by a gang of inmates.

Unger was warned against informing authorities and, several days later, received a phone call informing him that he would be killed in retribution for having allegedly contacted correctional officials. Unger responded by escaping from the dairy farm, and he was apprehended two days later while still wearing his prison clothes. He claimed that he had intended to return to the institution.

The court determined that Unger, under these circumstances, was entitled to a jury instruction on duress because he may have reasonably believed that he had no alternative other than to escape, to be killed, or to suffer severe bodily harm. The Illinois appellate court held that it was unrealistic to require that a prisoner wait to escape until the moment that he was being "immediately pursued by armed inmates" and it was sufficient that Unger was threatened that he would be dead before the end of the evening.

Inmates relying on duress must establish that they did not use force or violence toward prison personnel or other innocent individuals in the escape and that they immediately contacted authorities once having reached a position of safety. The requirement that individuals turn themselves in to authorities at the first opportunity in several federal court cases has been extended to individuals who acted as drug couriers after being threatened by gang leaders. In *United States v. Moreno*, the Ninth Circuit Court of Appeals held that "[t]he encounter with Officer [Thomas] Krajewski presented a clear opportunity for Moreno to save himself and alert authorities about the threat to his family. Instead, he kicked Officer Krajewski in the head twice in his attempt to escape to complete his illegal delivery."[54]

The duress defense is not fully embraced by all commentators; some argue that the law should encourage people to resist rather than to conform to the demands of violent and forceful individuals.

Model Penal Code

Section 2.09. Duress

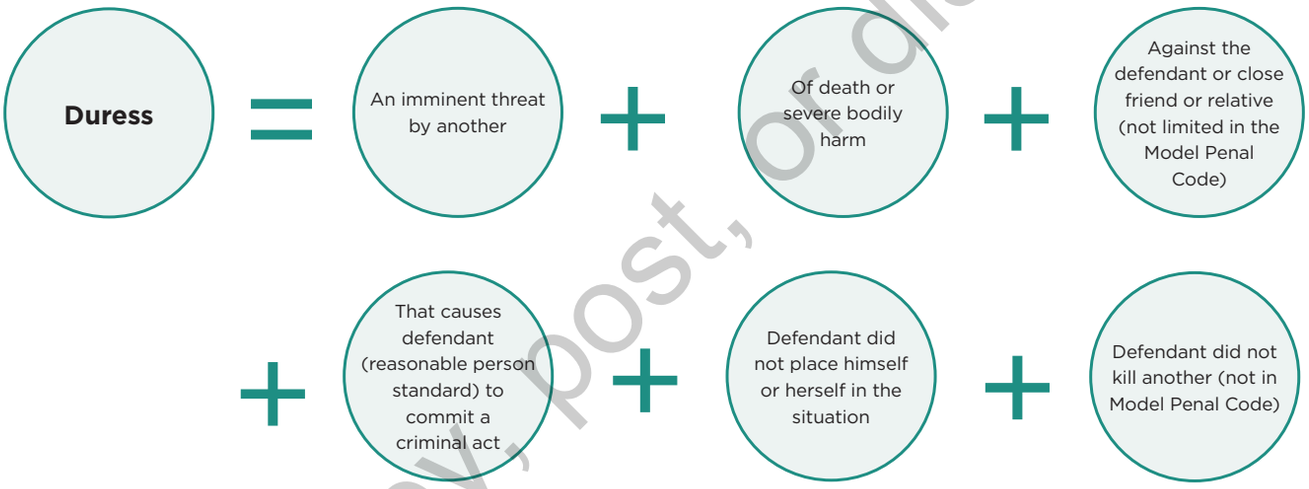
1. It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.
2. The defense is unavailable if the actor recklessly [or negligently] placed himself in such a situation.
3. It is not a defense that a woman acted on the command of her husband.

Analysis

The MPC significantly amends the common law standard:

1. The threat need not be limited to death or serious bodily harm. The commentary provides for a threat of unlawful force against the individual or another that would coerce an individual of "reasonable firmness" in the defendant's situation. Only threats to property or reputation are excluded in the commentary.
2. The threat is not required to be imminent or immediate.
3. Duress may be used as an excuse for homicide.
4. The threat may be to harm another person and is not limited to friends or relatives.

The Legal Equation 6.6: Duress



YOU DECIDE 6.4

Georgia Carradine was held in contempt of court based on her refusal to testify after witnessing a gang-related homicide, explaining that she was in fear for her life and the lives of her children. Carradine was sentenced to six months in the Cook County jail. She persisted in this refusal despite the government's offers to relocate her and her family to other areas in Chicago, Illinois, or the continental United States. Carradine had been separated from her husband for roughly four years and supported her six children aged five to eighteen through payments from her husband and supplemental welfare funds. She explained that she distrusted the State's Attorney and doubted that law enforcement authorities could protect her from the Blackstone Rangers youth gang. Carradine's fear was so great that she was willing to go to jail rather than to testify. The Illinois Supreme Court, in affirming the sentence, stated that criminals could not be brought to the bar of justice "unless citizens stand up to be counted." Do you agree with the decision to deny Carradine the defense of duress? See *People v. Carradine,* 287 N.E.2d 670 (Ill. 1972).

You can find the answer at **edge.sagepub.com/lippmaness3e**

Consent

The fact that an individual consents to be the victim of a crime ordinarily does not constitute a defense. For example, the Massachusetts Supreme Judicial Court held that an individual's consensual participation in a sadomasochistic relationship was not a defense to a charge of assault with a small whip. The Massachusetts justices stressed that as a matter of public policy, an individual may not consent to become a victim of an assault and battery with a dangerous weapon.[55]

Read *United States v. Moreno* on the study site: **edge.sagepub.com/lippmanness3e.**

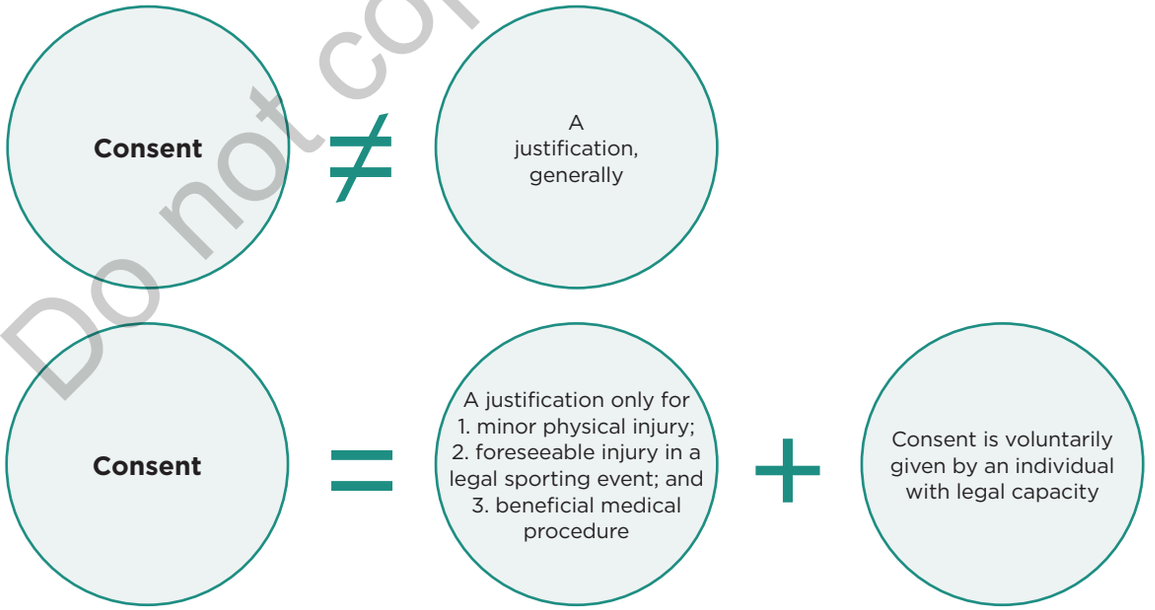
In *State v. Brown*, a New Jersey superior court ruled that a wife's instructions to her husband that he should beat her in the event that she consumed alcoholic beverages did not constitute a justification for the severe beating he administered. Judge Bachman ruled that to "allow an otherwise criminal act to go unpunished because of the victim's consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law."[56]

There are three exceptions or situations in which the law recognizes consent as a defense to criminal conduct, which are recognized in MPC Section 2.11:

- ***Incidental Contact.*** Acts that do not cause serious injury or harm customarily are not subject to criminal prosecution and punishment. People, for example, often are bumped and pushed on a crowded bus or at a music club.
- ***Sporting Events.*** Ordinary physical contact or blows are incident to sports such as football, boxing, or wrestling.
- ***Socially Beneficial Activity.*** Individuals benefit from activities such as medical procedures and surgery.

Consent must be free and voluntary and may not be the result of duress or coercion or fraud. Consent also is invalid if offered by an individual who lacks the legal capacity to consent based on age, a mental defect, or intoxication. An individual may limit the scope of consent by, for instance, authorizing a doctor to operate on only three of the five fingers on his or her left hand. The forgiveness of a perpetrator by the victim following a crime does not constitute consent to a criminal act. A recent area of concern involves fraternity hazing. A New York judge found that the beating inflicted on pledges exceeded the terms of consent and that consent must be voluntary and intelligent and must be "free of force or fraud."[57]

The Legal Equation 6.7: Consent



YOU DECIDE 6.5

Givens Miller, an eighteen-year-old, 210-pound football player, had a disagreement with his parents following a high school football game. Givens's father, George, responded by taking away Givens's cell phone and car keys. Givens repeatedly shouted at his parents, telling his father to "take your G.D. money and 'f---' yourself with it." He then baited George, uttering, "What the 'f---,' man. I'm going to—you going to hit me, man? Are you going to hit me? What the 'f---,' man."

George responded, "No, I'm not going to hit you," and shoved Givens away from him. Givens kicked and punched George in his side; and as Givens charged toward him, George punched Givens in the face. George then threw two more punches. Givens testified that at the time of the incident, he "was all jazzed up" from the game and "in an aggressive mood" and "kind of wanted to hit [George]" and he "kind of wanted [George] to hit [him]." Givens "suffered dental fractures and loose teeth. He also received two blows to the head, and testified that he may have lost consciousness for a brief moment." At the close of evidence, George objected to the jury charge because the court did not include an instruction on the defense of consent.

Was the judge correct in not issuing an instruction on consent? See *Miller v. State*, 312 S.W.3d 209 (Tex. Ct. App. 2010).

You can find the answer at **edge.sagepub.com/lippmaness3e**

Mistake of Law and Mistake of Fact

A core principle of the common law is that only "morally blameworthy" individuals should be subject to criminal conviction and punishment. What about the individual who commits an act that he or she does not realize is a crime? Consider a resident of a foreign country who is flying to the United States for a vacation and is asked by a new American acquaintance to bring a vial of expensive heart medicine to his or her parents in the United States. The visitor is searched by American customs officials as he or she enters the United States, and the heart medicine is discovered to be an illegal narcotic. Should the victim be held criminally liable for the knowing possession of narcotics despite this "mistake of fact"? What if the visitor was asked by his American friend to transport cocaine and was assured that there was nothing to worry about because the importation and possession of this narcotic is legal in the United States? How should the law address this "mistake of law"?

