CRIMINAL LAW

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Defenses to Criminal Liability

Justifications

CHAPTER OUTLINE

Right to Defend or License to Kill?

Opponents and supporters of the castle laws see them in fundamentally different ways. Supporters claim them as the public reasserting fundamental rights. Marion Hammer, the first woman president of the National Rifle Association, says the castle law codifies the "*right* of the people to use any manner of force to protect their home and its inhabitants." She contends this right goes back to the 1400s, and that Florida prosecutors and courts took away that right by requiring that "law-abiding citizens who are attacked by criminals" have to retreat.

Gun control advocates say the laws "are ushering in a violent new era where civilians may have more freedom to use deadly force than even the police." They're not a "right to defend"; they're a "license to kill."

LO 2

Proving **criminal conduct** (a criminal act and criminal intent) is necessary to hold individuals accountable for the crimes they commit. But criminal conduct alone is not enough to establish criminal liability. It's only the first of three requirements. Recall the framework for analyzing criminal liability. First, we have to answer the question asked in Chapters 3 and 4, "Was there criminal conduct?" If there wasn't, the inquiry is over, and the defendant is free. If there was, we have to answer the question of this chapter, "Was the criminal conduct justified?" If it was, the inquiry ends, and the defendant goes free. If it wasn't justified, we have to go on to answer the third question, asked in Chapter 6, "Was the unjustified conduct excused?" If it wasn't, the defendant is criminally accountable for her criminal conduct. If it was, the defendant may, or may not, go free.

The principles of justification and excuse comprise several traditional defenses to criminal liability; we'll discuss several in this chapter. In the **justification defenses**, defendants admit they were responsible for their acts but claim what they did was right (justified) under the circumstances. The classic justification is self-defense; kill or be killed. "I killed her; I'm responsible for killing her; but under the circumstances it was right to kill her." So, even if the government proves all the elements in the crime beyond a reasonable doubt, the defendant walks because she's not blameworthy. In the **excuse defenses**, defendants admit what they did was wrong but claim that, under the circumstances, they weren't responsible for what they did. The classic excuse is insanity. "What I did was wrong, but I was too insane to know or control what I did. So, under the circumstances, I'm not responsible for what I did."

LO 3

In addition to the traditional defenses of self and home, this chapter also examines, and asks you to think about "the epochal transformation" in self-defense and the defense of homes represented by the new "castle doctrine" statutes (Suk 2008, 237). More than 40 states have either passed or proposed statutes that expand the right to use deadly force to protect self and home in two ways:

1. "They permit a home resident to kill an intruder, by presuming rather than requiring proof of reasonable fear of death or serious bodily harm."
2. "They reject a general duty to retreat from attack, even when retreat is possible, not only in the home, but also in public space" (238).

LO 1

Before we examine the defenses themselves, and the dramatic changes taking place in the law of self-defense, let's look more closely at how the defenses operate in practice.

Affirmative Defenses and Proving Them

LO 4

Most justifications and excuses are **affirmative defenses**, which operate like this: Defendants have to "start matters off by putting in some evidence in support" of their justification or excuse (LaFave and Scott, 1986, 52). We call this the **burden of production**. Why put this burden on defendants? Because "We can assume that those who commit crimes are sane, sober, conscious, and acting freely. It makes sense, therefore, to make defendants responsible for injecting these extraordinary circumstances into the proceedings" (52).

The amount of evidence required "is not great; some credible evidence" is enough. In some jurisdictions, if defendants meet the burden of production, they also have to bear the **burden of persuasion**, meaning they have to prove their defenses by a **preponderance of the evidence**, defined as more than 50 percent. In other jurisdictions, once defendants meet the burden of production, the burden shifts to the government to prove defendants weren't justified or excused (Loewy 1987, 192–204).

Most defenses are **perfect defenses**; if they're successful, defendants are acquitted. There's one major exception. Defendants who successfully plead the excuse of insanity don't "walk"—at least not right away. Special hearings are held to determine if these defendants are still insane. Most hearings decide they are, and so they're sent to maximum-security hospitals to be confined there until they regain their sanity; in most serious crimes, that's never (Chapter 6).

Evidence that doesn't amount to a perfect defense might amount to an **imperfect defense**; that is, defendants are guilty of lesser offenses. For example, in *Swann v. U.S.* (1994), Ted Swann and Steve Crawford got into an argument while shooting baskets. Crawford's ball hit Swann in the stomach, where he had recently been stabbed. Crawford ordered Swann off the court. When Swann instead walked past him, ignoring the order, Crawford said, "You think you stabbed up now, just watch." Then, placing his hands to his side, Crawford appeared to be reaching for his back pocket. Swann, who had seen a bulge in Crawford's pocket, thought that he was reaching for a gun to kill him. Swann pulled his own gun from his waistband and shot Crawford twice in the head (929).

The Court ruled that Swann was entitled to a jury instruction on imperfect defense that would reduce the murder charge to manslaughter, because there was enough evidence for a jury to conclude that

> Swann's belief that he was in imminent danger and that he had to use deadly force to repel that danger was in fact actually and honestly held but was in one or both respects objectively unreasonable. (930)

Even when the evidence doesn't add up to an imperfect defense, it might still show mitigating circumstances that convince judges or juries that defendants don't deserve the maximum penalty for the crime they're convicted of. For example, words, however insulting, can't reduce murder to manslaughter in most states, but they might mitigate death to life without parole. So when a Black man killed a White man in a rage brought on by the White man's relentless taunting, "nigger, nigger," the killing was still murder but the taunting mitigated the death penalty to life without parole (Chapter 9).

Now, let's look at some justification defenses: self-defense, the defense of others, the defense of home and property, the choice-of-evils defense, and consent.

Self-Defense

If you use force to protect yourself, your home or property, or the people you care about, you've violated the rule of law, which our legal system is deeply committed to (Chapter 1). According to the rule of law, the government has a monopoly on the use of force; so when you use force, you're "taking the law into your own hands." With that great monopoly on force goes the equally great responsibility of protecting individuals who are banned from using force themselves.

Sometimes, the government isn't, or can't be, there to protect you when you need it. So necessity—the heart of the defense of justification—allows "self-help" to kick in. Self-defense is a grudging concession to necessity. It's only good before the law when three circumstances come together: the necessity is great, it exists "right now," and it's for prevention only. Preemptive strikes aren't allowed; you can't use force to prevent an attack that's going to take place tomorrow or even this afternoon. Retaliation isn't allowed either; you can't use it to "pay back" an attack that took place last year or even this morning. In short, preemptive strikes come too soon and retaliation too late; they both fail the necessity test. Individuals have to rely on conventional means to prevent future attacks, and only the state can punish past attacks (Fletcher 1988, 18–19).

LO 5

To learn more about the justification of self-defense, we'll examine the elements of self-defense. Then, we'll look at if and when claims of self-defense are justifiable when it's possible to retreat to escape harm.

Elements of Self-Defense

When can we ignore the government's monopoly on force and take the law into our own hands to defend ourselves? At common law, anyone who was subjected to an unprovoked attack could protect themselves by force from attacks that were going to happen right now. However, to justify the use of *deadly* force, the defender has to honestly and *reasonably* believe that she's faced with the choice of "kill or be killed, right now!"

LO 6

Specifically, self-defense consists of four elements:

1. *Unprovoked attack* The defender didn't start or provoke the attack.
2. *Necessity* Defenders can use deadly force only if it's necessary to repel an imminent deadly attack, namely one that's going to happen right now.
3. *Proportionality* Defenders can use deadly force only if the use of nondeadly force isn't enough, namely excessive force is not allowed.
4. *Reasonable belief* The defender has to reasonably believe that it's necessary to use deadly force to repel the imminent deadly attack.

Unprovoked Attack

Self-defense is available only against unprovoked attacks. So self-defense isn't available to an **initial aggressor**; someone who provokes an attack can't then use force to defend herself against the attack she provoked. With one exception: according to the **withdrawal exception**, if attackers completely withdraw from attacks they provoke, they can defend themselves against an attack by their initial victims. In a classic old case, *State v. Good* (1917, 1006), a son threatened to shoot his father with a shotgun. The father went to a neighbor's, borrowed the neighbor's shotgun, and came back. The son told him to "stop." When the father shot, the son turned and ran and the father pursued him. The son then turned and shot his father, killing him. The trial court failed to instruct the jury on the withdrawal exception. The Supreme Court of Missouri reversed because the trial judge's instruction ignores and excludes the defendant's right of self-defense. Although he may have brought on the difficulty with the intent to kill his father, still, if he was attempting to withdraw from the difficulty, and was fleeing from his father in good faith for the purpose of such withdrawal, and if his father, knowing that the defendant was endeavoring to withdraw from such conflict, pursued the defendant and sought to kill him, or do him some great bodily harm, then the defendant's right of self-defense is revived (1007).

Necessity, Proportionality, and Reasonable Belief

LO 5

Necessity refers to **imminent danger of attack**. Simply put, it means, "The time for defense is right now!" What kind of attacks? The best-known cases involve individuals who need to kill to save their own lives, but self-defense is broader than that. It also includes killing someone who's about to kill a member of your family—or any innocent person for that matter.

Necessity doesn't limit you to killing someone who's going to kill. You can also kill an attacker whom you reasonably believe is right now going to hurt you or someone else

badly enough to send you or them to the hospital for the treatment of serious injury. This is what serious (sometimes called "grievous") bodily injury means in most self-defense statutes.

Some self-defense statutes go even further. They allow you to kill someone you reasonably believe is about to commit a serious felony against you that doesn't threaten either your life or serious bodily injury. These felonies usually include rape, sodomy, kidnapping, and armed robbery. But the list also almost always includes home burglary and, sometimes, even personal property (discussed in "Defense of Home and Property" later).

What kind of belief does self-defense require? Is it enough that you *honestly* believe the imminence of the danger, the need for force, and the amount of force used? No. Almost all statutes require that your belief also be *reasonable*; that is, a reasonable person in the same situation would have believed that the attack was imminent, and that the need for force, and the amount of force used, were necessary to repel an attack. In the 1980s' sensational "New York Subway Vigilante Case," the New York Court of Appeals examined these elements as applied to the defense against the armed robbery provision in New York's self-defense statute (*Fletcher 1988*, 18–27).

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CASE Did He Shoot in Self-Defense?

People v. Goetz
497 N.E.2d 41 (N.Y. 1986)

HISTORY

Bernhard Goetz, the defendant, was indicted for criminal possession of a weapon, attempted murder, assault, and reckless endangerment. The Supreme Court, Trial Term, New York County, dismissed the indictment and the People appealed. The Supreme Court, Appellate Division affirmed, and the People appealed. The Court of Appeals reversed and dismissed, and reinstated all the counts of the indictment.

WACHTLER, CJ.

FACTS

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in the Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench toward the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38-caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed toward Chambers Street.

Canty approached Goetz, possibly with Allen beside him, and stated, "Give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun, and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab.

After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord.

All but two of the other passengers fled the car when, or immediately after, the shots were fired. The conductor, who had been in the next car, heard the shots and instructed the

motorman to radio for emergency assistance. The conductor then went into the car where the shooting occurred and saw Goetz sitting on a bench, the injured youths lying on the floor or slumped against a seat, and two women who had apparently taken cover, also lying on the floor.

Goetz told the conductor that the four youths had tried to rob him. While the conductor was aiding the youths, Goetz headed toward the front of the car. The train had stopped just before the Chambers Street station and Goetz went between two of the cars, jumped onto the tracks, and fled.

Police and ambulance crews arrived at the scene shortly thereafter. Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police in Concord, New Hampshire, identifying himself as the gunman being sought for the subway shootings in New York nine days earlier.

Later that day, after receiving *Miranda* warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements, which are substantially similar, Goetz admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had successfully warded off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked, "How are you?" to which he replied, "Fine." Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car.

Canty then said, "Give me five dollars." Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me." Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed."

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder, to hurt them, to make them suffer as much as possible." When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four.

Goetz recalled that the first two he shot "tried to run through the crowd but they had nowhere to run." Goetz then turned to his right to "go after the other two." One of these two "tried to run through the wall of the train, but . . . he had nowhere to go." The other youth (Cabey) "tried pretending that he wasn't with [the others]," by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him.

He then ran back to the first two youths to make sure they had been "taken care of." Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said, 'you seem to be all right, here's another,'" and he then fired the shot which severed Cabey's spinal cord. Goetz added that "If I was a little more under self-control . . . I would have put the barrel against his forehead and fired." He also admitted that "If I had had more [bullets], I would have shot them again, and again, and again."

After waiving extradition, Goetz was brought back to New York and arraigned on a felony complaint charging him with attempted murder and criminal possession of a weapon. The matter was presented to a grand jury in January 1985, with the prosecutor seeking an indictment for attempted murder, assault, reckless endangerment, and criminal possession of a weapon. Neither the defendant nor any of the wounded youths testified before this grand jury.

On January 25, 1985, the grand jury indicted Goetz on one count of criminal possession of a weapon in the third degree (Penal Law § 265.02) for possessing the gun used in the subway shootings, and two counts of criminal possession of a weapon in the fourth degree (Penal Law § 265.01) for possessing two other guns in his apartment building. It dismissed, however, the attempted murder and other charges stemming from the shootings themselves.

Several weeks after the grand jury's action, the People, asserting that they had newly available evidence, moved for an order authorizing them to resubmit the dismissed charges to a second grand jury. Supreme Court, Criminal Term, after conducting an in camera [in the judge's chambers] inquiry, granted the motion. Presentation of the case to the second Grand Jury began on March 14, 1985. Two of the four youths, Canty and Ramseur, testified. Among the other witnesses were four passengers from the seventh car of the subway who had seen some portions of the incident.

