

## PUNISHMENT, WHY?

### 1. Utilitarian

#### A. General

- i. Based on belief that people are by nature hedonistic and rational
- ii. Seeks to create greatest happiness for greatest number
- iii. Forward looking
- iv. General criticism- uses individual to advance societal goals, Minority Report example (it's just wrong to punish an innocent person, regardless of how broad the benefit)

#### B. Types

- i. Deterrence
  1. general- D is punished to teach others
  2. specific- D is punished to deter him from committing future crimes
  3. *criticism*- assumes/requires criminals:
    - a. are rational actors
    - b. know consequences
    - c. believe consequences are likely
- ii. Rehabilitation- best way to stop crime is reforming criminals
- iii. Incapacitation
  1. incarceration stops D from committing more crimes
  2. criticism- disregards:
    - a. prison crime
    - b. crimenegenic effect "schools for crime"
    - c. replacement effect for market oriented crimes
    - d. not all criminals are recidivists

### 2. Retributive

- A. Punishment based only on just deserts for *past crimes*
- B. Components of culpability
  - i. Knowledge/intent
  - ii. Severity of crime
  - iii. Free will of actor (assumed but essential)

## PUNISHMENT, HOW?

### 1. Statutory Constraints

#### A. Federal Sentencing Guidelines

- i. Offense related mandatory sentences: specific crime triggers mandatory sentence, usually drug crimes (egalitarian)
- ii. Recidivism related mandatory sentences: target repeat offenders
  1. 3 strikes:
    - a. misdemeanor becomes felony if prosecutor uses "3 strikes" charge and if D has 2 prior felonies
    - b. mandatory sentence = 25 years – life
    - c. criticisms:
      - i. *discriminatory*: prosecutor's discretion
      - ii. *bad drafting*: robbery+robbery+theft = 25-life, robbery+theft+robbery = misdemeanor
      - iii. *no limitation on time b/w crimes*

#### B. Federal Sentencing Guidelines

- i. Est in 1984 Act, very complex
- ii. 50% of states have adopted it
- iii. standards of proof for sentencing phase much lower than trial phase
- iv. unlike old system, sentencing can be challenged

### 2. Constitutional Constraints

#### A. Proportionality, 8th Amendment

- i. "cruel & unusual": Supreme Court held that gravity of crime cannot be grossly *disproportionate* to sentence
- ii. utilitarian interpretation: D should be punished just enough to deter him
- iii. retributive interpretation: punishment should match degree of D's harm

iv. application

1. death penalty, death penalty disproportionate to rape conviction
2. term of imprisonment, 3 prong test
  - a. inherent gravity of the crime
    - i. Hermelin Rule: if the crime is a grave one, no further analysis is necessary
  - b. intrajurisdictional comparison
  - c. interjurisdictional comparison

B. Privacy Rights

I. **ELEMENTS**

A. **Prosecution must prove beyond reasonable doubt AR & MR**

B. **Actus Reus (AR)**

1. *Bad Act*, causation of some harmful result
  - a. Essentially retributive in that punishment must be for past, voluntary conduct
  - b. Partially utilitarian in that it is useless to punish an involuntary actor
  - c. Not constitutionally required
2. A person is not guilty of a criminal offense unless his conduct includes a *voluntary act*
  - a. Internal involuntariness = convulsions, seizures, sleepwalking
  - b. External involuntariness = force or person physically controls your behavior
  - c. Beware:
    - i. *involuntary* holding means D defeated an element of the crime and walks free
    - ii. *insanity* means that D met all elements, used the insanity defense and was automatically committed.
  - d. Which elements of the crime have to be voluntary:
    - i. (1) appearing in public (2) manifesting drunken condition (3) and be drunk
    - ii. (1) manifesting a drunken condition in public (2) and be drunk
3. Result crimes are defined by the act's result w/act itself unclear
  - i. "keeping a place"
  - ii. possession satisfies act requirement
    - actual poss = on your person, in your custody
    - constructive poss = fictional, ex: pot found in crowded hotel rm
4. Status Crimes (Supreme Court holdings)
  - a. Addiction to narcotics is not a crime
  - b. "Drunk in public" can be a crime (because crime *not alcoholism*, pre se)
  - c. Not criminal to "be a vagrant"
5. Crimes of omission
  - a. General Rule: a person is not guilty of a crime for failure to act even if the failure permitted harm to occur to another, and even if the person could have acted at no risk to personal safety.
  - b. Duty neglected must be a legal duty, not a moral one. Legal duties include duty by:
    - i. Status relationship (ex. Parent or guardian)
    - ii. Contract (a civil violation triggering criminal liability)
    - iii. Assumption of care, excluding victim from aid of others
    - iv. Statute designating duty to care
    - v. Risk Creation
  - c. Good Samaritan Statutes
    - i. Statutory obligations to act under narrow circumstances
    - ii. Failure to report crimes in
      - food place & health related place,
      - abuse of elderly
      - sex abuse of children
6. Time Framing: voluntariness can be found in actions preceding criminal action
7. Vicarious Liability: extending criminal liability to a person other than the person who did the act