In the previous two hypothetical examples, the question is whether an individual who mistakenly believes that his or her behavior is legal should be held liable for violating the law. Professor Wayne R. LaFave has observed that no area has created "more confusion" than mistakes of law and fact—a confusion that has caused "ulcers in law students."[58]

Read *State v. Dejarlais* on the study site **edge.sagepub.com/lippmaness3e.**

Mistake of Law

The conventional wisdom is that ***ignorantia juris neminem excusat***: "Ignorance of the law excuses no one." The rule that a **mistake of law** does not constitute a defense is based on several considerations, including the expectation that individuals should know the law.[59]

The expectation that individuals know the law may have made sense in early England. Critics contend, however, that people cannot realistically be expected to comprehend the vast number of laws that characterize modern society. An individual who, through a lack of knowledge, violates highly technical statutes regulating taxation or banking can hardly be viewed as "morally blameworthy."[60] Some observers note that courts seem to have taken this criticism seriously and, in several instances, have relaxed the rule that individuals are presumed to "know the law."[61] Three U.S. Supreme Court decisions illustrate this trend:

1. ***Notice.*** In *Lambert v. California*, the defendant was convicted of failure to adhere to a law that required a "felon" resident in Los Angeles to register with the police within five days. The U.S. Supreme Court found that convicting Lambert would violate due process because the law was unlikely to have come to his attention.[62]
2. ***Intent.*** In *Cheek v. United States*, an airline pilot had been counseled by antitax activists and believed that his wages did not constitute income and, therefore, he did not owe federal tax. He was convicted of willfully attempting to evade or defeat his taxes. The U.S. Supreme Court ruled that Congress required a showing of a willful intent to violate tax laws because the vast number of tax statutes made it likely that the average citizen might innocently fail to remain informed of the provisions of the tax code.[63]
3. ***Reliance.*** In the civil rights–era case of *Cox v. Louisiana*, the defendants were convicted of picketing a courthouse with the intent of interfering with, obstructing, or influencing the administration of justice. The U.S. Supreme Court reversed the students' convictions on the grounds that the chief of police had instructed them that they could legally picket at a location 101 feet from the courthouse steps.[64]

The result of the rule that a mistake of law does not constitute a defense may not always appear to be entirely fair. In *People v. Marrero*, a federal prison guard was arrested for carrying an unlicensed, .38-caliber automatic handgun into a bar. He appealed on the grounds that the statute exempted "peace officers" from liability. Peace officers were defined in the law as any official or guard of "any state prison or of any penal correctional institution." A New York court ruled by a vote of 4–3 that Marrero had misinterpreted the law and that the legislature intended that only New York State correctional officers were entitled to carry unlicensed handguns. Although several judges agreed with Marrero's reading of the plain meaning of the statute, the majority of the judges on New York's highest court reasoned that an individual is not permitted to substitute his or her personal view of the meaning of a law for the meaning of the law as intended by the state legislature. Do you agree with the outcome of the case?[65]

MPC Section 2.04(3) recognizes an "ignorance of the law defense" when the defendant does not know the law and the law has not been published or made reasonably available to the public (notice). This defense also applies where the defendant has relied on an official statement of the law (reliance).

Mistake of Fact

A **mistake of fact** constitutes a defense in those instances when the defendant's mistake results in a lack of criminal intent. MPC Section 2.04(1) states that "ignorance or mistake is a defense when it negatives the existence of a state of mind that is essential to the commission of an offense." As a first step, determine the intent required for the offense and then compare this to the defendant's state of mind. A defendant may take an umbrella from a restaurant during a rainstorm, believing that this is the umbrella that he or she left at the restaurant two years ago. The accused will be acquitted of theft because he or she lacked the intent to take, carry away, and permanently deprive the owner of the umbrella. Some courts require that a defendant's mistake must be objectively reasonable, meaning that a reasonable person would have made the same mistake. A trial court, for instance, might conclude that it was unreasonable for the defendant to believe after two years that his umbrella was still at the restaurant.[66]

Another aspect of the mistake of fact defense is that an individual may be mistaken but nonetheless will be held criminally liable in the event that the facts as perceived by the defendant still comprise a crime. For example, a defendant may be charged with receiving stolen umbrellas and contend that he or she believed that the package contained stolen raincoats. This would not exonerate the defendant. The charge is based on the receipt of stolen property, not stolen umbrellas.[67]

In *Commonwealth v. Liebenow*, the defendant was convicted of larceny for the theft of steel pipes and metal plates from a construction site. The defendant claimed that he lacked the specific intent to steal because he honestly believed that the metal property was abandoned. The Massachusetts Appeals Court concluded that the defendant's belief, however sincere, was unreasonable because the metal materials were stored on private property with "No Trespassing" signs posted throughout the property and there was ongoing construction on the site.[68]

MPC Section 2.04(1)(a)(b) accepts that a mistake of fact constitutes a defense so long as it "negatives" the intent required under the statute.

The Legal Equation 6.8: Mistake of Law and Mistake of Fact

YOU DECIDE 6.6

The defendant and his cousin, knowing that their marriage would be illegal in Nebraska, married in Iowa, where such unions are not prohibited. The county prosecutor informed the defendant that he would be prosecuted for sexual relations without marriage ("fornication") in the event that the couple continued to live in Nebraska because the marriage was not recognized in the state. Three private attorneys confirmed that the Iowa marriage was not valid in Nebraska. The defendant subsequently "separated" from his pregnant cousin and remarried another woman. It later was determined that, in fact, the Iowa marriage was valid in Nebraska, and the defendant was charged with bigamy (simultaneous marriage to more than a single spouse). Is the defendant guilty of bigamy? See *Staley v. State*, 89 Neb. 701 (1911).

You can find the answer at edge.sagepub.com/lippmaness3e

DEFENSES JUSTIFYING THE USE OF FORCE

An individual who reasonably believes that he or she is threatened with imminent bodily harm is entitled to use force to protect himself or herself.

Self-Defense

It is commonly observed that the United States is a "government of law rather than men and women." This means that guilt and punishment are to be determined in accordance with fair and objective legal procedures in the judicial suites rather than by brute force in the streets. Accordingly, the law generally discourages individuals from "taking the law into their own hands." This type of "vigilante justice" risks anarchy and mob violence. One sorry example is the lynching of thousands of African Americans by the Ku Klux Klan following the Civil War.

Self-defense is the most obvious exception to this rule and is recognized as a defense in all fifty states. Why does the law concede that an individual may use physical force in self-defense? One federal court judge noted the practical consideration that absent this defense, the innocent victim of a violent attack would be placed in the unacceptable position of choosing between "almost certain death" at the hands of his or her attacker or a "trial and conviction of murder later." More fundamentally, eighteenth-century English jurist William Blackstone wrote that it was "lawful" for an individual who is attacked to "repel force by force." According to Blackstone, this was a recognition of the natural impulse and right of individuals to defend themselves. A failure to recognize this right would inevitably lead to a disregard of the law.[69]

The Central Components of Self-Defense

The common law recognizes that an individual is justified in employing force in self-defense. This may involve deadly or nondeadly force, depending on the nature of the threat. There are a number of points to keep in mind:

- ***Reasonable Belief.*** An individual must possess a reasonable belief that force is required to defend himself or herself. In other words, the individual must believe and a reasonable person must believe that force is required in self-defense.
- ***Necessity.*** The defender must reasonably believe that force is required to prevent the imminent and unlawful infliction of death or serious bodily harm.
- ***Proportionality.*** The force employed must not be excessive or more than is required under the circumstances.
- ***Retreat.*** A defendant may not resort to deadly force if he or she can safely **retreat**. This generally is not required when the attack occurs in the home or workplace, or if the attacker uses deadly force.
- ***Aggressor.*** An **aggressor**, or individual who unlawfully initiates force, generally is not entitled to self-defense. An aggressor may claim self-defense only in those instances when an aggressor who is not employing deadly force is himself or herself confronted by deadly force. Some courts require that, under these circumstances, the aggressor withdraw from the conflict if at all possible before enjoying the right of

self-defense. There are courts willing to recognize that even an aggressor who employs deadly force may regain the right of self-defense by withdrawing following the initial attack. The other party then assumes the role of the aggressor.

- ***Mistake.*** An individual who is mistaken concerning the necessity for self-defense may rely on the defense as long as his or her belief is reasonable.
- ***Imperfect Self-Defense.*** An individual who honestly, but unreasonably, believes that he or she confronts a situation calling for self-defense and intentionally kills is held liable in many states for an intentional killing. Other states, however, follow the doctrine of **imperfect self-defense**. This provides that although the defendant may not be acquitted, fairness dictates that he or she should be held liable only for the less serious crime of manslaughter.

Model Penal Code

Section 3.04. Use of Force in Self-Protection

1. [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
2. Limitations on Justifying Necessity for Use of Force.
   a) . . .
   b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:
      i. the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
      ii. the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take. . . .

Analysis

The MPC makes some significant modifications to the standard approach to self-defense that will be discussed later in the text. The basic formulation affirms that the use of force in self-protection is justified in those instances in which an individual "employs it in the belief that it is immediately necessary for the purpose of protecting himself against the other's use of unlawful force on the present occasion." The code provides that an aggressor who uses deadly force may "break off the struggle" and retreat and regain the privilege of self-defense against the other party.

The Legal Equation 6.9: Self-Defense

Reasonable Belief

The common law and most statutes and modern decisions require that an individual who relies on self-defense must act with a reasonable belief in the imminence of serious bodily harm or death. The Utah statute on self-defense specifies that a person is justified in threatening or using force against another in those instances in which he or she "reasonably believes that force is necessary . . . to prevent death or serious bodily injury." The reasonableness test has two prongs:

1. ***Subjective.*** A defendant must demonstrate an honest belief that he or she confronted an imminent attack.

2. ***Objective.*** A defendant must demonstrate that a reasonable person under the same circumstances would have believed that he or she confronted an imminent attack.

An individual who acts with an honest and reasonable, but mistaken, belief that he or she is subject to an armed attack is entitled to the justification of self-defense. The classic example is the individual who kills an assailant who is about to stab him or her with a knife, a knife that later is revealed to be a realistic-looking rubber replica. As noted by Supreme Court justice Oliver Wendell Holmes Jr., "Detached reflection cannot be demanded in the presence of an uplifted knife."[70] Absent a reasonableness requirement, it is feared that individuals might act on the basis of suspicion or prejudice or intentionally kill or maim and then later claim self-defense.