Goetz again chose not to testify, though the tapes of his two statements were played for the grand jurors, as had been done with the first grand jury.

On March 27, 1985, the second grand jury filed a ten-count indictment, containing four charges of attempted murder (Penal Law §§ 110.00, 125.25 [1]), four charges of assault in the first degree (Penal Law § 120.10[1]), one charge of reckless endangerment in the first degree (Penal Law § 120.25), and one charge of criminal possession of a weapon in the second degree (Penal Law § 265.03 [possession of a loaded firearm with intent to use it unlawfully against another]). Goetz was arraigned on this indictment on March 28, 1985, and it was consolidated with the earlier three-count indictment.

On October 14, 1985, Goetz moved to dismiss the charges contained in the second indictment, alleging, among other things, that the prosecutor's instructions to that grand jury on the defense of justification were erroneous and prejudicial to the defendant so as to render its proceedings defective.

On November 25, 1985, while the motion to dismiss was pending before Criminal Term, a column appeared in the *New York Daily News* containing an interview which the columnist had conducted with Darryl Cabey the previous day in Cabey's hospital room. The columnist claimed

that Cabey had told him in this interview that the other three youths had all approached Goetz with the intention of robbing him.

The day after the column was published, a New York City police officer informed the prosecutor that he had been one of the first police officers to enter the subway car after the shootings and that Canty had said to him, "We were going to rob [Goetz]." The prosecutor immediately disclosed this information to the Court and to defense counsel, adding that this was the first time his office had been told of this alleged statement and that none of the police reports filed on the incident contained any such information.

In an order dated January 21, 1986, the Court, after inspection of the grand jury minutes held that the prosecutor, in a supplemental charge elaborating upon the justification defense, had erroneously introduced an objective element into this defense by instructing the grand jurors to consider whether Goetz's conduct was that of a "reasonable man in [Goetz's] situation."

The Court concluded that the statutory test for whether the use of deadly force is justified to protect a person should be wholly subjective, focusing entirely on the defendant's state of mind when he used such force. It concluded that dismissal was required for this error because the justification issue was at the heart of the case. [We disagree.]

OPINION

Penal Law article 35 recognizes the defense of justification, which "permits the use of force under certain circumstances." One such set of circumstances pertains to the use of force in defense of a person, encompassing both self-defense and defense of a third person (Penal Law § 35.15). Penal Law § 35.15(1) sets forth the general principles governing all such uses of force:

> A person may use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he *reasonably* [emphasis added] believes to be the use or imminent use of unlawful physical force by such other person.

Section 35.15(2) sets forth further limitations on these general principles with respect to the use of "deadly physical force":

> A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless
>
> a. He *reasonably believes* [emphasis added] that such other person is using or about to use deadly physical force or
>
> b. He reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery.

Section 35.15(2)(a) further provides, however, that even under these circumstances a person ordinarily must retreat if he knows that he can with complete safety to himself and others avoid the necessity of using deadly physical force by retreating.

Thus, consistent with most justification provisions, Penal Law § 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met. As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery.

As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such force is necessary to avert the perceived threat. While the portion of section 35.15(2)(b) pertaining to the use of deadly physical force to avert a felony such as robbery does not contain a separate "retreat" requirement, it is clear from reading subdivisions (1) and (2) of section 35.15 together, as the statute requires, that the general "necessity" requirement in subdivision (1) applies to all uses of force under section 35.15, including the use of deadly physical force under subdivision (2)(b).

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in section 35.15 to the Grand Jury. The prosecutor properly instructed the grand jurors to consider whether the use of deadly physical force was justified to prevent either serious physical injury or a robbery, and, in doing so, to separately analyze the defense with respect to each of the charges. He elaborated upon the prerequisites for the use of deadly physical force essentially by reading or paraphrasing the language in Penal Law § 35.15. The defense does not contend that he committed any error in this portion of the charge.

When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term "reasonably believes." The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine "whether the defendant's conduct was that of a reasonable man in the defendant's situation." It is this response by the prosecutor—and specifically his use of "a reasonable man"—which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division's plurality opinion, because section 35.15 uses the term "he reasonably believes," the appropriate test, according to that court, is whether a defendant's beliefs and reactions were "reasonable to him."

Under that reading of the statute, a jury which believed a defendant's testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant's situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term "reasonably" in a statute, and misconstrues the clear intent of the Legislature, in enacting section 35.15, to retain an

objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense. These provisions have never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of *reasonableness*. [emphasis added]. . . .

The plurality below agreed with defendant's argument that the change in the statutory language from "reasonable ground," used prior to 1965, to "he reasonably believes" in Penal Law § 35.15 evinced a legislative intent to conform to the subjective standard.

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving a license for such actions. Statutes or rules of law requiring a person to act "reasonably" or to have a "reasonable belief" uniformly prescribe conduct meeting an objective standard measured with reference to how "a reasonable person" could have acted.

Goetz argues that the introduction of an objective element will preclude a jury from considering factors such as the prior experiences of a given actor and thus require it to make a determination of "reasonableness" without regard to the actual circumstances of a particular incident. This argument, however, falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." Such terms encompass more than the physical movements of the potential assailant.

As just discussed, these terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.

Accordingly, a jury should be instructed to consider this type of evidence in weighing the defendant's actions. The jury must first determine whether the defendant had the requisite beliefs under section 35.15, that is, whether he believed deadly force was necessary to avert the imminent use of deadly force or the commission of one of the felonies enumerated therein. If the People do not prove beyond a reasonable doubt that he did not have such beliefs, then the jury must also consider whether these beliefs were reasonable. The jury would have to determine, in light of all the "circumstances," as explicated above, if a reasonable person could have had these beliefs.

The prosecutor's instruction to the second Grand Jury that it had to determine whether, under the circumstances, Goetz's conduct was that of a reasonable man in his situation was thus essentially an accurate charge.

The order of the Appellate Division should be REVERSED, and the dismissed counts of the indictment reinstated.

QUESTIONS

1. **Consider the following:**
   a. New York tried Goetz for attempted murder and assault. The jury acquitted him of both charges. The jury said Goetz "was justified in shooting the four men with the silver-plated .38-caliber revolver he purchased in Florida." They did convict him of illegal possession of a firearm, for which the Court sentenced Goetz to one year in jail.
   b. Following the sentencing, Goetz told the Court: "This case is really more about the deterioration of society than it is about me. . . . I believe society needs to be protected from criminals."
   c. Criminal law professor George Fletcher followed the trial closely. After the acquittal, he commented:

      > The facts of the Goetz case were relatively clear, but the primary fight was over the moral interpretation of the facts. . . . I am not in the slightest bit convinced that the four young men were about to mug Goetz. If he had said, "Listen buddy, I wish I had $5, but I don't," and walked to the other side of the car the chances are 60–40 nothing would have happened. Street-wise kids like that are more attuned to the costs of their behavior than Goetz was. (quoted in Roberts 1989)

   If Professor Fletcher is right, was Goetz justified in shooting?

2. **Under what circumstances can people use deadly force, according to the New York statutes cited in the opinion?**
3. **Do you agree with those circumstances?**
4. **Would you add more? Remove some? Which ones? Why?**
5. **Were Goetz's shots a preemptive strike? Retaliation? Necessary for self-protection? Explain.**

Retreat

What if you can avoid an attack by escaping? Do you have to retreat? Or can you stand your ground and fight back? According to Richard Maxwell Brown (1991), the leading modern authority on American violence, "As far back as the thirteenth century, English common law dealt harshly with the act of homicide" (3). The burden was on defendants to prove their innocence, and no one could prove innocence unless he (all homicides were committed by men), proved he'd "retreated to the wall." The English common law "retreat to the wall" survived in a minority of American states:

> But one of the most important transformations in American legal and social history occurred in the nineteenth century when the nation as a whole repudiated the English common-law tradition in favor of American theme of no duty to retreat: that one was legally justified in standing one's ground to kill in self-defense.
>
> Recognized at the time as a crucial change in the "American mind," it was a combination of Eastern legal authorities and Western judges who wrought the legal transformation from an English law that, as they saw it, upheld cowardice to an American law suited to the bravery of the "true man." The centuries-long English legal severity against homicide was replaced in our country by a proud new tolerance for killing in situations where it might have been avoided by obeying a legal duty to retreat. (5)

LO 7

Who was this "true man"? According to Jeannie Suk (2008), various social meanings contributed to the definition. A true man was honest; he made decisions based on what he believed to be true, and he shouldn't have to flee from attack because he'd done nothing wrong to provoke or deserve the attack. The "true" man also did whatever he had to do to provide for his wife and children; he was the source of strength for his vulnerable dependents. The true man's duty to his family extended to his country.

> True men were patriots and protectors of the nation who would fight if necessary . . . to safeguard the legal rights fundamental to freedom. They had a sense of civic responsibility tied to the duty to ensure the rule of law and leadership of the nation. (Suk 2008, 245)

LO 8

Relying on these meanings, judges and legislators generalized the right to self-defense into the majority **stand-your-ground rule**, namely that if he didn't start the fight, he could stand his ground and kill to "defend himself without retreating from *any* place he had a right to be" (245). The minority rule, the **retreat rule**, says you have to retreat, if you reasonably believe

1. that you're in danger of death or serious bodily harm *and*
2. that backing off won't unreasonably put you in danger of death or serious bodily harm.

LO 9

States that require retreat have carved out an exception to the retreat doctrine. According to this **castle exception**, when you're attacked in your home, you can stand your ground and use deadly force to fend off an unprovoked attack, but *only* if you reasonably believe the attack threatens death or serious bodily injury (*State v. Kennamore* 1980, 858). Later on in this chapter, we'll explore the explosion of new statutes that vastly expand ordinary people's power to defend themselves in their homes *and* in public places. But now, let's look at how the elements of self-defense as they apply to domestic violence, especially battered women.

Domestic Violence

What if two men live in the same "castle"? Can they both stand their ground? It was these cases of **cohabitants** that gave birth to the rules governing domestic violence. One of the most famous and most often-cited cohabitant cases, the World War I era *People v. Tomlins* (1914), involved a man who killed his 22-year-old son, who had attacked his father in their cottage. Then Judge Cardozo (later a U.S. Supreme Court Associate Justice), wrote:

> It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than 200 years ago it was said by Lord Chief Justice Hale (1 Hale's Pleas of the Crown, 486):
>
> > In case a man "is assailed in his own house, he need not flee as far as he can, as in other cases of self-defense for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight."
>
> Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States. (243)
>
> The rule is the same whether the attack proceeds from some other occupant or from an intruder. Why should one retreat from his own house, when assailed by a partner or cotenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return? (243–44)

A modern cohabitant case, *State v. Shaw* (1981), recognized the implications for domestic violence case. Even though the case involved male roommates, the Connecticut Supreme Court relied on family violence to back up its creation of the cohabitant exception to the Connecticut rule requiring cohabitants to retreat. James Shaw Jr. rented one of two bedrooms in Wilson's owner-occupied house. Off the kitchen of this house were doors leading to both bedrooms, to a bathroom, to the hallway, and to the back door–fire escape. Wilson called Shaw to the common area of the house, where a discussion escalated first to an argument and then a physical altercation. (Each claimed that the other initiated the "tussle." Wilson went to his bedroom and grabbed his .30-30 Winchester rifle, intending to order Shaw to leave. Shaw went to his bedroom and got his .22 revolver. Weapons in hand, they both entered the kitchen from their bedrooms. Shaw fired five or six shots hitting Wilson three times (562).

The timing of the case coincided with the growing public recognition that domestic violence was a "serious and widespread crime." The feminist movement had convincingly argued that women were victims of violence at home. Law enforcement was beginning to treat domestic violence as a crime and not a private family matter (Suk 2008, 250). According to the Court:

> In the great majority of homicides the killer and the victim are relatives or close acquaintances. We cannot conclude that the Connecticut legislature intended to sanction the reenactment of the climactic scene from "High Noon" in the familial kitchens of this state. (*State v. Shaw*, 566)

LO 9

By the late 1990s, the recognition that battered women cases fit the "real man" protecting his castle paradigm had definitely influenced the law of self-defense. Courts in several Castle Doctrine states have adopted rules that allow women to "stand their ground and kill their batterers." All of these courts supported their decisions with a "sympathetic understanding of the dynamics of domestic violence and its victims" (Suk 2008, 252). In our next case excerpt, *State v. Thomas* (1997), the Ohio Supreme Court based its decision on the idea that a battered woman has "already retreated to the wall."

In our next case excerpt, State v. Thomas (1997), the Ohio Supreme Court based its decision on the idea that a battered woman has "already retreated to the wall."

CASE Did She Retreat to the Wall?

State v. Thomas
673 N.E.2d 1339 (1997 Ohio)

HISTORY

Teresa Thomas was convicted in the Court of Common Pleas, Athens County, of murder with a firearm specification, and she appealed. The Court of Appeals affirmed. The Supreme Court, Alice Robie Resnick, J., held that: (1) there is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with equal right to be in home, but (2) jury instructions on self-defense did not have to contain detailed definition of battered woman syndrome.

FACTS

On September 15, 1993, Teresa Thomas, defendant-appellant, shot and killed Jerry Flowers, her live-in boyfriend. At her trial for murder, Thomas admitted to shooting Flowers, but asserted that she had shot Flowers in self-defense, basing the defense on battered woman syndrome.

Thomas and Flowers had known each other for most of their lives when they first began dating two years prior to the shooting. By the end of 1991, Flowers and Thomas began living together. In July 1993, they moved into a new mobile home.