C. **Mens Rea**

1. Origins

- a. Utilitarian in that intentional killers are more dangerous than unintentional
  - b. Retributive in that, punishment should reflect culpability
  - c. in early common law, MR was implicit in all statutes and crimes
  - d. Rule of Construction = presumption of MR for every element of offense unless otherwise explicitly stated in statute
2. Strict liability
- a. Crimes with no MR
  - b. While not unconstitutional per se, there is a presumption against it
  - c. MPC has NO strict liability, except for "violations" that can't result in imprisonment
  - d. Public welfare strict liability offenses
    - i. Involves conduct that is wrong because it is prohibited, rather than because it is inherently wrong
    - ii. Penalties are usually minor
    - iii. High degree of social danger, with a single violation threatening many people
  - e. Non-public welfare strict liability offenses
    - i. Statutory rape
    - ii. Drug possession
  - f. Degrees of liability
    - i. Substantial liability = no culpable moral fault
    - ii. Pure liability = no culpable mental state with respect to obj. elements
    - iii. Impure liability = no culpable mental state w/respect to at least one element
  - g. Vicarious Liability + strict liability = crime with no MR or AR
3. Categories of Mens Rae
- a. General Intent: an offense which requires MR but is not a specific intent crime
  - b. Specific Intent:
    - i. Include (1) knowledge and (2) conscious objective
    - ii. Requires higher degree of culpability for more severe crimes
    - iii. Much higher burden of proof on prosecution
    - iv. Statutory structure usually: AR + further intent to do bad thing
4. Transferred Intent = one bad intent counts for all bad acts
5. Mistake of Fact = a D is not guilty of an act if her mistake of fact negates the MR of the offense charged.
- a. CL, majority approach
    - i. D is not guilty of a specific intent crime if her mistake of fact negates the specific intent element of the offense.
    - ii. D is guilty of a general intent offense if her mistake of fact was unreasonable
    - iii. Moral Wrong Doctrine: there should be no exculpation for an offense where, if the facts had been as the actor believed, the actor's conduct would still be immoral.
    - iv. Legal Wrong Doctrine: D is guilty of an offense, despite a mistake of fact, if she would be guilty of a different, albeit lesser, crime, if the situation were as she supposed.
  - b. MPC
    - i. No distinction between general intent and specific intent offenses: the rule applies to all offenses in the same manner, with one exception:
    - ii. D cannot use mistake of fact defense if D would be guilty of a lesser crime had the facts been as she believed them to be. However D is punished at the level of the lesser offense.
6. Mistake of Law
- a. A mistake of law does not relieve an actor of liability for the offense

D. Recklessness is the default MR where none exists

E. Capacity

1. Intoxication

- a. CL: voluntary intoxication can be a defense only to a Specific Intent crime and then only if the D is extremely drunk

- b. MPC: voluntary intoxication is a defense only if MR for the offense is purposefully or knowingly (regarding recklessness, MPC requires that you would have known the risk if sober)
  - c. Intoxication is not an affirmative defense.
2. Diminished capacity
- a. CL, majority: evidence of abnormal mental condition may negate the *specific* intent in a specific intent offense.
  - b. MPC: D may be acquitted for any offense for which he lacked the requisite MR, including those cases where he suffered a temporary or permanent mental disability.