The MPC adopts a subjective approach and only requires that a defendant actually believe in the necessity of self-defense. The subjective approach has been adopted by very few courts. An interesting justification for this approach was articulated by the Colorado Supreme Court, which contended that the reasonable person standard was "misleading and confusing." The right to self-defense, according to the Colorado court, is a "natural right and is based on the natural law of self-preservation. Being so, it is resorted to instinctively in the animal kingdom by those creatures not endowed with intellect and reason, so it is not based on the 'reasonable man' concept."[71]

A number of courts are moving to a limited extent in the direction of the MPC by providing that a defendant acting in an honest, but unreasonable, belief is entitled to claim *imperfect self-defense* and should be convicted of manslaughter rather than intentional murder.[72] In *Harshaw v. State*, the defendant and deceased were arguing, and the deceased threatened to retrieve his gun. They both retreated to their automobiles, and the defendant grabbed his shotgun in time to shoot the deceased as he reached inside his automobile. The deceased was later found to have been unarmed. The Arkansas Supreme Court ruled that the judge should have instructed the jury on manslaughter because the jurors could reasonably have found that Harshaw acted "hastily and without due care" and that he merited a conviction for manslaughter rather than murder.[73]

The New York Court of Appeals wrestled with the meaning of "reasonableness" under the New York statute in the famous "subway murder trial" of Bernhard Goetz. Goetz reacted to four young juveniles who asked him for money on the subway by brandishing a pistol and firing five shots in "self-defense." The court noted that a subjective standard would exonerate an individual who claimed to have acted in self-defense no matter how delusional his or her beliefs. The legal test according to the New York court is whether the defendant's subjective belief that he or she confronted an imminent threat was "reasonable under the circumstances." In evaluating the reasonableness of the defendant's belief, a number of factors are to be considered—including the relative "size" of the individuals involved, knowledge of the assailant's past involvement in violence, and past experiences of the defendant that could provide the defendant with a reasonable belief that he or she was threatened. The jury acquitted Goetz, who alleged that he had been threatened on the subway in the past, of all charges other than unlawful possession of a firearm.[74]

Imminence

A defendant must reasonably believe that the threatened harm is imminent, meaning that the harm "is about to happen."

In *State v. Schroeder*, the nineteen-year-old defendant stabbed a violent cellmate who threatened to make Schroeder his "sex slave" or "punk." Schroeder testified that he felt vulnerable and afraid and woke up at 1:00 a.m. and stabbed his cellmate in the back with a table knife and hit him in the face with a metal ashtray. The Nebraska Supreme Court ruled that the threatened harm was not imminent and that there was a danger in legalizing "preventive assaults."[75]

The MPC adopts a broad approach and provides that force is justifiable when the actor believes that he or she will be attacked on "the present occasion" rather than imminently. The broad MPC test has found support in the statutes of a number of states, including Delaware, Hawaii, Nebraska, New Jersey, and Pennsylvania. A dissenting judge in *Schroeder* cited the MPC and argued that the young inmate should have been acquitted on the grounds of self-defense. After all, he could not be expected to remain continuously on guard against an assault by his older cellmate or the cellmate's friends.

Battered Persons

The clash between the common law imminence requirement and the MPC's notion that self-defense may be justified where necessary to prevent an anticipated future harm is starkly presented by the so-called battered spouse defense. In *State v. Norman*, the defendant had been the victim of continual battering by her husband over a number of years, and he literally treated her like a "dog" and forced her to eat out of bowl and to sleep on the floor. The victim shot and killed her abusive spouse while he was asleep.[76] The North Carolina Supreme Court affirmed the trial court's refusal to issue a self-defense instruction. The court held that the evidence did not "show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm." The court further observed that "relaxed requirements" for self-defense would "legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' . . . subjective speculation as the probability of future felonious assaults by their husbands."[77]

Various state courts have held that a "battered spouse" is entitled to present expert witnesses explaining what is termed the "battered spouse syndrome." This syndrome is defined as a mental state that results from a cycle of physical and psychological abuse. The expert testimony helps the jury understand why it was reasonable for the defendant to have viewed himself or herself as confronting a threat of imminent harm and that there was no reasonable alternative other than to kill his or her abuser.[78]

A number of state legislatures have adopted statutes on intimate partner violence.[79] A Missouri statute provides that evidence that the defendant suffered from battered spouse syndrome is admissible "upon the issue of whether the actor lawfully acted in self-defense."[80]

Read *State v. Norman* on the study site: **edge.sagepub.com/lippmaness3e.**

Several courts have recognized the "battered child syndrome." The Washington Supreme Court, in an important decision, concluded that a seventeen-year-old who shot and killed his stepfather was entitled to rely on the "battered child syndrome" and to introduce evidence supporting the reasonableness of his belief that he confronted the prospect of imminent abuse. Children are more likely than adults to feel helpless and to lack the capacity to seek outside help or to leave the abusive relationship and to see no other avenue of escape other than to kill their abuser.[81]

Now that we have discussed the imminence requirement, we turn our attention to other requirements for self-defense.

YOU DECIDE 6.7

The defendant, seventeen-year-old Andrew Janes, was abandoned by his alcoholic father at age seven. Along with his mother Gale and brother Shawn, Andrew was abused by his mother's lover, Walter Jaloveckas, for roughly ten years. As Walter walked in the door following work on August 30, 1988, Andrew shot and killed him; one 9-millimeter pistol shot went through Walter's right eye and the other through his head. The previous night, Walter had yelled at Gale, and Walter later leaned his head into Andrew's room and spoke in low tones that usually were "reserved for threats." Andrew was unable to remember precisely what Walter said. In the morning, Gale mentioned to Andrew that Walter was still mad. After returning from school, Andrew loaded the pistol, drank some whiskey, and smoked marijuana.

Examples of the type of abuse directed against Andrew by Walter included beatings with a belt and wire hanger, hitting Andrew in the mouth with a mop, and punching Andrew in the face for failing to complete a homework assignment. In 1988, Walter hit Andrew with a piece of firewood, knocking him out. Andrew was subject to verbal as well as physical threats, including a threat to nail his hands to a tree, brand his forehead, place Andrew's hands on a hot stove, break Andrew's fingers, and hit him in the head with a hammer.

The "battered child syndrome" results from a pattern of abuse and anxiety. "Battered children" live in a state of constant alert ("hypervigilant") and caution ("hypermonitoring") and develop a lack of confidence and an inability to seek help ("learned helplessness"). Did Andrew believe and would a reasonable person in Andrew's situation believe that Andrew confronted an imminent threat of great bodily harm or death? The Washington Supreme Court clarified that *imminent* means "near at hand . . . hanging threateningly over one's head . . . menacingly near." The trial court refused to instruct the jury to consider whether Andrew was entitled to invoke self-defense.

Should the Washington Supreme Court uphold or reverse the decision of the trial court? See *State v. Janes*, 850 P.2d 495 (Wash. 1993).

You can find the answer at **edge.sagepub.com/lippmaness3e**

Excessive Force

An individual acting in self-defense is entitled to use that degree of force reasonably believed to be necessary to defend himself or herself. **Deadly force** is force that a reasonable person under the circumstances would be aware will cause or create a substantial risk of death or substantial bodily harm. This may be employed to protect against death or serious bodily harm. The application of excessive rather than proportionate force may result in a defender's being transformed into an aggressor. This is the case where an individual entitled to **nondeadly force** resorts to deadly force. The MPC limits deadly force to the protection against death, serious bodily injury, kidnapping, or rape. The Wisconsin statute authorizes the application of deadly force against arson, robbery, burglary, and any felony offense that creates a danger of death or serious bodily harm.[82]

In *State v. DeJesus*, DeJesus was attacked by two machete-wielding assailants, and he knocked them to the ground with a metal pipe and beat them to death. The Connecticut Supreme Court held that "[t]he jury could have reasonably concluded that the defendant did not reasonably believe that the degree of deadly force he exercised, in continuing to beat the victims in the manner established by the evidence, was necessary under the circumstances to thwart any immediate attacks from either or both of the victims."[83]

Retreat

The law of self-defense is based on necessity. An individual may resort to self-protection when he or she reasonably believes it is necessary to defend against an immediate attack. The amount of force is limited to that reasonably believed to be necessary. Courts have struggled with how to treat a situation in which an individual may avoid resorting to deadly force by safely retreating or fleeing. The principle of necessity dictates that every alternative should be exhausted before an individual resorts to deadly force and that an individual should be required to **retreat to the wall** (as far as possible). On the other hand, should an individual be required to retreat when confronted with a violent wrongdoer? Should the law promote cowardice and penalize courage?

Virtually every jurisdiction provides that there is no duty or requirement to retreat before resorting to *nondeadly force.* A majority of jurisdictions follow the same **stand your ground rule** in the case of *deadly force*, although a "significant minority" of states require retreat to the wall.[84]

Most jurisdictions limit the right to "stand your ground" when confronted with nondeadly force to an individual who is without fault, a **true man**. An aggressor employing nondeadly force must clearly abandon the struggle, and it must be a **withdrawal in good faith** to regain the right of self-defense. Some courts recognize that even an aggressor using deadly force may withdraw and regain the right of self-defense. In these instances, the right of self-defense will limit the initial aggressor's liability to manslaughter and will not provide a **perfect self-defense**. A withdrawal in good faith must be distinguished from a **tactical retreat** in which an individual retreats with the intent of continuing the hostilities.

The requirement of retreat is premised on the traditional rule that only necessary force may be employed in self-defense. The provision for retreat is balanced by the consideration that withdrawal is not required when the safety of the defender would be jeopardized. The **Castle Doctrine** is another generally recognized exception to the rule of retreat and provides that individuals inside the home are justified in "holding their ground." Aggressors are not entitled to rely on the Castle Doctrine inside the home.[85]

New Jersey along with a minority of states requires that a co-occupant of the home retreat before employing deadly force against another co-occupant.[86] In 2009, the West Virginia Supreme Court after considering the plight of the victims of domestic violence reversed the "no retreat rule" for lawful occupants of a home confronting abuse. The court explained that women who flee the home in many instances are "caught, dragged back inside, and severely beaten again. [Even i]f she manages to escape, . . . [w]here will she go if she has no money, no transportation, and if her children are left behind in the care of an enraged man?" The West Virginia court also reasoned that it was unfair that a woman attacked in the home by a stranger may stand her ground while a woman who is attacked by her husband or partner must retreat.[87]

MPC Section 3.04(b)(ii) provides that deadly force is not justifiable in those instances in which an individual "knows that he can avoid the necessity of using such force with complete safety by retreating." There is no duty to retreat under the MPC within the home or place of work unless an individual is an aggressor.

Defense of Others

The common law generally limited the privilege of **intervention in defense of others** to the protection of spouses, family, employees, and employers. This was based on the assumption that an individual would be in a good position to evaluate whether these individuals were aggressors or victims in need of assistance. Some state statutes continue to limit the right to intervene, but this no longer is the prevailing legal rule. The Wisconsin statute provides that a person is justified in "threatening or using force against another when . . . he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force."

The early approach in the United States was the **alter ego rule**. This provides that an individual intervening "stands in the shoes" of or possesses the "same rights" as the person whom he or she is assisting. The alter ego approach generally has been abandoned in favor of the reasonable person or **objective test for intervention in defense of others** of the MPC. Section 3.05 provides that an individual is justified in using force to protect another who he or she reasonably believes (1) is in immediate danger and (2) is entitled under the MPC to use protective force in self-defense, and that (3) such force is necessary for the protection of the other person. An intervener is not criminally liable under this test for a reasonable mistake of fact.

What is the difference between the alter ego rule and the objective test? Individuals intervening under the alter ego rule act at their own peril. The person "in whose shoes they stand" may in fact be an aggressor or may not possess the right of self-defense. The objective test, on the other hand, protects individuals who act in a "reasonable," but mistaken, belief.