Thomas testified that the relationship was marked by violence and intimidation, including incidents of Flowers pushing her against a wall, injuring her shoulder enough for her to go to the emergency room, and punching her in the abdomen, rupturing an ovarian cyst. She stated that he would purposely soil his clothes and then order her to clean them. He controlled the couple's money, and eventually ordered Thomas to quit her jobs. He did virtually all of the grocery shopping. On the two occasions when he permitted her to do the shopping, he required her to present to him the receipt and the exact change. At times, he would deny her food for three to four days. He also blamed his sexual difficulties on her.

Approximately three weeks before the shooting, Flowers' behavior became more egregious. In the middle of the night, almost every night, he would wake Thomas up by holding his hands over her mouth and nose so that she could not breathe. Flowers had trouble sleeping and on several occasions accused Thomas of changing the time on the clocks. He often told her how easy it would be to kill her by snapping her neck, shooting her with a gun, or suffocating her, and then hiding her body in a cave. This discussion occurred almost every time they awoke.

Three days prior to the shooting, Thomas fixed a plate of food, which Flowers refused to eat or to let her clear from the table. He put cigarette butts in the food and played with it. Thomas testified that if she had cleaned up the food he would have beaten her.

Thomas testified that Flowers forced her into having sexual relations against her wishes, that he blamed her for his periodic impotency, and that two days prior to the shooting, he anally raped her.

The night before the shooting, Flowers yelled at Thomas and threw flour, sugar, cider, and bread on the floor. They argued all night, and before Flowers went to work on Wednesday morning, he ordered Thomas to clean up the mess, told her he would kill her if she did not do it by the time he came home, and struck her on the arm.

After he left, Thomas went to see her mother and they returned to Thomas' and Flowers' mobile home. Thomas testified that her mother seemed entirely uninterested in Thomas' situation. When Thomas' mother left, Thomas went to see Flowers' father, and then she returned to her

mobile home. Thomas started to clean up the kitchen but stopped to eat a sandwich, sitting at the kitchen table.

At 12:45 p.m., Flowers came home from work early and, according to Thomas, he sneaked to the mobile home so that she wouldn't see him. She did see him, however, and when she did not get up to meet him at the door, he started yelling. When Flowers moved to the kitchen door, Thomas ran to the bathroom. Thomas testified that she could not get out of the tiny bathroom window and that she was afraid that Flowers was going to kill her.

She then ran to Flowers' closet and grabbed his gun out of the holster. She ran back to the kitchen and Flowers continued to yell at her and threaten to kill her. According to Thomas, she fired two warning shots and when Flowers continued to threaten her, she shot him in the arm twice. Each of these two bullets also entered his torso. Flowers fell and then started to get up again, continuing to threaten Thomas. Thomas shot Flowers two more times, while he was bent over; the shots entered Flowers in the back.

Dr. Larry Tate, a pathologist with the Franklin County Coroner's Office, testified that Flowers had two bullet wounds in the arm, one in the chest, one in the abdomen, and two in the back.

In support of her self-defense argument, Thomas presented the testimony of Dr. Jill Bley, a clinical psychologist who has extensive experience in treating and diagnosing women with battered woman syndrome. Dr. Bley explained the classic symptoms and signs of battered woman syndrome and then described her examination of Thomas. Dr. Bley stated that she diagnosed Thomas as suffering from battered woman syndrome and that Thomas reasonably believed that Thomas was in danger of imminent death or serious bodily harm at the time of the shooting.

On September 22, 1993, the grand jury indicted Thomas for aggravated murder, a violation of R.C. 2903.01(A), with a firearm specification, a violation of R.C. 2941.141. From December 7 through 17, 1993, the case was tried before a jury. At the close of the state's case in chief, Thomas moved for an acquittal. The Court denied the motion in part, but finding that the element of "prior calculation and design" had not been proved, dismissed the charge of aggravated murder, allowing the case to proceed on the lesser included charge of murder with a firearm specification, in violation of R.C. 2903.02(A) and 2941.141. On December 20, 1993, the jury found Thomas guilty of murder with a firearm specification.

Upon appeal, Thomas argued that the trial court erred by not instructing the jury that she had no duty to retreat from a cohabitant and that the Court's instructions to the jury on battered woman syndrome were incomplete. The Court of Appeals affirmed the conviction. The cause is now before this court pursuant to the allowance of a discretionary appeal in case No. 95-1837.

ALICE ROBIE RESNICK, J.

This case presents issues involving the duty to retreat between cohabitants and jury instructions in trials in which the criminal defendant asserts battered woman syndrome as support for the defense of self-defense.

I

We first consider whether there is a duty to retreat when one is attacked in one's own home by a cohabitant with an equal right to be in the home. In Ohio, the affirmative defense of self-defense has three elements:

(1) the defendant was not at fault in creating the violent situation,

(2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and

(3) that the defendant did not violate any duty to retreat or avoid the danger.

Because of the third element, in most cases, a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation. This requirement derives from the common law rule that the right to kill in self-defense may be exercised only if the person assaulted attempted to "retreat to the wall" whenever possible.

However, there is no duty to retreat when one is assaulted in one's own home. This exception to the duty to retreat derives from the doctrine that one's home is one's castle and one has a right to protect it and those within it from intrusion or attack. The rationale is that a person in her own home has already retreated "to the wall," as there is no place to which she can further flee in safety. Thus, a person who, through no fault of her own, is assaulted in her home may stand her ground, meet force with force, and if necessary, kill her assailant, without any duty to retreat.

In Ohio, one is not required to retreat from one's own home when attacked by an intruder; similarly one should not be required to retreat when attacked by a cohabitant in order to claim self-defense. Moreover, in the case of domestic violence, as in this case, the attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death. The victims of such attacks have already "retreated to the wall" many times over and therefore should not be required as victims of domestic violence to attempt to flee to safety before being able to claim the affirmative defense of self-defense.

There is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile, and, accordingly, we hold that there is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home.

II

We next consider the issue of whether, when a defendant presents the defense of self-defense based on the theory of battered woman syndrome, the judge's instructions to the jury regarding self-defense must include a detailed definition of the syndrome. The trial court did not include in the jury charge the defendant's proposed instruction that would define battered women as those women in intimate

relationships that have gone through the battering cycle at least twice. The defendant's proposed instructions would further state that if the cycle occurs a second time and the victims remain in the situation, they are defined as battered women.

As stated above, the second element of the affirmative defense of self-defense requires the defendant to prove that she had a bona fide [honest] belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force.

The trial court's instructions correctly emphasized to the jury that the second element of self-defense is a combined subjective and objective test. Self-defense is placed on the grounds of the *bona fides* of defendant's belief, and reasonableness therefore, and whether, under the circumstances, he exercised a careful and proper use of his own faculties. The jury instructions given by the trial court properly instructed the jury to consider all the circumstances when determining if appellant had an objectively reasonable belief of imminent danger and whether she subjectively honestly believed she was in danger of imminent harm.

Accordingly, we reverse the court of appeals as to the duty to retreat between cohabitants and affirm as to the jury instruction regarding battered woman syndrome.

Judgment reversed in part and affirmed in part.

CONCUR

STRATTON, J.

This case poses a troubling issue of a balancing of societal interests. There are strong public policies for preserving the sanctity of life on one hand and, on the other hand, for allowing one to protect oneself from harm in one's own home.

However, the issues involved in domestic violence complicate any attempt to consider a duty to retreat from one's own home. Domestic violence is the result of the abuser's need to dominate and control. Often the risk of violence against a woman is heightened when she attempts to *leave* the abusive relationship. Research demonstrates that a battered woman's attempt to retreat often increases the immediate danger to herself. Statistics show that a woman is at the greatest risk of death when she attempts to leave a relationship. The abuser may perceive his mate's withdrawal, either emotionally or physically, as a loss of his dominance and control over her, which results in an escalation of his rage and more violence.

DISSENT

PFEIFER, J.

The sanctity of human life must pervade the law. Accordingly, a cohabitant should be required to attempt to retreat before resorting to lethal force in self-defense against another cohabitant. I respectfully dissent.

There are dramatically more opportunities for deadly violence in the domestic setting than in the intrusion setting. Thus, to hold that cohabitants do not have to retreat before resorting to lethal force is to invite violence. Cohabitants should be required to retreat before resorting to lethal force in self-defense whenever it can be done safely. Such a duty would encompass leaving the home if that is necessary to prevent the destruction of life. It would also encompass retreating to the wall.

Finally, whatever you think about the first four shots, it is unconscionable to suggest that the last two shots were fired in self-defense. The law of self-defense has hitherto always been a shield. In this case, the majority is allowing the defendant to use the law of self-defense as a sword. I dissent.

DISSENT

COOK, J.

I respectfully dissent. Contrary to the fears expressed by the majority and concurring opinions, imposing the duty to retreat upon cohabitants would not leave the occupant of a home defenseless from attacks. First, a person is relieved of the duty where there is no reasonable or safe means to avoid the confrontation. Accordingly, the use of deadly force is justified and the failure to retreat is of no consequence where retreat would increase the actor's own danger of death or great bodily harm.

For these reasons, I would hold that a person assaulted by another cohabitant in the home is obliged to "retreat to the wall" before defending with deadly force, provided that a reasonable and safe means of avoiding the danger exists.

QUESTIONS

1. **State the three elements of self-defense in cases involving coinhabitants.**
2. **Summarize the majority decision arguments supporting Ohio's law of self-defense involving coinhabitants.**
3. **Summarize the importance to the majority that the case involved domestic violence.**
4. **According to Justice Stratton's concurring opinion, how do "issues involved in domestic violence complicate any attempt to consider a duty to retreat from one's own home"?**
5. **According to Justice Pfeifer's dissent, why should a "cohabitant be required to attempt to retreat before resorting to lethal force in self-defense against another cohabitant"?**
6. **According to Justice Cook's dissent, why would "imposing the duty to retreat upon cohabitants not leave the occupant of a home defenseless from attacks"?**
7. **Consider the following comments:**
   a. Retaliation, as opposed to defense, is a common problem in cases arising from wife battering and domestic violence. The injured wife waits for the first possibility of striking against a distracted or unarmed husband. The man may even be asleep when the wife finally reacts.

Retaliation is the standard case of "taking the law into your own hands." There is no way, under the law, to justify killing a wife batterer or a rapist in retaliation or revenge, however much sympathy there may be for the wife wreaking retaliation. Private citizens cannot act as judge and jury toward each other. They have no authority to pass judgment and to punish each other for past wrongs (Fletcher 1988, 21–22).

b. "The right to use force in the defense of one's person, family, habitation, lands, or goods is one of the unalienable rights of man. As it is a right not granted by any human code, no human code can take it away. It was recognized by the Roman law, declared by that law to be a natural right, and part of the law of nations. It is no doubt recognized by the code of every civilized State" (Thompson 1880, 546).

c. "A man is not born to run away. The law must consider human nature and make some allowance for the fighting instinct at critical moments. In Texas it is well settled, as you might imagine, that a man is not born to run away" (DeWolfe Howe 1953 I, 331).

Are any of the statements relevant to battered woman domestic violence cases? Do you agree with the statements? Explain your answer.

8. **In your opinion, did Teresa Thomas kill Jerry Flowers in self-defense, as a preemptive strike, or as retaliation?**

Defense of Others

Historically, self-defense meant protecting yourself and the members of your immediate family. Although several states still require a special relationship, the trend is in the opposite direction. Many states have abandoned the special relationship requirement altogether, replacing it with the defense of anyone who needs immediate protection from attack.

Several states that retain the requirement have expanded it to include lovers and friends. The "others" have to have the right to defend themselves before someone else can claim the defense. This is important in cases involving abortion rights protestors. In *State v. Aguillard* (1990, 674), protestors argued they had the right to prevent abortions by violating the law because they were defending the right of unborn children to live. In rejecting the defense of others, the Court said:

> The "defense of others" specifically limits the use of force or violence in protection of others to situations where the person attacked would have been justified in using such force or violence to protect himself. In view of *Roe v. Wade* and the provisions of the Louisiana abortion statute, defense of others as justification for the defendants' otherwise criminal conduct is not available in these cases. Since abortion is legal in Louisiana, the defendants had no legal right to protect the unborn by means not even available to the unborn themselves. (676)

Defense of Home and Property

> The right to use force in the defense of one's person, family, habitation, lands, or goods is one of the natural and unalienable rights of man. As it is a right not granted by any human code, no human code can take it away. It was recognized by the Roman law; declared by that law to be a natural right, and a part of the law of nations. It is no doubt recognized by the code of every civilized State. (Thompson 1880, 546)

The right to use force to defend your home is deeply rooted in the common law idea that "a man's home is his castle." As early as 1604, Sir Edward Coke, the great common law judge, in his report of Semayne's Case, wrote:

> The house of everyone is to him his castle and fortress, as well for his defense against injury and violence, as for his repose; and although the life of a man is a thing precious and favored in law . . . if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is not felony and he shall lose nothing. (*State v. Mitcheson* 1977, 1122)

The most impassioned statement of the supreme value placed on the sanctity of homes came from the Earl of Chatham during a debate in the British Parliament in 1764:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement. (quoted in Hall 1991, 2:4)

Don't let the Earl of Chatham's moving words lure you into thinking you can automatically kill an intruder to defend the sanctity of your home. Sir William Blackstone (1769), in his eighteenth-century *Commentaries* (the best-known—and often the only known—law book to American lawyers at that time), argues that the right is broad *but* limited. He writes:

> If any person attempts to break open a house in the nighttime and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to the breaking open of any house in the daytime, unless it carries with it an attempt of robbery. (180)

You can see that the defense was limited to nighttime invasions, except for breaking into homes to commit daytime robberies. Most modern statutes limit the use of deadly force to cases where it's reasonable to believe intruders intend to commit crimes of violence (like homicide, assault, rape, and robbery) against occupants.