	C. L. Definition		MPC definition
Intentionally	(1) it was D's conscious object to cause result and (2) she know it was almost certain to occur	Purposefully	Conscious object to cause the result; motives don't matter
Knowingly	(1) aware of the fact, (2) correctly believes it exists or (3) suspect it exists and willfully avoids knowing truth	Knowingly	D's knows result is a practically certain to result from conduct
Recklessness	Consciously disregards a substantial and unjustifiable risk	Recklessness	Awareness of substantial and unjustifiable risk
Negligence	Should be aware that conduct creates substantial and unjustifiable risk	Negligence	Substantial and unjustifiable risk without awareness

## SUBSTANTIVE CRIMES

### 1. Common Law Homicide

- A. Homicide is wrongfully causing the death of another human being
- B. Murder is an unjustified killing manifesting either:
  - i. purpose to cause death
  - ii. intent to inflict serious bodily harm
  - iii. extreme recklessness
  - iv. felony murder

### C. First Degree Murder

- i. Mens Rea is intentional, premeditated and deliberate
  - o **premeditated** dispassionately calmly and coolly
  - o no time is too short
  - o **deliberation** is calm cool thinking
  - o typically sentencing get 25-life
  - o US v. Watson: After substantial chase, D threatens cop, tackles him, and then gets gun and kills cop in the time it takes a little girl to run 16 feet. Was it premeditated with mere seconds of forethought? He could've escaped, however he was agitated provoked by cop?
- ii. **Felony Murder**
  - o definition: a person is guilty of a murder is she kills another person during the commission or attempted commission of any felony
  - o most statutes limit FM to "inherently dangerous" felonies or **predicate offenses**: dangerous to human life
  - o **duration**: when does felony begin/end
    - + begin: felony begins with attempt = substantial completion of the crime
    - + end: majority of states use *res gestae*, felony ends when D reaches a point of safety and is no longer in immediate flight
  - o **Merger doctrine**: the felony that serves as the predicate must be independent of the homicide

- + assault would be a *merged* felony murder charge since most murders result from assault, making it easy to prosecute the murder w/o burden of mens rea
- + only applies to assault and assault like charges
- o **Agency Rule:** limits felony murder to deaths caused by the felon or an accomplice, no third party deaths (provocative act doctrine?)
  - + innocent victim's rule: opposite of agency rule, D responsible for any innocent people killed during commission of felony.
- o **causation:** but for the felony the murder wouldn't have occurred.
- o MPC version of felony murder: If death occurs during commission of severe felony, extreme recklessness presumed. D has to prove there was no extreme recklessness (rather than prosecution proving there was). However if there is a mens rea in a statute, prosecution gets no breaks in burden of proof.

#### D. Second Degree Murder

- i. Intent: Mens Rea is intent to kill (impulsive and w/o premeditation & deliberation)
- ii. Extreme recklessness
  - o extreme indifference to the value of human life "depraved" or "abandoned and malignant heart"
  - o elements (1) substantial and unjustifiable (2) foreseeable risk
  - o if intoxicated:
    - + MPC: would defendant have known the risk sober?
    - + CL: recklessness general intent, so no intoxication defense ever
  - o in California reckless murder (aka implied malice) is an intentional act involving a
    - + high degree of probability that it will result in death,
    - + done for a base anti-social purpose and
    - + with a wanton disregard for human life.
- iii. Second Degree Felony Murder (less severe felonies)

### 2. Common Law Manslaughter

#### A. Voluntary Manslaughter

- i. definition: a killing constitutes voluntary manslaughter if is committed in sudden heat of passion as the result of adequate provocation
  - o **sudden:** no time to cool off
  - o **heat of passion:** usually anger though any overwrought state like fear, jealousy, or severe depression will do
  - o **adequate provocation** (what if mistaken?)
    - + mutual combat
    - + adultery
    - + personal injury attack to yourself
    - + violent or sexual assault on relative
    - + MUST be reasonable (*objective standard*)
- ii. words alone are never reasonable provocation

#### B. Involuntary Manslaughter

- i. **criminal negligence:** a person who kills another person in a criminally negligent manner is guilty of involuntary manslaughter
- ii. **unlawful act doctrine:** a person is guilty of involuntary manslaughter if they kill a person during an unlawful act not covered by felony murder
- iii. **vehicular manslaughter:** common law usually allows for separate vehicular manslaughter charge, which is lesser than involuntary manslaughter, mostly because it's so common and it's lame to punish bad driving severely only when people die. MPC doesn't do it.