Remember, you may intervene to protect another, but you are not required to intervene. Professor Fletcher notes that the desire to provide protection to those who intervene on behalf of others reflects the belief that an attack against a single individual threatens to erode the rule of law that protects each and every individual.[88]

Defense of the Home

The home has historically been viewed as a place of safety, security, and shelter. The eighteenth-century English jurist Lord Coke wrote that "[a] man's house is his castle—for where shall a man be safe if it be not his own house." Coke's opinion was shaped by the ancient Roman legal scholars who wrote that "one's home is the safety refuge for everyone." The early colonial states adopted the English common law right of individuals to use deadly force in those instances in which they reasonably believe that force is required to prevent an imminent and unlawful entry. The common law rule is sufficiently broad to permit deadly force against a rapist, burglar, or drunk who mistakenly stumbles into the wrong house on his or her way to a surprise birthday party.[89]

States gradually abandoned this broad standard and adopted statutes that restricted the use of deadly force in defense of the home. There is no uniform approach today, and statutes typically limit deadly force to those situations in which deadly force is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit "a felony" in the dwelling. Other state statutes strictly regulate armed force and authorize deadly force only in those instances in which it is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit a "forcible felony" involving the threat or use of violence against an occupant.[90] The first alternative would permit the use of deadly force against an individual who is intent on stealing a valuable painting, whereas the second approach would require that the art thief threaten violence or display a weapon.

The MPC balances the right to protect a dwelling from intruders against respect for human life and provides that deadly force is justified in those instances when the intruder is attempting to commit arson, burglary, robbery, other serious theft, or the destruction of property and has demonstrated that he or she poses a threat by employing or threatening to employ deadly force. Deadly force is also permissible under Section 3.06(3)(d)(ii)(A)(B) where the employment of nondeadly force would expose the occupant to substantial danger of serious bodily harm.

The most controversial and dominant trend is toward so-called **make my day laws** that authorize the use of "any degree of force" against intruders who "might use any physical force, no matter how slight, against any occupant."[91]

In *State v. Anderson*, the Oklahoma Court of Criminal Appeals stressed that under the state's make my day law, the occupant possesses unlimited discretion to employ whatever degree of force he or she desires based "solely upon the occupant's belief that the intruder might use any force against the occupant." In practice, this is a return to the original common law rule because a jury would likely find reasonable justification to believe that almost any intruder poses at least a threat of "slight" physical force against an occupant.[92] The make my day law raises the issue of the proper legal standard for the use of force in defense of the dwelling. Should a homeowner be required to wait until the intruder poses a threat of serious harm?

What about the protection of property? An individual is entitled to employ reasonable and necessary *nondeadly force* to protect property against a thief. Deadly force in protection of property is never justifiable. A victim of a theft who acts "promptly" and engages in hot pursuit against an assailant may use nondeadly force to recapture stolen property. Physical force generally may not be used by a "rightful owner" to "recapture" property that has been stolen and carried away by the perpetrator.[93]

The Castle Doctrine in Florida

Florida Statutes Section 776.013 is enormously influential and contains several provisions that have been followed by other states. A number of important provisions are reprinted below and are discussed in the Criminal Law and Public Policy feature.

776.013. Home protection; use of deadly force; presumption of fear of death or great bodily harm.—

1. A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
   a. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
   b. The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

2. The presumption set forth in subsection (1) does not apply if:
   a. The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person; or

3. A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

4. A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

Criminal Law and Public Policy

In 2005, Florida passed a Castle Doctrine law, also popularly referred to as the "stand your ground" law, which expands the right of self-defense. In the last five years, roughly thirty-one states have adopted some or all provisions of the Florida law. These laws are inspired by the common law doctrine that authorizes individuals to employ deadly force without the obligation to retreat against individuals unlawfully entering their home who are reasonably believed to pose a threat to inflict serious bodily harm or death. Individuals under the Castle Doctrine laws possess the right to stand their ground whether they are inside the home or in the curtilage outside the home. The Florida stand your ground law extends the right to stand your ground to individuals outside the home.

The National Rifle Association (NRA) has been at the forefront of the movement to persuade state legislatures to adopt these Castle Doctrine laws. The NRA argues that it is time for the law to be concerned with the rights of innocent individuals rather than to focus on the rights of offenders. The obligation to retreat before resorting to deadly force according to the NRA restricts the ability of innocent individuals to defend themselves against wrongdoers. The law of self-defense places victims in the position of having to make a split-second decision about whether they are obligated to retreat and whether they are employing proportionate force. The preamble to the Florida law states that "no person . . . should be required to surrender his or her personal safety to a criminal . . . nor . . . be required to needlessly retreat in the face of intrusion or attack." In the words of the spokesperson for the National Association of Criminal Defense Lawyers, "Most people would rather be judged by 12 (a jury) than carried by six (pallbearers)."

The Florida Castle Doctrine law modified the state's law of self-defense and has three central provisions.

Public place. An individual in any location where he or she "has a right to be" and who is not engaged in criminal activity is presumed to be justified in the use of deadly force or threatened use of deadly force and has no duty to retreat and has the right to stand his or her ground. The individual must reasonably believe that such force is required to prevent imminent death or great bodily harm or to prevent the imminent commission of a forcible felony to

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himself or herself or to another. Three questions are involved. Did the defendant have a right to be where he or she was located? Was the defendant engaged in lawful activity? Was the defendant in reasonable fear of death or great bodily harm?

Home. Individuals are presumed to be justified in using deadly force against intruders who forcefully and unlawfully enter their residence or automobile. In the past under the Florida law, a jury when confronted with a claim of self-defense by an individual in the home who employed deadly force was asked to decide whether the defendant reasonably believed that an intruder threatened death or serious bodily injury. Under the new Florida law, the issue is whether an intruder forcibly and unlawfully entered the defendant's home.

Immunity. Individuals who are authorized to use deadly force are immune from criminal prosecution.

Prosecutors after reviewing a case may decide against bringing charges despite a police decision to arrest an individual because the prosecutor concludes that the individual has a valid claim of self-defense. Claims of self-defense are adjudicated in a preliminary hearing. A 2017 Florida law shifts the burden of proof to the prosecutor to establish a lack of self-defense by "clear and convincing evidence." The immunity provision prevents an individual who possesses a credible claim of self-defense from being brought to trial in criminal or civil court (a separate hearing is conducted in civil court in which an individual is required to establish entitlement to stand his or her ground based on a preponderance of the evidence). The failure of a court to find that a defendant is immune from prosecution may be appealed. The individual whose claim is rejected in a preliminary hearing also may seek a plea bargain or rely on self-defense at trial. In some instances, the stand your ground law may influence the decision making of jurors despite the fact that the defense does not explicitly rely on the law.

The stand your ground law also subjects a law enforcement agency to civil liability that is responsible for arresting an individual who successfully relies on a "stand your ground" defense. At the same time, the Florida Supreme Court held in 2018 that police officers are entitled to rely on the stand your ground defense and to avoid a criminal trial.

A central criticism of stand your ground laws is that the laws create a climate in which people will resort to deadly force in situations in which they previously may have avoided armed violence. This, according to critics, threatens to turn communities into "shooting galleries" reminiscent of the "old West" in which a significant percentage of people feel the need to carry firearms. Since the passage of the Florida law in 2005, the number of individuals with concealed-carry permits has increased three times to 1.1 million permits.

There is evidence that in stand your ground states roughly 8 percent or six hundred more homicides have been committed than otherwise would be expected. Researchers speculate that this results from the fact that ordinary interpersonal conflicts escalate into violent confrontations. This in turn has led to an increase in the number of cases in which individuals claim that the violence was justified on the grounds of self-defense.

The *Tampa Bay Times* has compiled a database of stand your ground cases and has published several informative studies. Because of the failure of localities to keep accurate records, there is no fully accurate compilation of cases. Among the most important findings are these:

Number of cases. The stand your ground law is being applied in a growing number of cases. The *Tampa Bay Times* database of nonfatal cases increased five times between 2008 and 2011. Several hundred defendants are invoking the law each year. As a result, the court system is overburdened with expensive and time-consuming cases. On the other hand, individuals who acted in justifiable self-defense are able to avoid prosecution.

Acquittal. As of July 2012, 67 percent of defendants who invoked the law went free.

- Background. Individuals with "records of crime and violence . . . have benefited most from the . . . law": In the study of one hundred fatal stand your ground cases, more than thirty of the defendants had been accused of violent crimes, and 40 percent had three or more arrests.

Race. Individuals asserting self-defense against African Americans were more successful than individuals who relied on self-defense against assailants of other races. Of individuals who killed an African American, 73 percent were not punished as compared to 59 percent of individuals killing an individual of another race. The race of the defendant appears to play little role in the result of cases. Proponents of the law claim that African American offenders are more likely to be armed.

Age. In February 2014, the *Tampa Bay Times* reported that 19 percent of stand your ground cases resulted in the deaths of children or teens. Another 14 percent involved individuals who were either twenty or twenty-one.

In 2015, the American Bar Association (ABA), following a detailed study of stand your ground laws, determined that the laws had no deterrent impact on crime and had negatively impacted members of minority and ethnic groups. The ABA called on states to repeal and to refrain from adopting these laws.

The *Tampa Bay Times* notes that although stand your ground generally is applied in a responsible fashion by Florida prosecutors, there are a number of similar cases treated differently by local prosecutors. The newspaper also found cases that make a "mockery" of the law. "In nearly a third of the cases . . . defendants [who] initiated the fight, shot an unarmed person or pursued their victim . . . still went 'free.'"

In 2006, Jason Rosenbloom was shot by his neighbor Kenneth Allen in the doorway to Allen's home. Allen had complained about the amount of trash that Rosenbloom was putting out to be picked up by the trash collectors. Rosenbloom knocked on Allen's door, and the two engaged in a shouting match. Allen claimed that Rosenbloom prevented Allen from closing the door to his house with his foot and that Rosenbloom tried to push his way inside the house. Allen shot the unarmed Rosenbloom in the stomach and then in the chest. Allen claimed that he was afraid and that "I have a right . . . to keep my house safe."

The case came down to a "swearing contest" between Rosenbloom and Allen. Allen claimed that the unarmed Rosenbloom "unlawfully" and "forcibly" attempted to enter his home. Rosenbloom's entry created a presumption that Allen acted under reasonable fear of serious injury or death, and the prosecutors did not pursue the case. Under the previous law, the prosecution may have attempted to establish that Allen unlawfully resorted to deadly force because he lacked a reasonable fear that the unarmed Rosenbloom threatened serious injury or death.

The Florida stand your ground law became the topic of intense national debate when George Zimmerman, a neighborhood watch coordinator, was acquitted of the second-degree murder of seventeen-year-old Trayvon Martin. The controversy over stand your ground was further fueled by the conviction of Michael Dunn for the killing of seventeen-year-old Jordan Davis stemming from Dunn's complaint that Davis and his friends were playing music too loudly. Judge Russell Healey in sentencing Dunn to life imprisonment stated that this "exemplifies that our society seems to have lost its way. . . . We should remember that there's nothing wrong with retreating and deescalating the situation."

Despite the controversy over the provisions of the Florida law, a Florida gubernatorial task force reported in 2012 that the Castle Doctrine law has been effective in protecting citizens and in inspiring confidence in the criminal justice system and should be retained as part of the Florida criminal code.