Statutes vary as to the area that the use of deadly force covers. Most require entry into the home itself. This doesn't include the **curtilage**, the area immediately surrounding the home. Many require entry into an *occupied* home. This means you can't set some automatic device to shoot whoever trips the switch when you're not home.

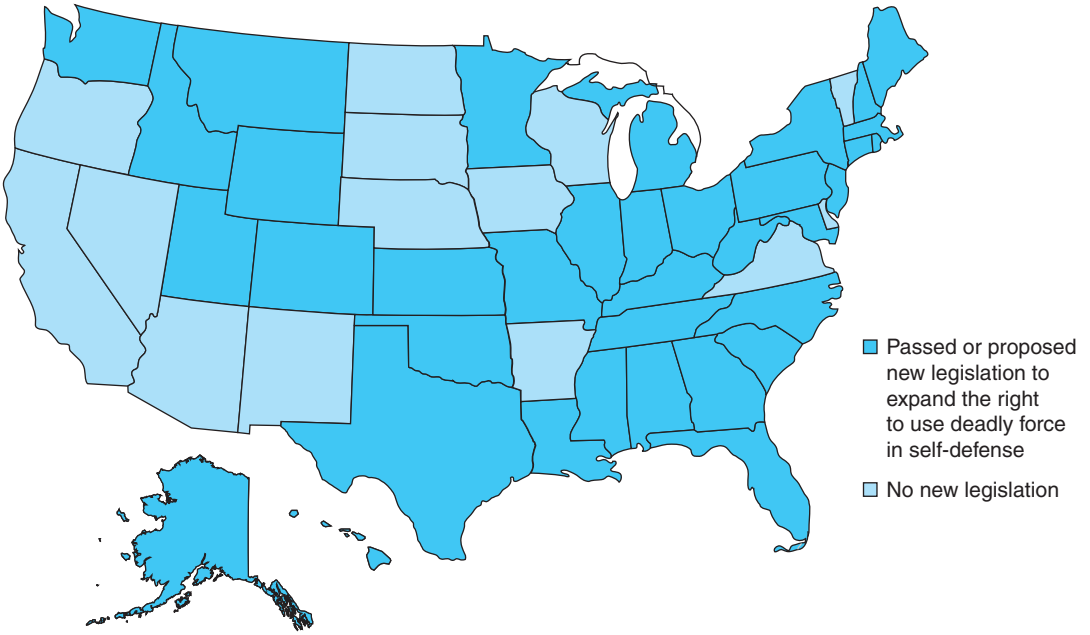
Homes are special places; they're not in the same category as our "stuff." Can you use force to protect your "stuff"? Not deadly force. But you can use the amount of nondeadly force you reasonably believe is necessary to prevent someone from taking your stuff. You also can run after and take back what someone has just taken from you. But, as with all the justifications based on necessity, you can't use force if there's time to call the police.

The "New Castle Laws": "Right to Defend" or "License to Kill"?

LO 10

Self-defense is undergoing an epochal transformation. Since 2005, more than forty states have passed or proposed new "Castle Doctrine" legislation intended to expand the right to use deadly force in self-defense. (See Figure 5.1) (Jeannie Suk 2008, 237)

FIGURE 5.1 Castle Doctrine Map Update for January 2009



Source: "Tekel," University of Oregon law student blog, http://tekel.wordpress.com/2009/01/24/castle-doctrine-map-update-for-january-2009/.

The first castle doctrine passed the Florida legislature in October 2005, by huge margins, unanimously in the state senate, and 94–20 in the state house of representatives. The **Florida Personal Protection Law** (2009) became the model for most of the new castle laws. It includes the following provisions:

> *Section 776.012.*
>
> A person is justified in using . . . deadly force and does not have a duty to retreat if:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or
> (2) Under those circumstances permitted pursuant to Section 776.013.
>
> *776.013.*
>
> (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.

(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.
(5) As used in this section, the term:
  (a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.
  (b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.
  (c) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

776.032

(1) A person who uses force as permitted in Sections 776.012 and 776.013 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer who was acting in the performance of his or her official duties, and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
(2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used was unlawful.
(3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

In short, Florida's castle law accomplished the following:

- Abolished the duty to retreat rule
- Replaced the common law "reasonable person" requirement, which placed the burden on defendants to prove the reasonableness of their actions with a presumption of reasonableness or fear. The presumption shifts the burden of proof to prosecutors, forcing them to disprove reasonableness. Proving this negative, always a very difficult burden, makes the reasonableness presumption almost unrebuttable.
- Extended the right to use deadly force outside the home to "any place you have a right to be"

- Broadened the legitimate circumstances where deadly force applies, including threats to property and threats that aren't imminent
- Created blanket criminal *and* civil immunity for anyone using force permitted by the law. (This immunity is broader than law enforcement officers' immunity.) (Jansen and Nugent-Borakove 2008, 5–6)

"Right to Defend" or "License to Kill"?

LO 10

Opponents and supporters of the castle laws see them in fundamentally different ways. Supporters claim them as the public reasserting fundamental rights. Marion Hammer, the first woman president of the National Rifle Association, says the castle law codifies the "*right* of the people to use any manner of force to protect their home and its inhabitants." She contends this right goes back to the 1400s, and that Florida prosecutors and courts took away that right by requiring that "law-abiding citizens who are attacked by criminals" have to retreat.

> When they take away your basic rights and freedoms, every once in a while you have to take them back. No law abiding citizen should be forced to retreat from an attacker in their homes or any place they have a legal right to be. Under the existing law [before the castle law was enacted] you had a duty to try to run and maybe get chased down, and beat to death. Now, if you have a knife, firearm or pepper spray, you can use force to protect yourself. (Kleindienst 2005)

(Don't confuse the U.S. Supreme Court case, *District of Columbia v. Heller* (2008) discussed in Chapter 2, with the castle laws. *Heller* decided that the Second Amendment guaranteed the right to *have* a gun; the castle laws authorize individuals to *use* the guns they have the right to have.)

Gun control advocates say the laws "are ushering in a violent new era where civilians may have more freedom to use deadly force than even the police." They're not a "right to defend"; they're a "license to kill" (Rather 2009). The Brady Campaign to Prevent Gun Violence, established by Jim Brady who was badly wounded and paralyzed during John Hinckley's attempt to assassinate President Reagan (Chapter 6), and his wife Sarah, see the laws entirely differently. Peter Hamm, communications director for the Campaign:

> The biggest myth in Florida is that this is about protecting people who use legitimate self-defense. This law sends a message to people who are potentially dangerous and have an itchy trigger finger that as long as they can make a reasonable case they were in fear, they can use deadly force against somebody. It's a particular risk faced by travelers coming to Florida for a vacation because they have no idea it's going to be the law of the land. If they get into a road-rage argument, the other person may feel he has the right to use deadly force. (Kleindienst 2005)

Law Enforcement Concerns

In March 2007, the American Prosecutors Research Institute (APRI) held a symposium consisting of prosecution, law enforcement, government, public health, and academic experts from 12 states. The purpose? Discuss the possible *unintended* negative consequences for public safety created by the new castle laws. The main concerns include

officers' use of force; operations and training requirements; increased investigation burdens; law enforcement attitudes and their impact on officer performance; and doubts that the castle laws deter crime (Jansen and Nugent-Barakove 2008, 8–9). Let's look briefly at each of these concerns.

Officers' Use of Force

Police officers are held to a higher standard than individuals when they use deadly force, namely officers aren't protected by the blanket immunity granted to citizens under the castle laws. In short, close scrutiny of officers can lead to internal discipline as well as civil and criminal liability. This imbalance between citizen and police power to use deadly force "has created a dangerous situation for law enforcement." Take officer safety during "no-knock" searches as one important example. Officers have to get a judge's approval to enter homes without warrants by demonstrating that it would be dangerous to knock and announce their presence. Individuals inside are not held to similar restraints; under the new laws' presumption of reasonableness of danger provision, they can shoot officers (8–9).

Operations and Training Requirements

Law enforcement officials attending the symposium noted that it's impossible to train officers regarding the new laws. This is especially true of the presumption of reasonableness.

> Because the courts' interpretation of the new standard is only in its infancy, law enforcement officers may find it difficult—if not impossible—to determine whether the new law is properly invoked. Officer training would have to be continually updated to help define when and where the Castle expansion might apply. (9)

Increased Investigative Burdens

Before the castle laws, officers responding to "public places" crime scenes involving deadly force had to investigate only whether the danger was imminent and whether there was a duty to retreat. Now, they have to anticipate self-defense claims in far more cases. So, both prosecutors and police officers have to gather evidence and

> Demonstrate beyond a reasonable doubt that there was not a self-defense claim that would excuse or justify the use of deadly force, ideally before charges are brought.
>
> Proving a negative is very difficult when the evidence is in the hands of the defendant. . . .
>
> As a result . . . police chiefs, sheriffs, and prosecutors have officers and line prosecutors investigating each shooting or assault as a potential claim under the Castle Doctrine. The increased investigative time needed to prove or disprove self-defense claims are a major concern for already overworked and understaffed law enforcement.

Effect of Law Enforcement Attitudes on Performance

The castle laws have also generated practical concerns about law enforcement attitudes and their effect on officer performance. For example, officers might feel like the dead "victims" deserved what they got, especially if both parties are criminals. So, they don't carry out the more intensive investigation the castle laws require.

> Because a large number of assaults occur outside the home, the expansion of no-retreat laws to areas outside the home will logically increase the number of defendants invoking the Castle expansion. This will further burden police officers' time. Police officers may become apathetic to hearing such self-defense claims every time they respond to a crime scene, which will only benefit those who deny liability because of the presumption of fear.

Doubts That the Castle Laws Will Deter Crime

Symposium experts saw one possible positive effect of the castle laws—that they'll deter crime. But, they believe that the deterrent effect depends on

- Whether the expansion of citizens' right to use deadly force is widely publicized so that citizens will know they've got the right.
- Whether would-be criminals appreciate that citizens are armed and might shoot, stab, or otherwise kill or seriously injure them.

According to the symposium members, the possible negative consequence of the castle doctrine is that it raises questions about whether they're good public policy. People might feel safer because they have a right to defend themselves. Or, they might feel less safe because they don't know who might be carrying a weapon, misinterpret behavior as threatening, and shoot them. Also, people may opt to carry weapons because they feel less safe, and people who already carried weapons might respond to threats by using force more readily.

With little to no empirical research at present to answer these important questions, the symposium advised that

> It would be prudent for states considering expansions to their self-defense laws to wait until there is better evidence that the unintended negative consequences of these laws do not outweigh the possible positive impacts. (13)

Why the Spread of Castle Laws Now?

LO 10

There's no empirical research to help explain why so many states have adopted the "new castle laws." There was no similar reaction in the 1980s when Colorado's "make-my-day" law, enacted in 1985, expanded traditional self-defense to resemble in most respects the new laws. But there's plenty of speculation as to why these laws have proliferated now. Two commonly mentioned reasons are Americans' heightened consciousness and concern about their security since 9/11 and the lack of enough police officers to protect the public. Florida and Mississippi are examples:

- *The series of hurricanes that battered Florida in 2005* "In a lot of these devastated areas, law enforcement would tell communities, 'You're on your own, we can't get to you.' So, we needed to be sure that when people protected themselves, their families and their property, that they weren't gonna be prosecuted by some criminal-coddling prosecutor" (Rather 2009).
- *The cuts in law enforcement officers in Mississippi* Jackson Police Chief McMillin "says he's waging a battle of attrition with a force that's nearly 200 officers short of the 600 the city needs. So he says it's no wonder that civilians are taking up the fight and using tools like the castle doctrine to help protect themselves. People are

sick and tired of being victims. They're tired of being robbed. They're tired of their houses being broken into. They think that they have to take matters into their own hands if they're gonna be safe (Rather 2009).

Cliff Cargill, a firearms instructor certified by the National Rifle Association says business has been booming with Jackson's crime on the rise and the new laws on the books. "If I'm in my home, my place of business or my vehicle, I don't have to justify my existence in my surroundings. If somebody breaks into my house to rob and/or do me harm, then I should be presumed innocent by anybody that comes to investigate that situation." Cargill says, "Packing heat is not paranoia, but common sense." There's an old saying, 'When seconds count, the police are only minutes away.' Well the meantime, the clock's running. What's that intruder doing to you?" That's especially true in Jackson, where locals say the police are badly out-gunned (Rather 2009).

Cases under New Castle Laws

Let's look at some of the cases illustrating how some citizens are using the new laws, and how police, prosecutors, and courts are responding to citizens' actions under the laws (see Table 5.1).

Two Shootings in Florida

1. Jacqueline Galas (Liptak 2006)

Jacqueline Galas, a New Port Richey prostitute, 23, said that a longtime client, Frank Labiento, 72, threatened to kill her and then kill himself last month. A suicide note he

TABLE 5.1 Expansion of "New Castle Laws"

State	Year	Name	Facts	Disposition
Florida	2006	Jennifer Galas, 23	Prostitute shot and killed 72-year-old client with his gun	Not charged
Florida	2006	Robert Lee Smiley, 56	Taxi driver shot and killed drunk passenger outside cab after altercation	Charged with first-degree murder; trial jury deadlocked 9–3
Mississippi	2008	Sarbrinder Pannu, 31	Convenience store clerk followed shoplifter outside store and shot him twice	
Mississippi	2008	Unidentified clerk in gas mart	Terrence Prior, 23, man in a clown mask burst through the door of a gas mart waving a gun, demanding money from the register, the third time in recent weeks store robbed by masked man. The clerk followed him out the door and shot and killed him outside the station.	Not charged
Texas	2007	Joe Horn, 62	Retired computer consultant shot two men in the back and killed two men from his front porch, as they were leaving his neighbor's house with money and jewelry	Grand jury refused to indict
Arizona	2004	Harold Fish, 59	Retired teacher on a hike fatally shot Grant Kuenzli, 43, claiming the man and his dogs charged at him	Convicted and sentenced to 10 years in prison before Arizona passed a castle law to protect people like Fish

had left and other evidence supported her contention. The law came into play when Ms. Galas grabbed Mr. Labiento's gun and chose not to flee but to kill him. "Before that law," Mr. Halkitis said, "before you could use deadly force, you had to retreat. Under the new law, you don't have to do that." The decision not to charge Ms. Galas was straightforward, Mr. Halkitis said. "It would have been a more difficult situation with the old law," he said, "much more difficult."