#### COMMON LAW

CHARGE                      MENS REA

#### MPC

CHARGE                      MENS REA

Murder 1°	Intent → premeditated & deliberate Felony Murder 1°	Murder	Purpose and Knowledge Recklessness+ → presumption for specified felonies
Murder 2°	Intent Extreme Recklessness Felony Murder 2°		
Voluntary Manslaughter	Intent → reasonable provocation & heat of passion	Manslaughter	Intent → extreme emotional distress w/reasonable explanation Recklessness
Involuntary Manslaughter	Criminal Negligence	Negligent Homicide	Criminal Negligence

### 3. Rape

#### A. Elements

- i. CL: (1) carnal knowledge of a woman (2) forcibly and (3) against her will
- ii. MPC: A man that has (1) sexual intercourse with a woman not his wife is guilty of rape if he (2) compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone

#### B. Eliminating Force or Consent

#### C. MR issue

- i. Majority rule rape is general intent crime

#### D. Consent Implied and Impossible

- i. Unconscious victim? Always rape.
- ii. Drugged/Intoxicated victim?
  1. involuntary- consent not an issue, usually rape
  2. voluntary- controversial
- iii. Statutory Rape
  1. (1) S.I. (2) with a minor
  2. no MR, force, or consent requirements
  3. Used to be strict liability, but increasingly reasonable mistake of fact is come to be a defense

#### E. Force

- i. Old CL: "utmost resistance"
  1. bright line rule: physical violent resistance, leaving physical evidence on body
  2. exception: reasonable belief resistance would be futile and severely dangerous
  3. beliefs behind the rule:
    - a. unlike other crimes, sex can be voluntary
    - b. originates from time when non-marital sex criminal: victim vindicating her virtue
    - c. consent inferred when victim puts herself in harm's way
    - d. HALE'S Instruction = special jury instruction to evaluate victim's testimony w/skepticism
- ii. Reasonable resistance standard
- iii. Modern CL
  1. California, no resistance requirement
  2. Washington, S.I. + force, puts burden of proof on D, not victim
  3. Connecticut, S.I. + non-consent, S.I. itself is force (assault/battery law)
  4. Red Light Rule, NO is NO, silence...yes?
  5. New Jersey, Green Light, affirmative consent necessary

### DEATH PENALTY

#### 1. Generally

- a. McClesky v. Kemp, D argues DP racially discriminatory, with higher likelihood of DP for blacks killing whites (values victim, not defendant). Fact that other D with similar facts did not receive DP is not enough to prove that system operates arbitrarily and capriciously.

Power to be lenient can also be power to discriminate: these powers are balanced with safeguards.

- b. 8th Amendment violations
  - i. to establish unusual compare (1) interstate (is it usual in other states) and (2) intrastate (is it usual within the state)

## 2. Substantive Rules

- a. Offense Limits
  - i. DP for rape is unconstitutional
- b. Mens Rea:
  - i. Edmund v. Florida held 8th amendment prohibits DP for Ds that do not kill, attempt to kill or intend to kill (basically felony murder).
  - ii. Tison v. Arizona held that Ds that act with extreme recklessness are sufficiently culpable to get DP.
- c. Offender Limits
  - i. mentally handicapped: it violates the constitution's cruel & unusual standard to execute a retarded person (Nat'l consensus/statutory trend against it)
  - ii. insane: usually found not guilty by insanity
    - 1. if they become insane later, cannot execute 'em
    - 2. most states hold you cannot force medicate someone to make 'em sane
  - iii. minors: it is legal to execute minor's, but 15 probably too young (Thompson)
- d. Execution Methods
  - i. US Supreme Court never ruled on methods
  - ii. in California, no gas chamber unless offender chooses it
  - iii. In Florida no Old Sparky unless offender chooses it

## 3. Procedural Rules (tell states what kind of procedures they can use)

- a. original division of first & second degree murder to reserve worst punishment for worst offenders
- b. Furman v. Georgia struck down "exercise of standard less discretion" as cruel and unusual, effectively destroying every death penalty statute on the books. States responded with statutes that either (1) imposed mandatory DP for certain offenses or (2) articulated guidelines. Later (Woodson v. North) mandatory sentences held unconstitutional. Only guided discretion statutes left.
- c. Guided discretion statutes
  - i. allow for early hearing to determine whether mitigating/aggravating circumstances matter, for example D's background, criminal record, etc.
  - ii. Lockett v. Ohio: Lockett drove getaway car for men robbing a pawnshop; pawnbroker accidentally killed. Ohio mandatory sentencing requires death penalty for aggravated murder conviction, with possible mitigation if (1) victim had induced offense (2) D was under duress, coercion, or strong provocation or (3) crime result of psychosis/mental deficiency. She met none of these, argued other mitigating factors should be considered. RESULT: Ds can submit any mitigating factors they want; *Lockett has been read broadly*.
  - iii. In California, statutory factors have been increasing > original 12 aggravating factors is now 30. result: not mushrooming of DP sentences, but rather enormous jury discretion and *disparities in sentencing*.