In one of the latest controversies surrounding the Florida stand your ground law, Britany Jacobs, 25, was sitting in a car parked in a handicapped space. Michael Drejka approached the automobile to see whether the vehicle displayed a handicap permit and found that the vehicle did not display a permit. Jacobs's boyfriend Markeis McGlockton, an African American, along with their five-year-old son, exited a nearby convenience store and witnessed Jacobs and Drejka yelling at one another about whether the car was legally parked in the space. McGlockton, 28, approached Drejka, who is white, and shoved the forty-seven-year-old to the ground. Drejka pulled out a gun and fatally shot McGlockton in the chest. The surveillance footage showed that McGlockton backed away after pushing Drejka to the ground although Drejka reported that he feared that McGlockton would attack him again. The sheriff of Pinellas County stated that Jacobs possessed a concealed carry permit and was justified under the stand your ground law. He described McGlockton as using a "violent push" that "slammed" Drejka to the ground. This decision evoked a rising chorus of protests, and Pinellas County state attorney Bernie McCabe after interviewing witnesses and evaluating the evidence subsequently charged Drejka with manslaughter.

Stand your ground cases have been equally controversial in other states. In 2015, Wayne Burgarello, 74, was acquitted by a Nevada jury for firing five shots and killing one intruder and seriously wounding another intruder, both of whom were breaking into a vacant rental unit. Burgarello was tired of the burglary and vandalism of the empty rental unit and had lain in wait for the intruders.

A Nevada jury rejected a stand your ground defense by Markus Kaarma, who baited an intruder by placing a purse in an open garage. After being alerted by motion sensors that an intruder was entering the garage, Kaarma killed the seventeen-year-old burglar with four shots from a pump action shotgun. The jury rejected Kaarma's defense that he was protecting his home, and he was sentenced to seventy years of imprisonment.

In Montana, in September 2012, Dan Fredenberg was fatally shot by Brice Harper. Fredenberg suspected that Harper was having an affair with Fredenberg's wife. The unarmed Fredenberg decided to confront Harper and was shot dead by Harper as he entered Harper's garage. Dan Corrigan, the local prosecutor, concluded that Harper had been justified in killing Fredenberg under the Montana stand your ground law and decided against pressing charges. Corrigan explained, "You don't have to claim that you were afraid for your life. You just have to claim that he [the assailant] was in the house illegally. If you think someone's going to punch you in the nose or engage you in a fistfight, that's sufficient grounds to engage in lethal force." Do you believe it is time to reconsider stand your ground laws?

Execution of Public Duties

The enforcement of criminal law requires that the police detain, arrest, and incarcerate individuals and seize and secure property. This interference with life, liberty, and property would ordinarily constitute a criminal offense. The law, however, provides a defense to individuals executing public duties. This is based on a judgment that the public interest in the enforcement of the law justifies intruding on individual liberty.

In 1985, the U.S. Supreme Court reviewed the **fleeing felon rule** in *Tennessee v. Garner.* The case was brought under a civil rights statute by the family of the deceased who was seeking monetary damages for deprivation of the "rights . . . secured by the Constitution," 42 U.S.C. § 1983. The Supreme Court determined that the police officer violated Garner's Fourth Amendment right to be free from "unreasonable seizures." Although this was a civil rather than criminal decision, the judgment established the standard to be employed in criminal prosecutions against officers charged with the unreasonable utilization of deadly force.[94]

When the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he or she has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Justice Sandra Day O'Connor in dissent wrote that "I cannot accept the majority's creation of a constitutional right to flight for burglary suspects seeking to avoid capture at the scene of the crime."

The U.S. Supreme Court in three "high speed pursuit" decisions affirmed the reasonableness of police officers' use of deadly force and other methods that pose a high likelihood of serious injury or death to halt a "fleeing motorist" so as to protect innocent members of the public who are placed at risk by the "fleeing motorist."[95] The Supreme Court in several recent cases issued decisions upholding the police use of deadly force.[96] For example, in *White v. Pauly*, the Court held that it was reasonable for an officer arriving "late on the scene" of an ongoing exchange of gunfire between the police and individuals in a home to assume that the officers had followed required procedures and had identified themselves to the occupants as law enforcement officers, and as a result, the officer was justified in shooting and killing one of the offenders.[97]

In *Graham v. Connor* in 1989, the Supreme Court held that claims that the law enforcement officers employed excessive force in the course of an investigatory stop, arrest, or other seizure should be evaluated under the Fourth Amendment reasonableness standard. The reasonableness of the use of force is to be evaluated based on the perspective of a reasonable officer on the scene rather than from the "20/20 vision of hindsight." The calculus of reasonableness should make allowance for the fact that the police often are asked to make split-second judgments.[98]

The use of deadly force by the police became an issue of heated debate in August 2015 when Officer Darren Wilson of the Ferguson, Missouri, Police Department (FPD) shot and killed unarmed African American teenager Michael Brown. A St. Louis County, Missouri, grand jury after hearing evidence from sixty witnesses over the course of three months voted against indicting Officer Wilson for murder. In the aftermath of the grand jury decision, the Criminal Section of the Department of Justice Civil Rights Division initiated an investigation into Brown's death and concluded that Wilson had not violated the federal criminal statute, 18 U.S.C. § 242, which prohibits an individual under color of law (e.g., Officer Wilson) from willfully subjecting any person (e.g., Brown) to the deprivation of his or her constitutional rights or rights under the laws of the United States. The issue of police use of deadly force has continued to be a point of concern and controversy, particularly in regard to the shooting of unarmed young African American and Hispanic males.[99]

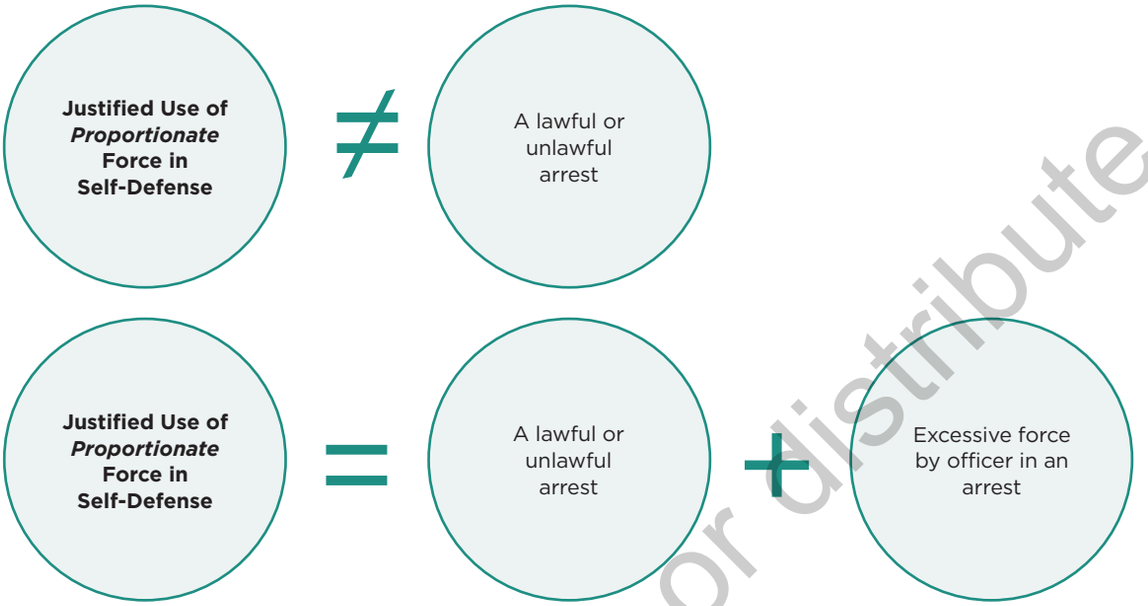
Read *Tennessee v. Garner* on the study site: **edge.sagepub.com/lippmaness3e**.

Resisting Unlawful Arrests

English common law recognized the right to resist an unlawful arrest by reasonable force. The U.S. Supreme Court, in *John Bad Elk v. United States* in 1900, ruled that "[i]f the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest."[100] In 1948, the U.S. Supreme Court affirmed that "[o]ne has an undoubted right to resist an unlawful arrest . . . and courts will uphold the right of resistance in proper cases."[101]

The English common law rule that authorizes the right to resist an unlawful arrest by reasonable force was recognized as the law in forty-five states as late as 1963. The Mississippi Supreme Court proclaimed in *State v. King* that "every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force."[102] Today, only twelve states continue to recognize the **English rule for resistance to an unlawful arrest**. Thirty-eight states have now abandoned the right to resist arrest—known as the **American rule for resistance to an unlawful arrest**.

The Legal Equation 6.10: Use of Force in Self-Defense During an Arrest



The abandonment of the recognition of the right to resist by an overwhelming majority of states and by the MPC is because the rule no longer is thought to make much sense. Individuals and the police often are heavily armed, and a violent exchange imperils the public. The common law rule reflected the fact that imprisonment, even for brief periods, subjected individuals to a "death trap" characterized by disease, hunger, and violence. Today, however, individuals who are arrested have access to a lawyer, and to release on bail while awaiting trial. Incarcerated individuals are no longer subjected to harsh, inhuman, and disease-ridden prison conditions that result in illness and death.[103]

Keep in mind that individuals continue to retain the right of self-defense to resist a police officer's application of unnecessary and unlawful force in executing arrest. Judges reason that individuals are not adequately protected against the infliction of death or serious bodily harm by the ability to bring a civil or criminal case charging the officer with the application of excessive force.[104]

DEFENSES BASED ON GOVERNMENTAL MISCONDUCT

Individuals who are pressured, tricked, or coerced into committing a crime can rely on the defense of entrapment.

Entrapment

American common law did not recognize the defense of **entrapment**. The fact that the government entrapped or induced a defendant to commit a crime was irrelevant in evaluating a defendant's guilt or innocence.

The development of the defense is traced to the U.S. Supreme Court's 1932 decision in *Sorrells v. United States.* In *Sorrells*, an undercover agent posing as a "thirsty tourist" struck up a friendship with Sorrells and was able to overcome Sorrells's resistance and persuaded him to locate some illicitly manufactured alcohol. Sorrells's conviction for illegally selling alcohol was reversed by the U.S. Supreme Court.[105]

The decision in *Sorrells* defined entrapment as the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or

fraud of the officer." The essence of entrapment is the government's inducement of an otherwise innocent individual to commit a crime. Decisions have clarified that the prohibition on entrapment extends to the activities of undercover government agents, confidential informants, and private citizens acting under the direction of law enforcement personnel. The defense has been raised in cases involving prostitution; the illegal sale of alcohol, cigarettes, firearms, and narcotics; and public corruption. There is some indication that the defense may not be invoked to excuse a crime of severe violence.

There are good reasons for the government to rely on undercover strategies:

- ***Crime Detection.*** Certain crimes are difficult to investigate and to prevent without informants. These include narcotics, prostitution, and public corruption.
- ***Resources.*** Undercover techniques, such as posing as a buyer of stolen goods, can result in a significant number of arrests without expending substantial resources.
- ***Deterrence.*** Individuals will be deterred from criminal activity by the threat of government involvement in the crime.

Entrapment is also subject to criticism:

- The government may "manufacture crime" by individuals who otherwise may not engage in such activity.
- The government may lose respect by engaging in lawbreaking.
- The informants who infiltrate criminal organizations may be criminals whose own criminal activity often is overlooked in exchange for their assistance.
- Innocent individuals are often approached in order to test their moral virtue by determining whether they will engage in criminal activity. They likely would not commit a crime were they not approached.

The Law of Entrapment

In developing a legal test to regulate entrapment, judges and legislators have attempted to balance the need of law enforcement to rely on undercover techniques against the interest in ensuring that innocent individuals are not pressured or tricked into illegal activity. As noted by Chief Justice Earl Warren in 1958, "[A] line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[106]

There are two competing legal tests for entrapment that are nicely articulated in the 1958 U.S. Supreme Court case of *Sherman v. United States.* Sherman's conviction on three counts of selling illegal narcotics was overturned by the Supreme Court, and the facts, in many respects, illustrate the perils of government undercover tactics. Kalchinian, a government informant facing criminal charges, struck up a friendship with defendant Sherman. They regularly talked during their visits to a doctor who was assisting both of them to end their addiction to narcotics. Kalchinian eventually was able to overcome Sherman's resistance and persuaded him to obtain and to split the cost of illegal narcotics.[107]

The U.S. Supreme Court unanimously agreed that Sherman had been entrapped. Five judges supported a *subjective test* for entrapment, and four supported an *objective test.* The federal government and a majority of states follow a subjective test, whereas the MPC and a minority of states rely on an objective test. Keep in mind that the defense of entrapment was developed by judges, and the availability of this defense has not been recognized as part of a defendant's constitutional right to due process of law. Entrapment in many states is an affirmative defense that results in the burden being placed on the defendant to satisfy a preponderance of the evidence standard. Other states require the defendant to produce some evidence, and then they place the burden on the government to rebut the defense beyond a reasonable doubt.[108]

The Subjective Test

The subjective test focuses on the defendant and asks whether the accused possessed the criminal intent or "predisposition" to commit the crime or whether the government "created" the offense. In other words, "but for" the actions of the government, would the accused have broken the law? Was the crime the "product of the creative activity of the government" or the result of the defendant's own criminal design?

The first step is to determine whether the government induced the crime. This requires that the undercover agent or informant persuade or pressure the accused. A simple offer to sell or to purchase drugs is a "mere offer" and does not constitute an "inducement." In contrast, an inducement involves appeals to friendship, compassion, promises of extraordinary economic or material gain, sexual favors, or assistance in carrying out the crime.

The second step is the most important and involves evaluating whether the defendant possessed a "predisposition" or readiness to commit the crime with which he or she is charged. The law assumes that a defendant who is predisposed is ready and willing to engage in criminal conduct in the absence of governmental inducements and, for this reason, is not entitled to rely on the defense of entrapment. In other words, the government must direct its undercover strategy against the unwary criminal rather than the unwary innocent. How is predisposition established? A number of factors are considered:[109]

- the character or reputation of the defendant, including prior criminal arrests and convictions for the type of crime involved;
- whether the accused suggested the criminal activity;
- whether the defendant was already engaged in criminal activity for profit;
- whether the defendant was reluctant to commit the offense; and
- the attractiveness of the inducement.

In *Sherman*, the purchase of the drugs was initiated by the informant, Kalchinian, who overcame Sherman's initial resistance and persuaded him to obtain drugs. Kalchinian, in fact, had instigated two previous arrests and was facing sentencing for a drug offense himself. The two split the costs. There is no indication that Sherman was otherwise involved in the drug trade, and a search failed to find drugs in his home. Sherman's nine-year-old sales conviction and five-year-old possession conviction did not indicate that he was ready and willing to sell narcotics. In other words, before Kalchinian induced Sherman to purchase drugs, he seemed to be genuinely motivated to overcome his dependency on narcotics.

The underlying theory is that the jury, in evaluating whether the defendant was entrapped, is merely carrying out the intent of the legislature. The "fiction" is that the legislature did not intend for otherwise innocent individuals to be punished who were induced to commit crimes by government trickery and pressure. The issue of entrapment under the subjective test is to be decided by the jury.

The Objective Test

The objective test focuses on the conduct of the government rather than on the character of the defendant. Justice Felix Frankfurter, in his dissenting opinion in *Sherman*, explained that the crucial question is "whether police conduct revealed in the particular case falls below standards to which common feelings respond, for the proper use of governmental power." The police, of course, must rely on undercover work, and the test for entrapment is whether the government, by offering inducements, is likely to attract those "ready and willing" to commit crimes "should the occasion arise" or whether the government has relied on tactics and strategies that are likely to attract those who "normally avoid crime and through self-struggle resist ordinary temptations."

The subjective test focuses on the defendant; the objective test focuses on the government's conduct. Under the subjective test, if an informant makes persistent appeals to compassion and friendship and then asks a defendant to sell narcotics, the defendant has no defense if he is predisposed to selling narcotics. Under the objective test, there would be a defense because the conduct of the police, rather than the predisposition of the defendant, is the central consideration.[110]

Justice Frankfurter wrote that public confidence in the integrity and fairness of the government must be preserved and that government power is "abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law."[111] These unacceptable methods lead to a lack of respect for the law and encourage criminality. Frankfurter argued that judges must condemn corrupt and uncivilized methods of law enforcement even if this judgment may result in the acquittal of the accused. Frankfurter criticized the predisposition test for providing protection for "innocent defendants," while permitting the government to employ various unethical strategies and schemes against defendants who are predisposed.

In *Sherman*, Frankfurter condemned Kalchinian's repeated requests that the accused assist him to obtain drugs. He pointed out that Kalchinian took advantage of Sherman's susceptibility to narcotics and manipulated Sherman's sympathetic response to the pain Kalchinian was allegedly suffering in withdrawing from drugs. The *Sherman* and *Sorrells* cases suggest that practices prohibited under the objective test include

- taking advantage of weaknesses;
- repeated appeals to friendship and sympathy;

- promising substantial economic gain;
- pressure or threats;
- providing the equipment required for carrying out a crime;
- false representations designed to induce a belief that the conduct is not prohibited; and
- targeting individuals who are not engaged in criminal activity rather than targeting ongoing criminal conduct.

Critics complain that the objective test has not resulted in clear and definite standards to guide law enforcement. Can you determine at what point Kalchinian crossed the line? Critics also charge that it makes little sense to acquit a defendant who is "predisposed" based on the fact that a "mythical innocent" individual may have been tricked into criminal activity by the government's tactics. However, the objective test was adopted by the MPC, which follows Justice Frankfurter in assigning the determination of entrapment to judges rather than juries based on the fact that judges are responsible for safeguarding the integrity of the criminal justice process.

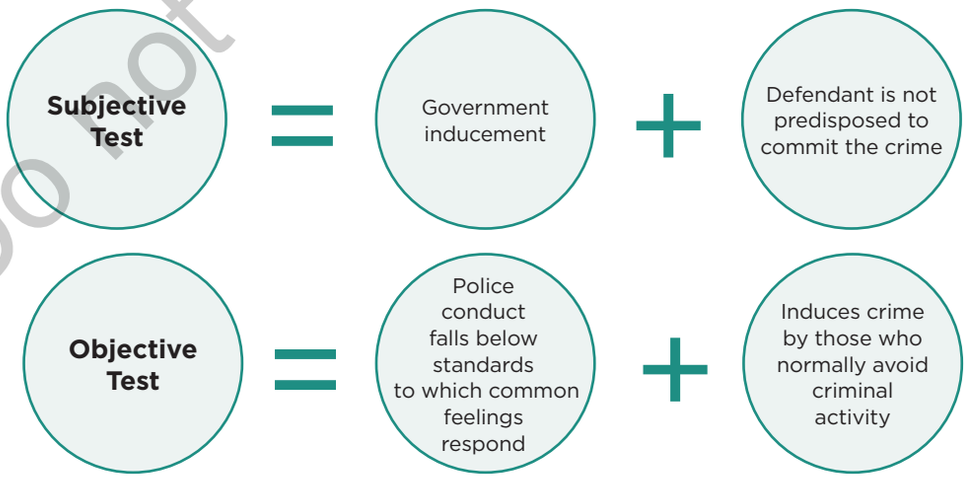
The Entrapment Defense

In the past, a disadvantage of pleading entrapment was that a defendant was required to admit that he or she was entrapped by the government into committing a crime. A defendant who was unsuccessful in pleading entrapment would be found guilty. The Supreme Court has recognized that in the federal judicial system, a defendant may assert "inconsistent defenses," both relying on entrapment and denying guilt. State courts take different approaches to this issue.[112]

We might question whether courts should be involved in evaluating law enforcement tactics and in acquitting individuals who are otherwise clearly guilty of criminal conduct. Can innocent individuals really be pressured into criminal activity? Do we want to limit the ability of the police to use the techniques they believe are required to investigate and punish crime? There also appear to be no clear judicial standards for determining predisposition under the subjective test and for evaluating acceptable law enforcement tactics under the objective test. This leaves the police without a great deal of guidance or direction. On the other hand, we clearly are in need of a legal mechanism for preventing government abuse.

In recent years, the Bureau of Alcohol, Tobacco, Firearms and Explosives has relied on a controversial undercover "sting operation" to combat the drug trade. An informant involved in the drug trade approaches individuals and tells them that there is a loosely guarded stash house in which drugs are stored. As the individuals approach the stash house, they are arrested by federal agents and charged with various firearms and narcotics offenses. This tactic has resulted in the arrest of nearly one thousand individuals.

The Legal Equation 6.11: Subjective and Objective Tests



YOU DECIDE 6.8

Detective Jason Leavitt of the Las Vegas Police Department was disguised as an "intoxicated vagrant." Twenty $1 bills were placed in his pocket and were visible to anyone standing close to him. Leavitt's words and actions were monitored by other officers.

Appellant Richard Miller, who was walking southbound on Main Street, approached Detective Leavitt and asked him for money. Leavitt responded that he would not give Miller any money. "Miller then pulled Detective Leavitt closer to him, quickly reached his hand into Detective Leavitt's pocket, and took the twenty dollars. Miller then loosened his grip on Detective Leavitt and again asked for money. Detective Leavitt said that he could not give Miller any money because his money was gone." Miller was arrested and charged with larceny.

May Miller successfully rely on the entrapment defense? See *Miller v. State*, 110 P.3d 53 (Nev. 2005). Would your answer be different if the defendant stole money from a "decoy" who pretended to be "intoxicated and asleep" with a $10 bill protruding out of his or her pocket? *See Oliver v. State*, 703 P.2d 869 (Nev. 1985).

You can find the answer at **edge.sagepub.com/lippmaness3e**

NEW DEFENSES

The criminal law is based on the notion that individuals are responsible and accountable for their decisions and subject to punishment for choosing to engage in morally blameworthy behavior. We have reviewed a number of circumstances in which the law has traditionally recognized that individuals should be excused and should not be held fully responsible. In the last decades, medicine and the social sciences have expanded our understanding of the various factors that influence human behavior. This has resulted in defendants' offering various new defenses that do not easily fit into existing categories. These defenses are not firmly established and have yet to be accepted by judges and juries. Most legal commentators dismiss the defenses as "quackery" or "science" and condemn these initiatives for undermining the principle that individuals are responsible for their actions.

One of the foremost critics is Professor Alan Dershowitz of Harvard Law School, who has pointed to fifty "abuse excuses." Dershowitz defines an **abuse excuse** as a legal defense in which defendants claim that the crimes with which they are charged result from their own victimization and that they should not be held responsible. Examples are the "battered wife" and "battered child syndromes."[113] A related set of defenses are based on the claim that the defendant's biological or genetic heredity caused him or her to commit a crime. Professor Fletcher has warned that these types of defenses could potentially undermine the assumption that all individuals are equal and should be rewarded or punished based on what they do, not on who they are. On the other hand, proponents of these new defenses argue that the law should evolve to reflect new intellectual insights.[114]

Read *United States v. Jacobsen* on the study site: **edge.sagepub.com/lippmaness3e**.

Some New Defenses

Four examples of *biological defenses* and two examples of *psychological defenses* are as follows:

- ***XYY Chromosome.*** This is based on research that indicates that a large percentage of male prison inmates possess an extra Y chromosome that results in enhanced "maleness." (Each fetus has two sex chromosomes, one of which is an X. A female has two X chromosomes; a male, a Y and an X chromosome.) A Maryland appeals court dismissed a defendant's claim that his robbery should be excused based on the presence of an extra Y masculine chromosome that allegedly made it impossible for him to control his antisocial and aggressive behavior.[115]

- ***Premenstrual Syndrome (PMS).*** Many women experience cramps, nausea, and discomfort prior to menstruation. PMS has been invoked by defendants who contend that they suffered from severe pain and distress that drove them to act in a violent fashion. Geraldine Richter was detained by an officer for driving while intoxicated, and she verbally attacked and threatened the officer and kicked the Breathalyzer. A Fairfax County, Virginia, judge acquitted Richter of driving while intoxicated, resisting arrest, and other charges after an expert testified that her premenstrual condition caused her to absorb alcohol at an abnormally rapid rate.[116]

- ***Postpartum Psychosis.*** This is caused by a drop in the hormonal level following the birth of a child. The result can be depression, suicide, and in its extreme manifestations delusions, hallucinations, and violence. Stephanie Molina reportedly was a happy and outgoing young woman who suffered severe depression and a paranoid fear of being killed. She subsequently killed her child, attempted suicide, and made an effort to burn her house down. A California appellate court ruled that the jury should have been permitted to consider evidence of Molina's condition in evaluating her guilt for the intentional killing of her child.[117]

- ***Environmental Defense.*** The Massachusetts Supreme Judicial Court rejected a defendant's effort to excuse a homicide based on the argument that the chemicals he used in lawn care work resulted in involuntary intoxication and led him to violently respond to a customer's complaint.[118]

- ***Brainwashing.*** Brainwashing is an example of a psychological defense in which an individual claims to have been placed under the mental control of others and to have lost the capacity to make independent decisions. A well-known example is newspaper heiress Patricia Hearst who, in 1974, was kidnapped by a small terrorist group, the Symbionese Liberation Army (SLA). Several months later, she entered a bank armed with a machine gun and assisted the group in a robbery. Hearst testified at trial that she had been abused and brainwashed by the SLA and had been programmed to assume the identity of "Tanya the terrorist." The jury dismissed this claim and convicted Hearst.

- ***Post-Traumatic Stress Disorder (PTSD).*** PTSD is another example of a psychological defense. A Tennessee court of appeals ruled that a veteran of the Desert Shield and Desert Storm military campaigns, who recently had returned to the United States, should be permitted to introduce evidence demonstrating that his wartime experiences led him to react in an emotional and violent fashion to his wife's romantic involvement with the victim.[119]

Defendants relying on *sociological defenses* claim that their life experiences and environment have caused them to commit crimes. These include the following:

- ***Black Rage.*** Colin Ferguson, a thirty-five-year-old native of Jamaica, in December 1993, boarded a commuter train in New York City and embarked on a shooting spree against Caucasian and Asian passengers that left six dead and nineteen wounded. The police found notes in which Ferguson expressed a hatred for these groups as well as for "Uncle Tom Negroes." His lawyer announced that Ferguson would offer the defense of extreme racial stress precipitated by the destructive racial treatment of African Americans. Ferguson ultimately represented himself at trial and did not raise this defense, which nonetheless has been the topic of substantial discussion and debate.[120]

- ***Urban Survivor.*** Daimion Osby, a seventeen-year-old student, shot and killed two unarmed cousins who had been demanding that Osby provide them with the opportunity to win back the money they had lost to him while gambling. At one point, a white pickup apparently belonging to one of the cousins pulled alongside Osby's automobile, and a rifle barrel was allegedly pointed out the window. Two weeks later, the same truck approached and Osby shot and killed the occupants, Marcus and Willie Brooks, neither of whom were armed. The defense offered the "urban survivor defense" during Osby's first trial. This resulted in a hung jury. He then was retried and convicted. The defense unsuccessfully appealed the fact that Osby was prohibited from introducing experts supporting his claim of the "urban survivor syndrome" at the second trial. The "urban survivor defense" consists of the contention that young people living in poor and violent urban areas do not receive adequate police protection and develop a heightened awareness and fear of threats.[121]

- ***Media Intoxication.*** Defendants have claimed that their criminal conduct is caused by "intoxication" from television and pornography. Ronald Ray Howard, 19, unsuccessfully argued in mitigation of a death sentence that he had killed a police officer while listening to "gangsta rap."[122]

- ***Rotten Social Background.*** In *United States v. Alexander*, the defendant shot and killed a white Marine who had uttered a racial epithet. The African American defendant claimed that he had shot as a result of an irresistible impulse that resulted from his socially deprived childhood. Alexander's early years were marked by abandonment, poverty, discrimination, and an absence of love. This "rotten social background" (RSB) allegedly created an irresistible impulse to kill in response to the Marine's remark. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the trial judge's refusal to issue a jury instruction on RSB. Judge David Bazelon dissented and questioned whether society had a right to sit in judgment over a defendant who had been so thoroughly mistreated.[123]

- ***Agent Orange/PTSD.*** Defendant Bruce Franklin Jerrett was charged with first-degree murder, breaking and entering, kidnapping, and armed robbery. Jerrett and his mother testified to six or seven incidents following the Vietnam War in which he "blacked out," and on one occasion he attacked his sister. He attributed the incidents to

the downward spiral of his health and to PTSD as a result of having been exposed to the chemical Agent Orange. Following his blackouts, Jerrett had no memory of what he had done. Jerrett appealed his conviction; and the North Carolina Supreme Court overturned his conviction on the grounds that the jurors should have received an instruction that if they found that the defendant suffered from PTSD and was unconscious at the time of his crime, he should be acquitted.[124]

The Cultural Defense

Defendants in several cases have invoked the "cultural defense." This involves arguing that a foreign-born defendant was following his or her culture and was understandably unaware of the requirements of American law. Those in favor of the "cultural defense" argue that it is unrealistic to expect that new immigrants will immediately know or accept American practices in areas as important as the raising and disciplining of children. The acceptance of diversity, however, may breed a lack of respect for the law among immigrant groups and lead Americans who are required to conform to legal standards to believe that they are being treated unfairly. Judges and juries may also lack the background to determine the authentic traditions of various immigrant groups and may be forced to rely on expert witnesses to understand different cultures.[125]

In *State v. Kargar*, the Maine Supreme Judicial Court held that the defendant, who had immigrated to the United States three years earlier, should not be held liable for gross sexual conduct because his kissing of his eighteen-month-old son in sensitive areas of his anatomy was part of his cultural tradition.[126]

Read *State v. Kargar* on the study site: **edge.sagepub.com/lippmaness3e.**

CASE ANALYSIS

In *Commonwealth v. Kendall*, the Massachusetts Supreme Judicial Court addressed whether the trial court judge should have allowed the jury to consider if the defendant was entitled to the necessity defense.

Was the defendant's driving under the influence of alcohol justified based on the necessity defense?

COMMONWEALTH V. KENDALL

883 N.E.2D 269 (MASS. 2008)

On the evening of November 25, 2001, the defendant and his girl friend, Heather Maloney, went out to the Little Pub in Marlborough for drinks. They were able to travel there on foot because the establishment was no more than a ten-minute walk from the defendant's trailer home. Over the course of several hours, the defendant and Maloney consumed enough alcohol to become intoxicated. They left the Little Pub around 10 p.m. and walked to a nearby Chinese restaurant to get something to eat. The kitchen was closed, but the bar remained open and they each consumed another drink. Maloney wanted to stay at the restaurant for additional drinks, but the defendant persuaded her that they should return to his home.

After they walked back to the defendant's trailer, he opened the door for Maloney, and she went inside, stopping at the top of the stairs to remove her shoes. As the defendant entered the trailer, he stumbled and bumped into Maloney, causing her to fall forward and hit her head on the corner of a table. The impact opened a wound on her head, and she began to bleed profusely. The defendant was unsuccessful in his efforts to stop the bleeding, so the two decided to seek immediate medical attention.

The trailer did not have a telephone, and neither Maloney nor the defendant had a cellular telephone. Approximately seventy-five to eighty other trailers were located in the mobile home park (each about twenty-five feet apart), at least one nearby neighbor (who lived about forty feet from the defendant) was at home during the time of the incident, and a fire station was located approximately one hundred yards from the neighbor's home. Nonetheless, Maloney and the defendant got into his car, and he drove her to the emergency room of Marlborough Hospital. A [B]reathalyzer test subsequently administered to the defendant at the Marlborough police station, after

(Continued)

(Continued)

he had been placed under arrest, showed a blood alcohol level of .23 per cent.

At the close of all the evidence at trial, defense counsel informed the judge that he intended to argue a defense of necessity to the charge of OUI [operating a motor vehicle while under the influence of intoxicating liquor], and he requested an appropriate jury instruction. The judge denied counsel's request for an instruction on necessity, concluding that evidence had not been presented to demonstrate that such a defense was applicable in the circumstances of this case, where the parties were in a highly populated area and the defendant could have availed himself of nearby resources to obtain medical attention for Maloney. . . .

The defendant now contends in this appeal that the judge erred in refusing to allow him to present a defense of necessity during his closing argument and in refusing his request for a jury instruction on such defense. The defendant asserts that, contrary to the judge's conclusion, there were no legal alternatives which would have been effective in abating the danger to Maloney given that her wound was extremely serious and time was a critical factor. Moreover, the defendant continues, by determining that alternative courses of action were available, the judge simply substituted his own judgment, with the benefit of hindsight, for that of the jury. We disagree.

"[I]n a prosecution for operating a motor vehicle while under the influence of intoxicating liquor, the Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's ability to operate a motor vehicle safely. The Commonwealth need not prove that the defendant actually drove in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely." It is well established that criminal conduct may be negated by compulsion.

The defense of necessity, also known as the "competing harms" defense, "exonerates one who commits a crime under the 'pressure of circumstances' if the harm that would have resulted from compliance with the law . . . exceeds the harm actually resulting from the defendant's violation of the law. At its root is an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value." . . . In other words, "[a] necessity defense is sustainable '[o]nly when a comparison of the "competing" harms in specific circumstances clearly favors excusing' the defendant's conduct."

The common-law defense of necessity is available in limited circumstances. It can only be raised if each of the following conditions is met: "(1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." In those instances where the evidence is sufficient to raise the defense of necessity, the burden is on the Commonwealth to prove the absence of necessity beyond a reasonable doubt. In considering whether a defendant is entitled to a jury instruction on the defense of necessity, we have stated that a judge shall so instruct the jury only after the defendant has presented some evidence on each of the four underlying conditions of the defense. That is to say, an instruction on necessity is appropriate where there is evidence that supports at least a reasonable doubt whether operating a motor vehicle while under the influence of intoxicating liquor was justified by necessity. . . . Notwithstanding a defendant's argument that the jury should be allowed to decide whether the defendant has established a necessity defense, a judge need not instruct on a hypothesis that is not supported by evidence in the first instance. Thus, if some evidence has been presented on each condition of a defense of necessity, then a defendant is entitled to an appropriate jury instruction.

The only issue here is whether the defendant presented some evidence on the third element of the necessity defense, namely, that there were no legal alternatives that would be effective in abating the danger posed to Maloney from her serious head wound. "Where there is an effective alternative available which does not involve a violation of the law, the defendant will not be justified in committing a crime." "Moreover, it is up to the defendant to make himself aware of any available lawful alternatives, 'or show them to be futile in the circumstances.'"

When viewing the evidence in the light most favorable to the defendant, we conclude that he failed to present any evidence to support a reasonable doubt that his operation of a motor vehicle while under the influence of intoxicating liquor was justified by necessity. There is no question that Maloney's head wound was serious and that time was of the essence in securing medical treatment. Nonetheless, the record is devoid of evidence that the defendant made any effort to seek assistance from anyone prior to driving a motor vehicle while intoxicated. The defendant did not try to contact a nearby neighbor to place a 911 emergency telephone call or, alternatively, to drive Maloney to the hospital. There is also no evidence that the defendant attempted to secure help from the fire station or Chinese restaurant, both in relatively close proximity to the defendant's trailer. This is not a case where, because of location or circumstances, there were no legal alternatives

for abating the medical danger to Maloney. Moreover, there has been no showing by the defendant that available alternatives would have been ineffective, leaving him with no option but to drive while intoxicated. Because the defendant did not present at least some evidence at trial that there were no effective legal alternatives for abating the medical emergency, we conclude that the judge did not err in refusing to allow counsel to present a defense of necessity and in denying his request for an instruction on such a defense.

Dissenting, *Cowin J.*, with whom *Marshall, C.J.*, and *Cordy, J.*, join

The necessity defense recognizes that circumstances may force individuals to choose between competing evils. In particular, it may be reasonable at times for an individual to engage in the "lesser evil" of committing a crime in order to avoid greater harms; when this occurs, the individual should not be punished by the law for his actions. "At [the] root [of the necessity defense] is an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value which makes it inappropriate and unjust to apply the usual criminal rule."

As the court states, our common law requires a defendant to present some evidence on each of the four elements of the necessity defense before a judge is required to instruct the jury on such defense. Once a judge determines that the evidence, viewed in the light most favorable to the defendant, permits a finding that the defendant reasonably acted out of necessity, the judge must instruct on the defense. The jury then decide what the facts are and resolve the ultimate question whether the defendant's actions were justified by necessity. . . .

The problem with the court's decision is that it puts unreasonable demands on the defendant to show in every instance that he has tested the legal alternatives. In this case, the court apparently requires the defendant to have knocked on a neighbor's door or walked to the fire station or Chinese restaurant. This is too burdensome a threshold. To get to the jury, the defendant need only present evidence that he did not explore the legal alternatives because he reasonably deemed them to have been too high a risk, and he was, applying an objective standard, entitled not to have pursued them. If it was unreasonable to forgo the lawful alternatives, then the defendant has not made out a case that should go to the jury.

The legal alternatives available to the defendant here carried considerable risk of failure. The defendant had already spent valuable time attempting to stop Maloney's bleeding using towels, but was unable to do so. The first neighbor from whom the defendant might have sought help might not have owned a car, or might have been unable or unwilling to drive Maloney to a hospital; the defendant would then have had to proceed to other neighbors, or to the fire station, where there might not have been anyone available to help; even had there been, it could have meant unacceptable delay in getting a badly injured person to the hospital. In short, any of the alternatives proposed today by the court would have consumed valuable time to no purpose; their exploration raised the real possibility of a chain of events that could have resulted in Maloney's serious injury or death. Given the element of risk associated with the situation and the uncertain likelihood of success with respect to the legal alternatives, a jury could find that it was reasonable for the defendant to reject those alternatives and to select the unlawful solution because of the greater likelihood that it would work. The court's decision, however, punishes a reasonable person for taking the "lesser evil" of the unlawful but more effective alternative. . . .

Of course, a defendant would not be entitled to an instruction on necessity if a reasonable person in his position would have found the legal alternatives to be viable. It would have been proper, for instance, for the judge to deny the defendant's request for an instruction on necessity had there been a hospital within walking distance or a neighbor who offered to drive Maloney to the hospital immediately. In most instances, the unlawful path will not be deemed to be reasonable. On this record, however, the defendant was entitled to make a case to the jury that it was reasonable for him to drive his heavily bleeding girl friend to the hospital to receive treatment without first exploring potentially ineffective alternatives. Although the jury might ultimately reject the defendant's argument, it was for them to decide whether he chose the lesser of two evils.

CHAPTER SUMMARY

Excuses comprise a broad set of defenses in which defendants claim a lack of responsibility for their criminal acts. This lack of "moral blameworthiness" is based on a lack of criminal intent or on the involuntary nature of the defendant's criminal act.

Justification defenses provide that acts that ordinarily are criminal are justified and carry no criminal liability under certain circumstances. This is based on the reasoning that a violation of the law under these conditions promotes important social values, advances the social welfare, and is encouraged by society.

The *M'Naghten* "right–wrong" formula is the predominant test for *legal insanity.* The criminal justice system has experimented with broader approaches that resulted in a larger number of defendants being considered legally insane.

- ***Irresistible Impulse.*** Emotions cause loss of control to conform behavior to the law.
- **Durham *Product Test.*** The criminal act was the product of a mental disease or defect.
- ***Substantial Capacity.*** The defendant lacks substantial (not total) capacity to distinguish right from wrong or to conform his or her behavior to the law.

The diminished capacity defense permits defendants to introduce evidence of mental defect or disease to negate a required criminal intent. This typically is limited to murder. Other defenses based on a lack of a capacity to form a criminal intent include the following:

- ***Age.*** The common law and various state statutes divide age into three distinct periods. Infancy is an excuse (younger than seven at common law). There is a rebuttable presumption that adolescents in the middle period lack the capacity to form a criminal intent (between seven and fourteen at common law). Individuals older than fourteen are considered to have the same capacity as adults.
- ***Intoxication.*** Voluntary intoxication is recognized as a defense to a criminal charge requiring a specific intent. The trend is for abolition of the excuse of voluntary intoxication. Involuntary intoxication is a defense where, as a result of alcohol or drugs, the individual meets the standard for legal insanity in the jurisdiction.

A number of defenses were discussed under the category of justification and excuse defenses. A defendant who commits a crime under a reasonable belief that he or she is threatened with imminent serious physical harm or death is excused from culpability based on the defense of duress. Necessity or "choice of evils" justifies illegal acts that alleviate an imminent and greater harm. The defense of consent is recognized in certain isolated instances in which the defendant's criminal conduct advances the social welfare. These include incidental contact, sports, and medical procedures. The defense of mistake falls into two categories.

A mistake of law is never a defense; a mistake of fact may be relied on to demonstrate a lack of a specific criminal intent. Some courts require that the mistake of fact be objectively reasonable.

Another group of defenses justify the use of physical force. Self-defense preserves the right to life and bodily integrity of an individual confronting an imminent threat of death or serious bodily harm. Individuals are also provided with the privilege of intervening to defend others in peril. Defense of the dwelling preserves the safety and security of the home. The execution of public duties justifies the acts of individuals in the criminal justice system that ordinarily would be considered criminal. A police officer, for instance, may use deadly force against a "fleeing felon" who poses an imminent threat to the police or to the public.

The right to resist an illegal arrest is still recognized in several states, but it has been sharply curtailed based on the fact that the state and federal governments provide effective criminal and civil remedies for the abuse of police powers.

Entrapment is a defense based on "governmental misconduct." Entrapment asks whether the government "implanted a criminal intent" in an otherwise innocent individual. The subjective approach to entrapment focuses on the defendant. This version of the defense requires proof that the government induced an individual who lacked a criminal predisposition to commit a crime. The objective test centers on the government. This test requires a judge to determine whether the government's conduct falls below accepted standards and would have induced an otherwise innocent individual to engage in criminal conduct. Courts have been reluctant to find that the Due Process Clause protects individuals against outrageous governmental misconduct.

The new defenses surveyed illustrate the effort to base excuses on new developments in biology, psychology, and sociology. Critics contend that many of these are "abuse excuses," in which defendants manipulate the law by claiming that they are victims. On the other hand, defendants ask why some traits and conditions are considered to excuse criminal activity while factors such as poverty, inequality, or abuse are not recognized as a defense. The general trend is for the law to limit rather than to expand criminal excuses.

CHAPTER REVIEW QUESTIONS

1. Distinguish between the affirmative defenses of justification and excuse.
2. Define and distinguish between the four major approaches to legal insanity.

3. Discuss the purpose of the diminished capacity defense. What is the result of the application of the defense to a defendant charged with a crime requiring a specific intent?
4. Why did some states permit juries to return a verdict of GBMI?
5. Distinguish between the defenses of voluntary and involuntary intoxication.
6. Describe the common law defense of infancy. How has this been modified under contemporary statutes?
7. What are the elements of the duress defense?
8. What are the elements of the necessity defense? Provide some examples of the application of the defense.
9. Why do most state legal codes provide that an individual cannot consent to a crime? What are the exceptions to this rule?
10. List the elements of self-defense. Explain the significance of reasonable belief, imminence, retreat, withdrawal, the Castle Doctrine, and defense of others.
11. What are the two approaches to intervention in defense of another? Which test is preferable?
12. What is the law pertaining to the defense of the home? Discuss the policy behind this defense. Compare the laws pertaining to defense of habitation and self-defense.
13. Discuss the importance of the Florida Castle Doctrine law.
14. How does the rule regulating police use of deadly force illustrate the defense of execution of public duties? Does this legal standard "handcuff" the police?
15. Why have the overwhelming majority of states abandoned the defense of resistance to an illegal arrest? Distinguish this from the right to resist excessive force.
16. Discuss the difference between the mistake of law and mistake of fact defenses.
17. What are the two tests of entrapment? How do these two tests differ from one another? Explain the relationship between these two tests for entrapment and the due process approach.
18. Provide some examples of the "new defenses." How do these differ from established criminal law defenses? Do you agree that some of these defenses deserve to be criticized as "abuse excuses"?
19. Write a brief essay outlining justification defenses.

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TEST YOUR KNOWLEDGE: ANSWERS

1. False.
2. False.
3. False.
4. False.
5. False.
6. False.
7. False.
8. False.
9. False.
10. False.

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