2. Robert Lee Smiley Jr. (Liptak 2006)

In November 2004, before the new law was enacted, Robert Lee Smiley Jr., then 56, a cabdriver in West Palm Beach, killed a drunken passenger in an altercation after dropping him off. Mr. Smiley killed Jimmie Morningstar, 43. A sports bar had paid Mr. Smiley $10 to drive Mr. Morningstar home in the early morning of Nov. 6, 2004. Mr. Morningstar was apparently reluctant to leave the cab once it reached its destination, and Mr. Smiley used a stun gun to hasten his exit. Once outside the cab, Mr. Morningstar flashed a knife, Mr. Smiley testified at his first trial, though one was never found. Mr. Smiley, who had gotten out of his cab, reacted by shooting at his passenger's feet and then into his body, killing him. Cliff Morningstar, the dead man's uncle, said he was baffled by the killing. "He had a radio," Mr. Morningstar said of Mr. Smiley. "He could have gotten in his car and left. He could have shot him in his knee." Carey Haughwout, the public defender who represents Mr. Smiley, conceded that no knife was found. "However," Ms. Haughwout said, "there is evidence to support that the victim came at Smiley after Smiley fired two warning shots, and that he did have something in his hand."

Smiley was charged and tried for murder. The jury deadlocked 9–3 in favor of convicting him. According to Henry Munnilal, the jury foreman, a 62-year-old accountant, "Mr. Smiley had a lot of chances to retreat and to avoid an escalation. He could have just gotten in his cab and left. The thing could have been avoided, and a man's life would have been saved." Mr. Smiley tried to invoke the new law, which does away with the duty to retreat and would almost certainly have meant his acquittal, but an appeals court refused to apply it retroactively.

In April 2006, a Florida appeals court indicated that the new law, had it applied to Mr. Smiley's case, would have affected its outcome. "Prior to the legislative enactment, a person was required to 'retreat to the wall' before using his or her right of self-defense by exercising deadly force," Judge Martha C. Warner wrote. The new law, Judge Warner said, abolished that duty.

Two Robberies in Mississippi

1. Sarbrinder Pannu

Rather: It was just after ten on a hot Mississippi night in August 2008 at a gas mart on the outskirts of Jackson. A man in a black SUV pulled into the lot, walked inside, grabbed a case of beer from the cooler, and walked right out the door. Without paying. A single case of beer wasn't going to break the bank, but according to the property owner, Mr. Surinder Singh, who operates several sister stores nearby, the man was just the latest of a seemingly endless stream of thieves.

Surinder Singh, owner of the BP station property: They come, they take stuff . . . By the time we call the police they are already gone. And they know that. So when . . . when the police come, they say, "Well, call us if they come back."

Rather: But the clerk manning the counter that night wasn't willing to wait for anyone to come back. According to police, he ran outside with a .357 magnum, aimed at the man in the black SUV, and fired three shots.

Singh: Somebody got to stop him. The police cannot be there 24 hours. The only person who was there to stop him was the clerk. And he stopped him, whatever means he could.

Rather: Thirty-six-year-old James Hawthorne Jr. was pronounced dead at the hospital.

2. Unidentified Gas Mart Clerk

Just a few nights later, there was another shooting at a gas mart a few miles away; police say a man in a clown mask burst through the door waving a gun, demanding money from the register. It was the third time in recent weeks the store was robbed by a man in a clown mask, as captured on this surveillance video. But when the masked man ran out with the cash, this time the clerk didn't let him get away.

Reporter, WJTV Live Broadcast: The clerk went after him and shot him outside the store. . . .

Rather: Ten rounds, according to the police report. Twenty-three-year-old Terrence Prior was pronounced dead at the hospital.

In our next case excerpt, State v. Harold Fish, the prosecution of Harold Fish for second-degree murder led to a change in Arizona's self-defense law, but the change came too late to keep him out of prison.

CASE Was It Murder or Self-Defense?

State v. Harold Fish
(Corbett 2009)

The prosecution of Harold Fish for second-degree murder led to a change in Arizona's self-defense law, but the change came too late to keep the former Tolleson teacher out of prison. Fish, 62, is serving a ten-year sentence for killing a man on a hiking trail north of Payson five years ago this week. Fish fatally shot Grant Kuenzli, 43, saying the man and his dogs charged at him on a trail in the Coconino National Forest. "The choice was this: Use the firearm or let (Kuenzli) kill me or seriously hurt me," Fish said in a recent telephone interview from the Arizona State Prison Complex–Lewis near Buckeye. "I would do the same thing again today because I didn't have any choice. That gun saved my life."

A Coconino County investigator believed that Fish acted in self-defense based on Fish's statements and limited evidence at the scene. Prosecutors saw it differently and charged him with second-degree murder. Fish was convicted in June 2006. He must serve until June 2016 unless the conviction is overturned. The Arizona Court of Appeals reviewed Fish's appeal last July but has not ruled on it yet. Fish's case sparked debate about self-defense, drawing national attention from gun-rights advocates. The National Rifle Association contributed to Fish's defense.

Unconvinced Jurors

During the trial, jurors were not convinced that Fish was justified in shooting Kuenzli to protect himself. At the time of the shooting, Arizona's self-defense law required that a person claiming self-defense must prove that his or her actions were reasonable and justified. The law was changed in 2006 just before Fish's trial. It now puts the burden of proof on prosecutors to prove that shooters were not justified in using deadly force to protect themselves.

Fish's attorney, Melvin McDonald, lobbied for that change in the Arizona Legislature before Fish's case went to trial. Then Governor Janet Napolitano vetoed two bills

that would have made the change in the self-defense law retroactive to his case.

"Classic" Self-Defense

"The state finally got it right, but they didn't give it to me," Fish said. "It is a bitter, cruel irony." NRA spokesman Andrew Arulanandam said Wednesday that the shooting "was a classic case of a good person acting in self-defense." The group is holding its national convention Friday through Sunday in Phoenix. Arulanandam said the prosecutor manipulated the legal system to exclude "the mental history of the attacker (Kuenzli)."

Hike Ends in Tragedy

Fish, a father of seven who taught English and Spanish at Tolleson High School for 27 years, was completing a day-long hike along a forested trail north of Strawberry on May 11, 2004, when he fired the fatal shots from a Kimber 10mm handgun that he was legally carrying. Kuenzli, unemployed and living out of his car, was camped at the trailhead with three dogs. Fish said he saw Kuenzli's car and was relieved that his ten-mile hike was nearly over. Just then, Kuenzli's dogs charged down the hill, barking and snarling at him.

Single Warning Shot

Fish said he yelled to Kuenzli to call off his dogs. He fired a warning shot into the ground. The dogs veered off the trail, Fish said. Suddenly, Fish said, Kuenzli charged down the hill, swinging his fists and threatening to kill him. Fish dropped Kuenzli with three shots to his chest. Kuenzli fell dead in the dirt at Fish's feet. Members of the grand jury later asked Fish why he had fired a warning shot at the dogs but did not do the same for Kuenzli. Fish said he did not have time and had been trained not to fire warning shots.

Victim's Past at Issue

Kuenzli was unarmed, but the defense argued that a screwdriver in his pocket could have been used as a weapon. Judge Mark Moran of Coconino County Superior Court did not allow that evidence into the trial. The issue is part of Fish's appeal. McDonald also tried to introduce evidence about Kuenzli's mental health problems, a domestic violence incident, and previous heated encounters Kuenzli had had with police, court officials, and strangers.

Moran excluded testimony about any prior confrontations. The legal theory was that Fish did not know of Kuenzli's mental stability when they squared off, so it was irrelevant. "Baloney!" Fish said. "If you look in the eyes of a man who wants to kill, you know he's not right. I'll never forget those eyes. This guy was as nutty as anyone I've ever seen." McDonald said he hopes the Arizona Court of Appeals will overturn Fish's conviction and set him free so he can return to his wife and family.

Family Is Still Hopeful

For three years, Debora Fish has been raising their seven children, ages 5 to 20, without her husband. She supports the family with his retirement income and her paycheck from a nursing home. "We're keeping our heads above water," she said, adding that the family is eager for a ruling that would overturn the conviction and free her husband without another expensive trial.

Flagstaff attorneys, John Trebon and Lee Phillips, filed an appeal for Fish in April 2008. Coconino County Prosecutor Michael Lessler said he is awaiting the appellate court's decision, but he declined to speculate about the outcome. After the trial verdict nearly three years ago, Lessler said of the shooting that Fish "engaged in conduct that the law just can't accept."

Kuenzli's sister, Linda Almeter, said Fish was unhurt in the deadly encounter and did nothing to substantiate his self-defense claim. "He didn't have a button missing from his shirt," she said. "I think justice put him where he is, and he needs to stay there," she said.

"God and I Are OK"

Fish, a member of the Church of Jesus Christ of Latter-Day Saints, said he has had a lot of time to reflect about what happened five years ago. "God and I are OK with this," Fish said of the shooting. Did he pray for Kuenzli? "I wish I could say I did," Fish said, adding that it would be hypocritical for him to do that.

As prisoner No. 208513, Fish spends his time reading and watching TV. His family visits every week. "It's not a happy place," he said of prison. "It's not meant to be an experience you want to repeat."

"Innocent Citizen"

Fish will be 69 years old when he is released unless Trebon and Phillips succeed in getting his conviction overturned sooner. People empathize with Fish because he went to prison for defending himself, Trebon said. "Here's an ordinary, innocent citizen in a life-and-death situation," the attorney said. "He makes the most reasonable decision under the circumstances and then is second-guessed by people who didn't have to live through that situation."

QUESTIONS

1. **Summarize the story of Harold Fish's shooting Grant Kuenzli.**
2. **State the elements of the Arizona castle doctrine law.**
3. **Assume you're the prosecutor; present the case for murder.**
4. **Now, assume you're the defense attorney; present the case for self-defense.**
5. **In your opinion, should the new law be applied to Harold Fish, or should the governor pardon him? Defend your answer with specific points from the case.**

ETHICAL DILEMMA

New Castle Doctrine: Right to Defend or License to Kill?

Marion Hammer, executive director of Unified Sportsmen of Florida, representative of the National Rifle Association in Florida:

> When you are prosecuting law-abiding people for defending themselves against criminals, it's wrong and it has to be fixed. And the castle doctrine laws fixed that.

Gregory Hicks, Warren City attorney:

> I believe in protecting one's property. I believe in the fact that your home is your castle. But I don't believe you have the right to use that kind of deadly force on a prank. I'm sorry, that's not the way an ordered society acts.

Dan Rather, *Dan Rather Reports*:

> To shoot or not to shoot? For even the most seasoned police officer, it's the ultimate dilemma. A split-second choice that could prevent a violent crime or be a fatal mistake. But it's no longer just police who are deciding whether or not to pull the trigger. There's a new breed of laws that's expanding the rights of civilians to use deadly force. They are called the "castle doctrine" laws, and since 2005, they've been passed or proposed in more than 35 states.
>
> The new laws are not about the right to bear arms, but the right to use them. The National Rifle Association says the castle doctrine is restoring a tradition of self-defense that dates back to medieval England, when a man's home was considered his castle. But others say these laws are ushering in a violent new era where civilians may have more freedom to use deadly force than even the police.

Instructions

1. Go to the website www.cengage.com/criminaljustice/samaha.
2. Read the transcript of the report on the new castle laws.
3. List the arguments for the proposition that the new castle doctrine laws represent a right to defend guaranteed by the Constitution.
4. List the arguments for the proposition that the new castle doctrine laws represent a license to kill.
5. Write a one-page essay stating what you believe best balances the right to defend yourself while protecting the lives of innocent people. Explain how your position represents the most ethical public policy regarding the right to bear arms. Back up your answer with the selections you read and with the New Castle Doctrine sections in your text.

"Choice of Evils" (General Principle of Necessity)

At the heart of the choice-of-evils defense is the necessity to prevent imminent danger; so in that respect, it's like all the defenses we've discussed up to now. The justifications based on the necessity of defending yourself, other people, and your home aren't

controversial. Why? Because we see the attackers of us, our families, and our homes as evil and the defenders as good. However, in the general choice-of-evils defense, the line between good and evil isn't always drawn as clearly as it is in self-defense and defense of home.

LO 11

The **choice-of-evils defense**, also called the **general principle of necessity**, has a long history in the law of Europe and the Americas. And, throughout that history, the defense has generated heated controversy. Bracton, the great thirteenth-century jurist of English and Roman law, declared that what "is not otherwise lawful, necessity makes lawful." Other distinguished English commentators, such as Sir Francis Bacon, Sir Edward Coke, and Sir Matthew Hale in the sixteenth and seventeenth centuries, agreed with Bracton. The influential seventeenth-century English judge Hobart expressed the argument this way: "All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience."

On the other side of the debate, the distinguished nineteenth-century English historian of criminal law Judge Sir James F. Stephen believed that the defense of necessity was so vague that judges could interpret it to mean anything they wanted. In the mid-1950s, the distinguished professor of criminal law Glanville Williams (1961) wrote: "It is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it, but these cases cannot be defined beforehand" (724–25).

Early cases record occasional instances of defendants who successfully pleaded the necessity defense. In 1500, a prisoner successfully pleaded necessity to a charge of prison break; he was trying to escape a fire that burned down the jail. The most common example in the older cases is destroying houses to stop fires from spreading. In 1912, a man was acquitted on the defense of necessity when he burned a strip of the owner's heather to prevent a fire from spreading to his house (Hall 1960, 425).

The most famous case of imminent necessity is *The Queen v. Dudley and Stephens* (1884). Dudley and Stephens, two adults with families, and Brooks, an 18-year-old man without any family responsibilities, were lost in a lifeboat on the high seas. They had no food or water, except for two cans of turnips and a turtle they caught in the sea on the fourth day. After 20 days (the last 8 without food), perhaps a thousand miles from land and with virtually no hope of rescue, Dudley and Stephens—after failing to get Brooks to cast lots—told him that, if no rescue vessel appeared by the next day, they were going to kill him for food. They explained to Brooks that his life was the most expendable because they each had family responsibilities and he didn't.

The following day, no vessel appeared. After saying a prayer for him, Dudley and Stephens killed Brooks, who was too weak to resist. They survived on his flesh and blood for four days, when they were finally rescued. Dudley and Stephens were prosecuted, convicted, and sentenced to death for murder. They appealed, pleading the defense of necessity.

Lord Coleridge, in this famous passage, rejected the defense of necessity:

> The temptation to act here was not what the law ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defense of it. It is not so.

> To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's own life.
>
> It is not needful to point out the awful danger of admitting the principle contended for.
>
> Who is to be the judge of this sort of necessity? By what measure of the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own.
>
> In this case, the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"—"So spake the Fiend, and with necessity, The tyrant's plea, executed his devilish deeds." It is not suggested that in this particular case, the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.

Lord Coleridge sentenced them to death but expressed his hope that Queen Victoria would pardon them. The queen didn't pardon them, but she almost did—she commuted their death penalty to six months in prison.

The crux of the choice-of-evils defense is proving that the defendant made the right choice, the only choice—namely, the necessity of choosing now to do a lesser evil to avoid a greater evil. The Model Penal Code choice-of-evils provision contains three elements laid out in three steps:

1. Identify the evils.
2. Rank the evils.
3. Reasonable belief that the greater evil is imminent, namely it's going to happen right now (ALI 1985, 1:2, 8–22).

Simply put, the choice-of-evils defense justifies choosing to commit a lesser crime to avoid the harm of a greater crime. The choice of the greater evil has to be both imminent and necessary. Those who choose to do the lesser evil have to believe reasonably their only choice is to cause the lesser evil to avoid the imminent greater evil.

The Model Penal Code (ALI 1985, 1:2, 8) lists all of the following "right" choices:

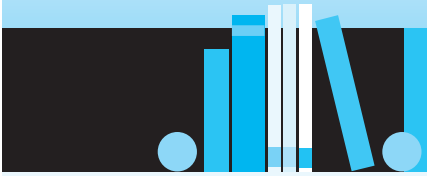
1. Destroying property to prevent spreading fire
2. Violating a speed limit to get a dying person to a hospital
3. Throwing cargo overboard to save a sinking vessel and its crew
4. Dispensing drugs without a prescription in an emergency
5. Breaking into and entering a mountain cabin to avoid freezing to death

The right choices are life, safety, and health over property. Why? Because according to our values, life, safety, and health always trump property interests (ALI 1985, 12).

The MPC doesn't leave the ranking of evils to individuals; it charges legislatures or judges and juries at trial with the task. Once an individual has made the "right" choice, she's either acquitted, or it's considered a mitigating circumstance that can

lessen the punishment. Courts rarely uphold choice-of-evils defendants' claims. In our next case excerpt, *The People of the State of New York, Plaintiff v. John Gray et al., Defendants*, the Criminal Court of the City of New York ruled that a demonstration organized by Transportation Alternatives at the entrance to the Queensboro Bridge was a lesser evil than the harm to the environment and New York City's population caused by opening the bridge's bicycle and pedestrian lane to motor vehicle traffic during evening rush hours.

In our next case excerpt,* The People of the State of New York, Plaintiff v. John Gray et al., Defendants, *the Criminal Court of the City of New York ruled that a demonstration organized by Transportation Alternatives at the entrance to the Queensboro Bridge was a lesser evil than the harm to the environment and New York City's population caused by opening the bridge's bicycle and pedestrian lane to motor vehicle traffic during evening rush hours.



CASE Was the Demonstration Against Pollution the Lesser Evil?

The People of the State of New York, Plaintiff v. John Gray et al., Defendants
150 Misc.2d 852 (N.Y.City Crim.Ct. 1991)

HISTORY AND FACTS

John Gray and others were charged with disorderly conduct (Penal Law § 240.20 [5], [6]). These charges are a result of their participation in a demonstration organized by Transportation Alternatives on October 22, 1990, at the entrance to the south outer roadway of the Queensboro Bridge, in opposition to the opening to vehicular traffic of the one lane that had been reserved for bicycles and pedestrians during evening rush hours.

Pursuant to an agreement with the Manhattan District Attorney's office, defendants stipulated to the facts constituting the People's direct case. In substance, they admitted their presence on the south outer roadway of the Queensboro Bridge at approximately 4:00 p.m. on October 22, 1990. They also admitted that at about 4:15 p.m., a New York City police officer ordered them to move and that they did not comply with that order until they were placed under arrest, at which time they moved voluntarily and did not resist in any way. In return for this stipulation, the prosecution agreed not to offer any objections to the presentation of a necessity defense by these defendants.

LAURA SAFER-ESPINOZA, J.W.

OPINION

Defendants are all members of an organization called Transportation Alternatives, an organization devoted to the promotion of nonvehicular, ecologically sound means of transportation. Through their testimony and that of their expert witnesses, it was clear that these defendants' actions were motivated by the desire to prevent what they called the "asphyxiation of New York" by automobile-related pollution. Specifically, the harm they seek to combat is the release of ever higher levels of pollution from vehicular traffic, and the unnecessary death and serious illness of many New Yorkers as a result.

Defendants also articulated a motivation to put an end to an extremely hazardous situation that had resulted on the Queensboro Bridge south outer roadway subsequent to the implementation of the regulation opening of that roadway to vehicular traffic during the evening rush hour. Since many pedestrians and bicyclists continued to use that roadway, the defendants testified that they also acted to prevent serious injuries to those individuals who continued to use alternative forms of transportation on the bridge.

Certainly, neither of these harms could be said to have developed through any fault of these defendants.

Legislative Preemption

There is no issue of legislative preemption in this case. *In fact, in a departure from the usual situation in citizen intervention cases, it is clear that it is the defendants' point of view concerning air pollution and its accompanying dangers that has been confirmed and adopted by the Legislature.*

As testified to by the former Commissioner of Transportation, Ross Sandler, the federal Clean Air Act Amendments of 1970 (42 USC §§ 7401–7642, as amended) required the Environmental Protection Agency (EPA) to promulgate "clean air" standards. New York is not now, and has never been, in compliance with those

minimum standards set by the EPA. This noncompliance has been the cause of numerous citizen suits seeking enforcement of pollution level standards in New York City.

Broad legislative preferences such as that expressed by the Clean Air Act have often been used in the reverse situation by the courts to ban the necessity defense on grounds of legislative preemption. This is particularly true in a number of cases where courts have implied a legislative choice in favor of nuclear power and weaponry. Other courts have required that the Legislature have specifically weighed competing harms, including those foreseen by defendants, and made a value choice rejecting defendant's position.

Nor is this a case where the defendants are acting against what the courts have already recognized as a fundamental right, as in the abortion protests which have asserted a necessity defense. There is no corresponding fundamental right to contribute to life-threatening air pollution. (*People v Archer*, 143 Misc 2d 390 [Rochester City Ct 1988].) In *Archer*, the court submitted the necessity defense to the jury to be considered if they found second trimester abortions were being performed. The court failed to recognize the protections extended to such procedures under *Roe v Wade* (410 US 113 [1973]). Defendants in that case were convicted.

The Necessity Defense and Citizen Intervention

The necessity defense is fundamentally a balancing test to determine whether a criminal act was committed to prevent a greater harm. The common elements of the defense found in virtually all common law and statutory definitions include the following:

(1) the actor has acted to avoid a grave harm, not of his own making;

(2) there are not adequate legal means to avoid the harm; and

(3) the harm sought to be avoided is greater than that committed.

A number of jurisdictions, New York among them, have included two additional requirements—first, the harm must be imminent, and second, the action taken must be reasonably expected to avert the impending danger.

Burdens of Proof in Necessity Defense Cases under Penal Law § 35.05 (2)

Justification in New York, as defined in Penal Law §§ 35.05 through 35.30 is an ordinary and not an affirmative defense (Penal Law § 35.00). Thus, the People have the burden of disproving such a defense beyond a reasonable doubt. Penal Law § 35.05 (2) requires, however, that a defendant establish a prima facie case by producing evidence from which a reasonable juror could find that he has met each element of the defense.

Therefore, when seeking to establish a defense under Penal Law § 35.05 (2), a defendant bears the same initial burden as those presenting affirmative defenses—that of establishing a prima facie case (29 Am Jur 2d, Evidence, § 156 [1967]). If that burden is met, the People must then disprove the defense of necessity beyond a reasonable doubt. Unlike true affirmative defenses, defendants in cases under Penal Law § 35.05 (2) do not have the burden of establishing their defense by a preponderance of the evidence.

It is particularly important to clearly delineate and evaluate whether defendants have met their initial burden of production in trials involving the necessity defense, since if that question is resolved in a defendant's favor, the burden of proof then shifts dramatically, and the People must disprove the defense beyond a reasonable doubt. This is true whether the trier of fact is a jury or a Judge. As to the burden of production in affirmative defenses, it is uniformly held that a defendant is obliged to start matters off by putting in *some* evidence of his defense unless the prosecution does so in presenting its side (1 LaFave & Scott, Substantive Criminal Law § 1.8).

In light of the strong constitutional considerations in favor of allowing defendants to have their defenses submitted to the trier of fact, the discrepancy between the low standard of production which some courts have articulated in theory and the extraordinarily high standard ultimately imposed in many instances on civil disobedients who raise the necessity defense seems inappropriate.

The Reasonable Belief Standard

In *People v Goetz* (68 NY2d 96 [1986]), the New York Court of Appeals emphasized that the justification statute requires a determination of reasonableness that is both subjective and objective. The critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having defendant's background and experiences would conclude. The same basic standards should apply in cases where defendants assert the justification defense defined by Penal Law § 35.05 (2).

There is only one element of the necessity defense to which a standard more stringent than reasonable belief must be applied—that is the actor's choice of values, for which he is strictly liable. An actor is not justified, for example, in taking human life to save imperiled property. No matter how real the threat to property is, by making the wrong choice in placing the value of property over human life, the actor loses the defense. Thus, the choice of values requirement ensures that the defense cannot be used to challenge shared societal values.

The Choice of Evils Requirement

As stated earlier, defendants' value choice is the one area where they must be held strictly liable. A Judge must decide whether the actor's values are so antithetical to shared social values as to bar the defense as a matter of law. As part of this objective inquiry, the requirement that a Judge also determine whether or not the defendant's value choice has been preempted by the Legislature has sometimes been

read into the statute. New York provided that defendants must not be protesting only against the morality and advisability of the statute under which they are charged.

A reading of the cases in this area reveals that it is seldom the correctness of defendants' values which is at issue. Courts have generally recognized that the harms perceived by activists protesting nuclear weapons and power and United States domestic and foreign policy—nuclear holocaust, international law violations, torture, murder, the unnecessary deaths of United States citizens as a result of environmental hazards and disease—are far greater than those created by a trespass or disorderly conduct.

In this case, as well as in most necessity cases, it is clear that defendants chose the correct societal value. It is beyond question that both the death and illness of New Yorkers as a result of additional air pollution, and the danger to cyclists and pedestrians posed by vehicles on the south outer roadway, are far greater harms than that created by the violation of disorderly conduct.

The more difficult issue in many of the necessity defense cases has been whether the actors' perception of harm was reasonable. The court will now turn to a discussion of this requirement, and the additional requirement of Penal Law § 35.05, that the harm be imminent.

The Imminence of Grave Harm Requirement

In evaluating whether defendants' perceptions of the harm they sought to avoid in this case were reasonable, the court must decide whether they had a well-founded belief in imminent grave injury. Such determination is almost always a question for the trier of fact. Defendants in the instant case presented several witnesses, as well as submitting studies, to establish the existence of a grave and imminent harm. Defendants themselves testified that the DOT regulation, if obeyed, would prove to be a devastating disincentive to New Yorkers who use alternative or nonvehicular means of transportation between the Boroughs of Manhattan and Queens. The only road open to bicyclists and pedestrians is practically inaccessible to them during the hours most critical to their return home. In contrast to this disincentive to nonpolluting forms of transportation, another lane is open to vehicular traffic.

Defendants clearly articulated their belief that encouraging automobiles at a rush hour traffic "chokepoint" while discouraging walkers and cyclists produces a specific, grave harm that is not only imminent, but is occurring daily. This belief was supported by the testimony of expert witnesses and studies submitted into evidence. Former Commissioner of Transportation Sandler gave undisputed testimony that New York City *would have to reduce vehicular traffic in order to come into compliance with the minimum standards set by the Environmental Protection Agency for air pollution*. Indeed, recent litigation corroborates defendants' claim that New York's failure to comply with EPA standards is due, in substantial measure, to automobile-related pollution.

Additionally, Dr. Steven Markowitz of the Mount Sinai Department on Environmental and Occupational Diseases testified that air pollution in New York and elsewhere is a major cause of lung, respiratory tract and heart disease. *The EPA's 1989 assessment concluded that motor vehicles were the single largest contributor to cancer risks from exposure to air toxics. Motor vehicles, said the EPA, are responsible for 55% of the total cancer incidence from air contaminants, five times greater than from any other air pollution source.*

The above-cited DOT study also acknowledges that bicycle riding has a significant and untapped potential to reduce traffic congestion and its accompanying air pollution. It indicates that the numbers of people who would adopt this form of transportation if encouraged by simple safety measures *including bicycle lanes* on the part of New York City (almost 30% of those surveyed) is impressive. It states that the current level of bicycle ridership in New York City is indicative only of those individuals who are so dedicated to cycling that they are willing to utilize a transportation system that has been shaped for decades without provisions for bicycles.

Unlike many of the cases in this area, where the harm sought to be prevented was perceived as too far in the future to be found "imminent," the grave harm in this case is occurring every day. The additional pollution breathed by all New Yorkers (in a city that is already out of compliance with the minimal standards set by the EPA), as a result of the fact that more road space will be devoted to vehicles and its corollary that those hundreds of individuals who would otherwise bicycle or walk are discouraged from using nonpolluting forms of transportation is a concrete harm being suffered by the population at this moment.

In light of all the evidence of grave and imminent harm cited by these defendants, the court finds that it would be improper to hold as a matter of law that they had not met their burden of production on this element of the defense, i.e., that no reasonable juror could find that defendants had a reasonable belief that grave and imminent harm was occurring. The inquiry therefore becomes whether the People have disproved this element beyond a reasonable doubt.

This court rejects the contention that proof of the imminent death of New Yorkers as a result of high levels of air pollution or accidents on the south outer roadway is required before the finding of an emergency can be made to uphold this defense. The medical evidence connecting air pollution and disease—namely, cancer and heart disease—is too well established for such a position to be logical.

In recent cases, it has become evident that the lesser evil sometimes must occur well in advance of the greater harm. In *People v Harmon* (53 Mich App 482, 220 NW2d 212 [1974]), the defendants escaped from prison one evening after threat of assault, although there was no present or impending assault. The court ruled that imminency is "to be decided by the trier of fact taking into consideration all the surrounding circumstances, including defendant's opportunity and ability to avoid the feared harm" (*People v Harmon, supra*, at 484, at 214.) In this case, the threatened harm of increased deaths and illness through air pollution is a uniquely modern horror, very different from the fires, floods and

famines which triggered necessity situations in simpler days. However, the potential injury is just as great, if not greater.

Pursuant to the foregoing discussion, this court finds the prosecution has failed to disprove the element that defendants in this case had a reasonable belief in a grave and imminent harm constituting an emergency, beyond a reasonable doubt.

The No Legal Alternative Requirement

A key requirement of the necessity defense is that no reasonable legal option exists for averting the harm. Once again, the proper inquiry here is whether the defendant reasonably believed that there was no legal alternative to his actions. The defense does not legalize lawlessness; rather it permits courts to distinguish between necessary and unnecessary illegal acts in order to provide an essential safety valve to law enforcement in a democratic society.

Defendants in this case testified to a long history of attempts to prevent the harm they perceived. Although Transportation Alternatives is a group that is regularly consulted by the Department of Transportation and meets often with agency officials to propose measures to encourage walking, cycling and the use of mass transit, and to relieve traffic congestion with its accompanying pollution, they received no advance warning that the closing of the bicycle and pedestrian lane on the Queensboro Bridge was being considered.

The Causal Relationship Requirement

New York is among the jurisdictions that require a defendant's actions to be reasonably designed to actually prevent the threatened greater harm. As with the other elements of this defense, the test consistent with the purposes of this defense is one of reasonable belief. Defendants' initial burden is to offer sufficient evidence of a reasonable belief in a causal link between their behavior and ending the perceived harm. The New York statute and most common-law formulations use the term "necessary" rather than "sufficient." In the opinion of this court, a defendant's reasonable belief must be in the necessity of his action to avoid the injury. The law does not require certainty of success.

Defendants testified that they had participated in two short-term campaigns in the recent past which only became successful when civil disobedience was employed. One of these campaigns resulted in the defeat of Mayor Koch's attempt in 1987 to ban bicycles from Manhattan streets. The second involved their attempts during the 1980s to obtain access to a roadway along the river in New Jersey for cyclists and walkers. All efforts at letter writing and petitioning had been rebuffed, and it was only after members of Transportation Alternatives were arrested for acts of civil disobedience that a three-month trial period of access to the roadway for walkers and cyclists was instituted.

Pursuant to the foregoing opinion, this court finds that the People have not disproved the elements of the necessity defense in this case beyond a reasonable doubt. Defendants are therefore acquitted.

QUESTIONS

1. **Identify the lesser and the greater evil.**
2. **List the elements of the choice of evils defense discussed by the court.**
3. **Summarize the court's arguments that support the defendants' choice.**
4. **Assume you're the prosecutor. List the arguments against the choice-of-evils defense.**
5. **Assume you're the defense attorney. List the arguments in favor of the choice-of-evils defense.**
6. **In your opinion, should there be a choice-of-evils defense? Back up your answer with specific details from the case, and from the text.**

EXPLORING FURTHER

Choice of Evils

1. Was Violating the Marijuana Law a Lesser Evil?

State v. Ownbey, 996 P.2d 510 (Ore.App. 2000)

DEITS, C.J.

FACTS Jack Ownbey is a veteran of the Vietnam War. He has been diagnosed with post-traumatic stress disorder (PTSD). In his defense to the charges against him, Ownbey intended to show that "his actions in growing marijuana and possessing marijuana were as a result of medical necessity or choice of evils."

ORS 161.200, codifies that defense in Oregon. It provides:

> . . . (2) Unless inconsistent with . . . some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> (a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> (b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> (3) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.

Was Ownbey entitled to the defense of necessity?

DECISION No, according to the Oregon Court of Appeals:

> Ownbey fails to recognize that the defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If the legislature has not made such a value judgment, the defense would be available. However, when, as here, the legislature has already balanced the competing values that would be presented in a choice-of-evils defense and made a choice, the court is precluded from reassessing that judgment.

2. Was Speeding the Lesser Evil?

People v. Dover, 790 P.2d 834 (Colo. 1990)

FACTS The prosecution proved beyond a reasonable doubt by the use of radar readings that James Dover was driving 80 miles per hour in a 55 mile-per-hour zone. However, the court also found that the defendant, who is a lawyer, was not guilty on the grounds that his speeding violation was justified because he was late for a court hearing in Denver as a result of a late hearing in Summit County, Colorado.

A Colorado statute, § 42-4-1001(8)(a) provides:

> The conduct of a driver of a vehicle which would otherwise constitute a violation of this section is justifiable and not unlawful when: It is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of said driver and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the consequences sought to be prevented by this section.

Was Dover justified in speeding because of necessity?

DECISION No, said the Colorado Supreme Court:

> In this case, the defendant did not meet the foundational requirements of § 42-4-1001(8)(a). He merely testified that he was driving to Denver for a "court matter" and that he was late because of the length of a hearing in Summit County. No other evidence as to the existence of emergency as a justification for speeding was presented. The defendant did not present evidence as to the type or extent of the injury that he would suffer if he did not violate § 42-4-1001(1). He also failed to establish that he did not cause the situation or that his injuries would outweigh the consequences of his conduct.

3. Was Burglary the Lesser Evil?

State v. Celli, 263 N.W.2d 145 (S.D. 1978)

FACTS On a cold winter day, William Celli and his friend, Glynis Brooks, left Deadwood, South Dakota, hoping to hitchhike to Newcastle, Wyoming, to look for work. The weather turned colder, they were afraid of frostbite, and there was no place of business open for them to get warm. Their feet were so stiff from the cold that it was difficult for them to walk.

They broke the lock on the front door, and entered the only structure around, a cabin. Celli immediately crawled into a bed to warm up, and Brooks tried to light a fire in the fireplace. They rummaged through drawers to look for matches, which they finally located, and started a fire. Finally, Celli came out of the bedroom, took off his wet moccasins, socks, and coat; placed them near the fire; and sat down to warm himself. After warming up somewhat they checked the kitchen for edible food. That morning, they had shared a can of beans but had not eaten since. All they found was dry macaroni, which they could not cook because there was no water.

A neighbor noticed the smoke from the fireplace and called the police. When the police entered the cabin, Celli and Brooks were warming themselves in front of the fireplace. The police searched them but turned up nothing belonging to the cabin owners.

Did Celli and his friend choose the lesser of two evils?

DECISION The trial court convicted Celli and Brooks of fourth-degree burglary. The appellate court reversed on other grounds, so, unfortunately for us, the court never got to the issue of the defense of necessity.

Consent

LO 12

Now we turn to a justification that has nothing to do with necessity. At the heart of the **defense of consent** is the high value placed on individual autonomy in a free society. If mentally competent adults want to be crime victims, so the argument for the justification of consent goes, no paternalistic government should get in their way.

Consent may make sense in the larger context of individual freedom and responsibility, but the criminal law is hostile to consent as a justification for committing crimes.

For all the noise about choice, you know already that except for the voluntary act requirement (discussed in Chapter 3), there are many examples of crimes where choice is either a total fiction or very limited. We've seen some major examples in the chapters so far. There's the rule of lenity discussed in Chapter 1; the void-for-vagueness doctrine discussed in Chapter 2; and the mental state of negligence and the absence of mental fault in strict liability discussed in Chapter 4.

Individuals can take their own lives and inflict injuries on themselves, but in most states they can't authorize others to kill them or beat them. Let's look at how confined choice is in the defense of consent and examine some of the reasons. Here's an example from the Alabama Criminal Code:

Alabama Criminal Code (1977) Section 13a-2-7

(a) In general. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives a required element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(b) Consent to bodily harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense only if:

(1) The bodily harm consented to or threatened by the conduct consented to is not serious; or

(2) The conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

(c) Ineffective consent. Unless otherwise provided by this Criminal Code or by the law defining the offense, assent does not constitute consent if:

(1) It is given by a person who is legally incompetent to authorize the conduct; or

(2) It is given by a person who by reason of immaturity, mental disease or defect, or intoxication is manifestly unable and known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct; or

(3) It is given by a person whose consent is sought to be prevented by the law defining the offense; or

(4) It is induced by force, duress or deception.

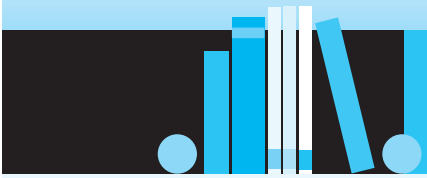
In most states, the law recognizes only four situations where consent justifies otherwise criminal conduct:

1. No serious injury results from the consensual crime.
2. The injury happens during a sporting event.
3. The conduct benefits the consenting person, such as when a patient consents to surgery.
4. The consent is to sexual conduct. (Fletcher 1978, 770)

Fitting into one of these four exceptions is necessary, but it's not enough to entitle defendants to the defense. They also have to prove that the consent was voluntary, knowing, and authorized. **Voluntary consent** means consent was the product of free will, not of force, threat of force, promise, or trickery. Forgiveness after the commission of a crime

doesn't qualify as voluntary consent. **Knowing consent** means the person consenting understands what she's consenting to; she's not too young or insane to understand. Authorized consent means the person consenting has the authority to give consent; I can't give consent for someone else whom I'm not legally responsible for. The court dealt with the sporting event exception in *State v. Shelley* (1997).

In* State v. Shelley*, the court dealt with the sporting event exception in the defense of consent.



CASE Did He Consent to the Attack?

State v. Shelley
929 P.2d 489 (Wash.App. 1997)

HISTORY

Jason Shelley was convicted in the Superior Court, King County, of second-degree assault, arising out of an incident in which Shelley intentionally punched another basketball player during a game. Shelley appealed. The Court of Appeals affirmed the conviction.

GROSSE, J.

FACTS

On March 31, 1993, Jason Shelley and Mario Gonzalez played "pickup" basketball on opposing teams at the University of Washington Intramural Activities Building (the IMA). Pickup games are not refereed by an official; rather, the players take responsibility for calling their own fouls.

During the course of three games, Gonzalez fouled Shelley several times. Gonzalez had a reputation for playing overly aggressive defense at the IMA. Toward the end of the evening, after trying to hit the ball away from Shelley, he scratched Shelley's face and drew blood. After getting scratched, Shelley briefly left the game and then returned.

Shelley and Gonzalez have differing versions of what occurred after Shelley returned to the game. According to Gonzalez, while he was waiting for play in the game to return to Gonzalez's side of the court, Shelley suddenly hit him. Gonzalez did not see Shelley punch him. According to Shelley's version of events, when Shelley rejoined the game, he was running down the court and he saw Gonzalez make "a move towards me as if he was maybe going to prevent me from getting the ball." The move was with his hand up "across my vision." Angry, he "just reacted" and swung. He said he hit him because he was afraid of being hurt, like the previous scratch. He testified that Gonzalez continually beat him up during the game by fouling him hard.

A week after the incident, a school police detective interviewed Shelley and prepared a statement for Shelley to sign based on the interview. Shelley reported to the police that Gonzalez had been "continually slapping and scratching him" during the game. Shelley "had been getting mad" at Gonzalez, and the scratch on Shelley's face was the "final straw."

As the two were running down the court side by side, "I swung my right hand around and hit him with my fist on the right side of his face." Shelley asserted that he also told the detective that Gonzalez waved a hand at him just before Shelley threw the punch and that he told the detective that he was afraid of being injured.

Gonzalez required emergency surgery to repair his jaw. Broken in three places, it was wired shut for six weeks. His treating physician believed that a "significant" blow caused the damage.

During the course of the trial, defense counsel told the court he intended to propose a jury instruction that: "A person legally consents to conduct that causes or threatens bodily harm if the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful, athletic contest or competitive sport."

Although the trial court agreed that there were risks involved in sports, it stated that "the risk of being intentionally punched by another player is one that I don't think we ever do assume." The court noted, "In basketball you consent to a certain amount of rough contact. If they were both going for a rebound and Mr. Shelley's elbow or even his fist hit Mr. Gonzalez as they were both jumping for the rebound and Mr. Gonzalez's jaw was fractured in exactly the same way then you would have an issue."

Reasoning that "our laws are intended to uphold the public peace and regulate behavior of individuals," the court ruled "that as a matter of law, consent cannot be a defense to an assault." The court indicated that Shelley

could not claim consent because his conduct "exceeded" what is considered within the rules of that particular sport:

> Consent is a contact that is contemplated within the rules of the game and that is incidental to the furtherance of the goals of that particular game. If you can show me any rule book for basketball at any level that says an intentional punch to the face in some way is a part of the game, then I would take another look at your argument. I don't believe any such rule book exists.

Later, Shelley proposed jury instructions on the subject of consent:

> An act is not an assault, if it is done with the consent of the person alleged to be assaulted. It is a defense to a charge of second degree assault occurring in the course of an athletic contest if the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

The trial court rejected these, and Shelley excerpted. The trial court did instruct the jury about self-defense.

OPINION

First, we hold that consent is a defense to an assault occurring during an athletic contest. This is consistent with the law of assault as it has developed in Washington. A person is guilty of second-degree assault if he or she "intentionally assaults another and thereby recklessly inflicts substantial bodily harm."

One common law definition of assault recognized in Washington is "an unlawful touching with criminal intent." At the common law, a touching is unlawful when the person touched did not give consent to it, and it was either harmful or offensive. As our Supreme Court stated in *State v. Simmons*, "Where there is consent, there is no assault." The State argues that because Simmons was a sexual assault case, the defense of consent should be limited to that realm. We decline to apply the defense so narrowly.

Logically, consent must be an issue in sporting events because a person participates in a game knowing that it will involve potentially offensive contact and with this consent the "touchings" involved are not "unlawful." The rationale that courts offer in limiting consent as a defense is that society has an interest in punishing assaults as breaches of the public peace and order, so that an individual cannot consent to a wrong that is committed against the public peace.

Urging us to reject the defense of consent because an assault violates the public peace, the State argues that this principle precludes Shelley from being entitled to argue the consent defense on the facts of his case. In making this argument, the State ignores the factual contexts that dictated the results in the cases it cites in support. When faced with the question of whether to accept a school child's consent to hazing or consent to a fight, *People v. Lenti*, 253 N.Y.S.2d 9 (1964), or a gang member's consent to a beating, *Helton v. State*, 624 N.E.2d 499, 514 (Ind. Ct.App.1993), courts have declined to apply the defense. Obviously, these cases present "touchings" factually distinct from "touchings" occurring in athletic competitions.

If consent cannot be a defense to assault, then most athletic contests would need to be banned because many involve "invasions of one's physical integrity." Because society has chosen to foster sports competitions, players necessarily must be able to consent to physical contact and other players must be able to rely on that consent when playing the game. This is the view adopted by the drafters of the Model Penal Code:

> There are, however, situations in which consent to bodily injury should be recognized as a defense to crime.
>
> There is the obvious case of participation in an athletic contest or competitive sport, where the nature of the enterprise often involves risk of serious injury. Here, the social judgment that permits the contest to flourish necessarily involves the companion judgment that reasonably foreseeable hazards can be consented to by virtue of participation.

The more difficult question is the proper standard by which to judge whether a person consented to the particular conduct at issue. The State argues that when the conduct in question is not within the rules of a given sport, a victim cannot be deemed to have consented to this act. The trial court apparently agreed with this approach.

Although we recognize that there is authority supporting this approach, we reject a reliance on the rules of the games as too limiting. Rollin M. Perkins in Criminal Law explains:

> The test is not necessarily whether the blow exceeds the conduct allowed by the rules of the game. Certain excesses and inconveniences are to be expected beyond the formal rules of the game. It may be ordinary and expected conduct for minor assaults to occur. However, intentional excesses beyond those reasonably contemplated in the sport are not justified.

Instead, we adopt the approach of the Model Penal Code which provides:

> . . . (4) Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
>
> (c) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.

The State argues the law does not allow "the victim to 'consent' to a broken jaw simply by participating in an unrefereed, informal basketball game." This argument presupposes that the harm suffered dictates whether the defense is available or not. This is not the correct inquiry.

The correct inquiry is whether the conduct of defendant constituted foreseeable behavior in the play of the game.

Additionally, the injury must have occurred as a byproduct of the game itself.

In *State v. Floyd*, a fight broke out during a basketball game and the defendant, who was on the sidelines, punched and severely injured several opposing team members. The defense did not apply because the statute "contemplated a person who commits acts during the course of play." There is a "continuum, or sliding scale, grounded in the circumstances under which voluntary participants engage in sport which governs the type of incidents in which an individual volunteers (i.e., consents) to participate."

The New York courts provide another example. In a football game, while tackling the defendant, the victim hit the defendant. After the play was over and all of the players got off the defendant, the defendant punched the victim in the eye. . . . Initially it may be assumed that the very first punch thrown in the course of the tackle was consented to by defendant. The act of tackling an opponent in the course of a football game may often involve "contact" that could easily be interpreted to be a "punch." Defendant's response after the pileup to complainant's initial act of "aggression" cannot be mistaken. This was not a consented to act. *People v. Freer*, 381 N.Y.S.2d 976, 978 (1976).

The State may argue that the defendant's conduct exceeded behavior foreseeable in the game. Although in "all sports players consent to many risks, hazards and blows," there is "a limit to the magnitude and dangerousness of a blow to which another is deemed to consent." This limit, like the foreseeability of the risks, is determined by presenting evidence to the jury about the nature of the game, the participants' expectations, the location where the game has been played, as well as the rules of the game.

Here, taking Shelley's version of the events as true, the magnitude and dangerousness of Shelley's actions were beyond the limit. There is no question that Shelley lashed out at Gonzalez with sufficient force to land a substantial blow to the jaw, and there is no question but that Shelley intended to hit Gonzalez. There is nothing in the game of basketball, or even rugby or hockey, that would permit consent as a defense to such conduct. Shelley admitted to an assault and was not precluded from arguing that the assault justified self-defense; but justification and consent are not the same inquiry.

We AFFIRM.

QUESTIONS

1. **According to the Court, why can participants in a sporting event consent to conduct that would otherwise be a crime?**
2. **Why should they be allowed to consent to such conduct when in other situations, such as those enumerated in the Exploring Further cases that follow, they can't consent?**
3. **Should individuals be allowed to knowingly and voluntarily consent to the commission of crimes against themselves? Why or why not?**
4. **Why was Shelley not allowed the defense of consent in this case?**
5. **Do you agree with the Court's decision? Relying on the relevant facts in the case, defend your answer.**

EXPLORING FURTHER

Consent

1. Is Shooting BB Guns a Sport?

State v. Hiott, 987 P.2d 135 (Wash.App. 1999)

FACTS Richard Hiott and his friend Jose were playing a game of shooting at each other with BB guns. During the game, Jose was hit in the eye and lost his eye as a result. Richard was charged with third-degree assault. His defense was consent. Was he entitled to the defense?

DECISION No, said the Washington Court of Appeals:

> Hiott argues that the game they were playing "is within the limits of games for which society permits consent." Hiott compares the boys' shooting of BB guns at each other to dodgeball, football, rugby, hockey, boxing, wrestling, "ultimate fighting," fencing, and "paintball." We disagree.
>
> The games Hiott uses for comparison, although capable of producing injuries, have been generally accepted by society as lawful athletic contests, competitive sports, or concerted activities not forbidden by law. And these games carry with them generally accepted rules, at least some of which are intended to prevent or minimize injuries. In addition, such games commonly prescribe the use of protective devices or clothing to prevent injuries.
>
> Shooting BB guns at each other is not a generally accepted game or athletic contest; the activity has no generally accepted rules; and the activity is not characterized by the common use of protective devices or clothing.
>
> Moreover, consent is not a valid defense if the activity consented to is against public policy. Thus, a child cannot consent to hazing, a gang member cannot consent to an initiation beating, and an individual cannot consent to being shot with a pistol. Assaults are breaches of the public peace. And we consider shooting at another person with a BB gun a breach of the public peace and, therefore, against public policy.

2. Can She Consent to Being Assaulted?

State v. Brown, 364 A.2d 27 (N.J. 1976)

FACTS Mrs. Brown was an alcoholic. On the day of the alleged crime she had been drinking, apparently to her husband Reginald Brown's displeasure. Acting according to the terms of an agreement between the defendant Reginald Brown and his wife, he punished her by beating her severely with his hands and other objects.

Brown was charged with atrocious assault and battery. He argued he wasn't guilty of atrocious assault and battery because he and Mrs. Brown, the victim, had an understanding to the effect that if she consumed any alcoholic beverages (and/or became intoxicated), he would punish her by physically assaulting her. The trial court refused the defense of consent.

Was Mr. Brown justified because of Mrs. Brown's consent?

DECISION No, said the New Jersey Appellate Court:

> The laws are simply and unequivocally clear that the defense of consent cannot be available to a defendant charged with any type of physical assault that causes appreciable injury. If the law were otherwise, it would not be conducive to a peaceful, orderly and healthy society.
>
> This court concludes that, as a matter of law, no one has the right to beat another even though that person may ask for it. Assault and battery cannot be consented to by a victim, for the State makes it unlawful and is not a party to any such agreement between the victim and perpetrator. 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.
>
> Thus, for the reasons given, the State has an interest in protecting those persons who invite, consent to and permit others to assault and batter them. Not to enforce these laws which are geared to protect such people would seriously threaten the dignity, peace, health and security of our society.

3. Can He Consent to Being Shot?

State v. Fransua, 510 P.2d 106 (N.Mex.App. 1973)

FACTS Daniel Fransua and the victim were in a bar in Albuquerque. Fransua had been drinking heavily that day and the previous day. Sometime around 3:00 p.m., after an argument, Fransua told the victim he'd shoot him if he had a gun. The victim got up, walked out of the bar, went to his car, took out a loaded pistol, and went back in the bar. He came up to Fransua, laid the pistol on the bar, and said, "There's the gun. If you want to shoot me, go ahead." Fransua picked up the pistol, put the barrel next to the victim's head, and pulled the trigger, wounding him seriously.

Was the victim's consent a justification that meant Fransua wasn't guilty of aggravated battery?

DECISION No, said the New Mexico Court of Appeals:

> It is generally conceded that a state enacts criminal statutes making certain violent acts crimes for at least two reasons: One reason is to protect the persons of its citizens; the second, however, is to prevent a breach of the public peace. While we entertain little sympathy for either the victim's absurd actions or the defendant's equally unjustified act of pulling the trigger, we will not permit the defense of consent to be raised in such cases.
>
> Whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in preventing and prohibiting acts such as these. We hold that consent is not a defense to the crime of aggravated battery, irrespective of whether the victim invites the act and consents to the battery.

SUMMARY

LO 2, LO 3
- Defendants who plead justification admit they're responsible for committing crimes but contend they're right under the circumstances. If a defendant pleads excuse she admits she's wrong but contends that, under the circumstances, she's not responsible.

LO 4
- Most justifications and excuses are affirmative defenses in which defendants have to start matters by presenting some evidence in support of their arguments.

LO 4
- Most defenses are perfect defenses and the defendants are acquitted. There's one major exception. Defendants who successfully plead the excuse of insanity don't "walk." Evidence that doesn't amount to a perfect defense might amount to an imperfect defense; that is, defendants are guilty of lesser offenses.

LO 5
- When you use force to protect yourself, your home or property, or the people you care about, you're "taking the law into your own hands." Sometimes, the government isn't, or can't be, there to protect you when you need it. So necessity is the heart of the defense of self-defense.

LO 6
- To justify the use of deadly force in self-defense the defender has to honestly and reasonably believe that she's faced with the choice of "kill or be killed, right now."

LO 7
- The English common law put the burden on the defendants to prove they "retreated to the wall" before acting in self-defense. The American majority "stand-your-ground rule" was based on the idea that a "man" shouldn't have to flee from attack because he'd done nothing wrong to provoke or deserve the attack and the need to protect the family and country, and could stand his ground and kill to "defend himself without retreating from any place he had a right to be."

LO 9
- States that require the minority retreat rule created an important exception when it comes to the home to avoid using deadly force. This exception, known as the castle exception, allows the defendant to stand his ground and use deadly force to fend off an unprovoked attack.

LO 1, LO 7
LO 8, LO 9
LO 10
- Recently under the "New Castle Doctrine" there has been an explosion of new statutes that vastly expand ordinary people's power to defend themselves in their homes and in public places, or anywhere else they have a legal right to be.

LO 11
- At the heart of the choice-of-evils defense is the necessity to prevent imminent danger as is true of most other defenses. The difference is, however, this defense justifies choosing to commit a lesser crime to avoid the harm of a greater crime.

LO 12
- If mentally competent adults want to be crime victims, the justification of consent says that no paternalistic government should get in their way. The consent has to be voluntary and knowing.

KEY TERMS

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justification defenses, p. 136
excuse defenses, p. 136
affirmative defenses, p. 136
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