## CAUSATION

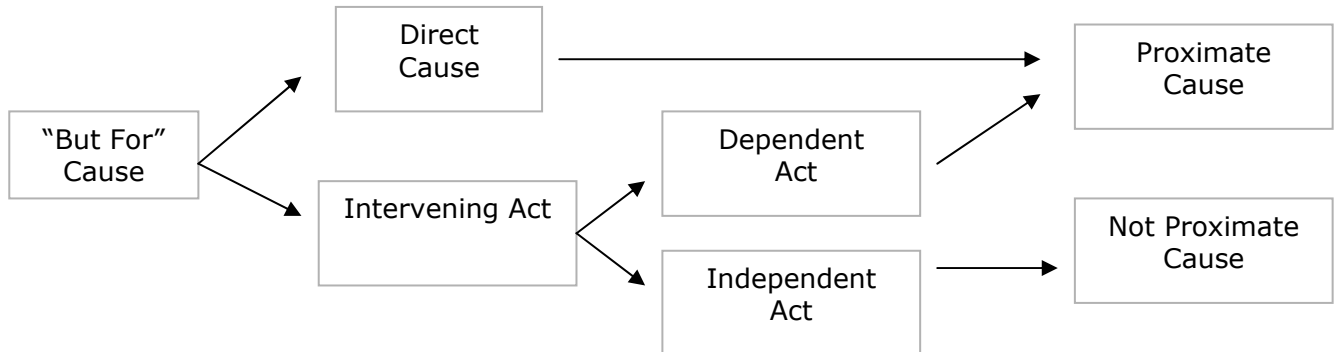
### 1. Step 1: Was D Actual, or "But For" cause?

- A. Def: conduct is actual cause if the result would not have occurred BUT FOR the actor's conduct (MPC & CL)

### 2. Step 2: If D was But For cause, was D Proximate cause? if D's conduct was...

- A. The direct cause, then yes, automatically the Proximate Cause too. Simple scenario.
- B. Intervened upon, then depends on whether intervening act was:
  - i. Dependent act = does the act occur in response to Ds earlier action?
    - a. Ex: negligent medical care, preexisting condition, escape and rescue, police pursuit
    - b. If intervening act was **dependent** act, the yes, D was proximate cause

- ii. Independent act = would have come into play in the absence of D's conduct, and break the chain of causation?
  - a. If intervening act was **independent** act, or *Novus Actus Intervenus*, then no, D not proximate cause
  - b. **Exception**: if independent act was **extremely foreseeable**, then D is still proximate cause, for ex in Kevorkian or the case of the gang kid abandoned in enemy gang territory



3. **Multiple Causes** = there can be more than one "but for" cause; an event accelerating death is still a "but for" cause (are both causes proximate?)
4. **Concurrent Causation**, if two simultaneous "but for" causes occur, defer to substantial factor test: was D's conduct a substantial factor in causing the harm?

## DEFENSES

1. Justification = actor advances a social interest or vindicated a right of sufficient weight that the criminal law should neither disapprove nor discourage her conduct. *Did no wrong.*
2. Excuse = actor's circumstances limited her voluntariness such that she is not morally blameworthy nor could have been deterred. *Denies responsibility for conduct that is concededly wrong.*

### 3. Self-Defense

A. CL Elements: Self-defense exists where D:

- i. Honestly & reasonably believes
- ii. Deadly force
- iii. Is necessary to repel
- iv. Imminent use of deadly force by another

B. CL elements dissected

- i. "Honestly & Reasonably believes"
  - Imperfect Self Defense
    - Minority rule & Calif. Rule
    - "Genuine but unreasonable belief" can mitigate crime
    - Ex- Murder would be manslaughter if D had *unreasonable* belief that deadly force was necessary.
  - Subjective & objective
- ii. "Deadly force"
  - deadly force is force likely to cause death or serious bodily injury
  - must be proportional: deadly force can only be used against deadly force
- iii. "Necessary to Repel"
  - Majority Rule: Retreat isn't necessary
  - Minority Rule: D may not use self-defense if retreat was safely possible
    - "Castle exception" = a person is never expected to retreat from their home.
- iv. "Imminent use of deadly force by another"
  - Battered wife syndrome (BWS): consists of "learned helplessness" evidence that the women suffer from psychological syndrome that causes state of paralysis and incapability in altering circumstances.

- o Addresses *immanence* element by illustrating that D subjectively believed deadly force was necessary at that moment, and explaining why she did not leave abuser before that moment
- o Contrast with unreasonable beliefs based on prejudice/racism.
- o Expert testimony is only permissible when:
  - + Beyond understanding of lay person
  - + Based on research generally accepted in the scientific community (BWS has become generally accepted)
  - + Expert can only speak generally, not about defendant

B. Aggressor Exception

- i. D forfeits the right to self-defense if she instigates the altercation
  1. Aggressor is a person who commits an unlawful act *reasonably calculated to produce an affray* foreboding injurious consequences
  2. Exception: if the aggressor expressly renounces and abandons the conflict, then she loses her aggressor status.

C. MPC

- i. "Use of force...is justifiable when the actor believes that such force is immediately necessary for the purpose... of protecting himself against the use of unlawful force..."
- ii. Actor must believe that "such force is necessary to protect himself against death, serious bodily injury, ..."
- iii. Not a defense if the actor
  1. provoked, w/purpose of causing death or serious bodily injury, unless
  2. a person is not obliged to retreat from their dwelling or place of work

4. Necessity

- A. used rarely and carefully because it enables juries to determine whether certain law are fair under circumstances, to subvert black letter law with moral justice, destabilizing the entire justice system

COMON LAW ELEMENTS

**D reasonably believes that conduct is necessary...**

*necessary* means greater harm is  
 (1) imminent and  
 (2) unavoidable  
 mistaken appraisal: if belief unreasonable, no defense

**... to prevent greater harm to person or property**

limitations:

1. clean hands (**no defense** if you incur the peril)
2. no legislative pre-determination
3. applies to natural forces **only**
4. does **not** apply to homicide crimes

MPC ELEMENTS

**D reasonably believes that conduct is necessary...**

*necessary* is left to jury determination

When actor is reckless or negligent in bringing about choice of evils, he is charged as such

**... to prevent greater harm to person or property**

limitations:

1. clean hands (if D was recklessness or negligence in incurring the peril, she's **liable for reckless/negligent conduct**)
2. no legislative pre-determination
3. applies to natural **or human** forces
4. **can** apply to homicide crimes

B. prison escape specifically: Lovercamp requirements

- i. peril must be death, sexual assault or substantial bodily injury
- ii. no time for complaint to authorities or history of futile complaints
- iii. no time or opportunity to resort to courts
- iv. no violence toward innocents in escape
- v. turn yourself in when you reach safety

C. jury nullification

- i. jury procedures are secret with only results announced: powerful restraint on gov't

5. Duress

- A. though it's a complete defense, duress permits the coercer to be charged for the crime

## B. Elements

### DURESS COMMON LAW ELEMENTS

D has well-founded fear ("reasonable") of *imminent serious* or *fatal* physical injury to defendant or family

limitations...

1. D must have clean hands
2. Applies to human threats only
3. Does not apply to homicide cases

### DURESS MPC ELEMENTS

D was threatened with physical force sufficient to coerce a person of reasonable firmness... directed against defendant *or others*

limitations...

1. D must have clean hands
2. Applies to human threats only
3. Applies to homicide cases too.
4. You can be charged with negligence if you were negligent in putting yourself at risk?

## 6. Insanity

- A. M'Naghten test: A person is insane at the time of a crime if she (1) could not know the **nature and quality** of his act or its wrongfulness or (2) did not **know the act was wrong**
  - i. (1) mistake squeezing a towel for someone's neck
  - ii. (2) cognitive inability to tell right from wrong
    1. split of authority regarding legal wrong or moral wrong
    2. deific decree rule: some jxs provide that a person who commits a crime because she believes god has commanded her to do so is insane, even if she knows that law and society condemn the act
- B. ALI test: A person is not responsible for her conduct if she lacked capacity to (1) appreciate the criminality of the act (2) to conform her conduct to the dictates of the law
  - i. no longer used by majority of states
- C. burden of proof on defendant usually (standard: clear and convincing)

## 7. Mistake of law

- A. a mistake of law does not relieve an actor of liability for the commission of a criminal offense
- B. Exceptions:
  - i. authorized reliance doctrine: a person is not guilty if he reasonably relied on an official statement of the law later determined to be erroneous, obtained from a person or public body with responsibility for the interpretation, administration, or enforcement of the law defining the offense.
  - ii. mistake of non-governing law: a defendant is not guilty of an offense if his mistake of law negates an element of the crime charged (i.e. mens rae is knowledge or intent) (usually relating to an offense other than the one charged, for example "felon in possession of firearm" was violated by a guy that didn't know he was a felon
  - iii. due process clause: