8 JUSTIFICATIONS

Did the defendant have the right to kill her husband in self-defense?

The trial was replete with testimony of forced prostitution, beatings, and threats on the defendant's life. The defendant testified that she believed the decedent would kill her, and the evidence showed that on the occasions when she had made an effort to get away from Norman, he had come after her and beat her. Indeed, within twenty-four hours prior to the shooting, defendant had attempted to escape by trying to take her own life and throughout the day on 12 June 1985 had been subjected to beatings and other physical abuse, verbal abuse, and threats on her life up to the time when decedent went to sleep. Experts testified that in their opinion, defendant believed killing the victim was necessary to avoid being killed. . . .

Learning Objectives

1. Understand the presumption of innocence.
2. Distinguish between justifications and excuses.
3. Differentiate between affirmative defenses and mitigating circumstances.
4. List and explain the elements of self-defense.
5. State the two tests for the defense of others.
6. Know the law on defense of the home.
7. Explain the fleeing felon rule.
8. Distinguish between the American and the European rules for resistance to an unlawful arrest.
9. Summarize the elements of the necessity defense.
10. List the three situations in which the law recognizes consent as a defense to criminal conduct.

INTRODUCTION

The Prosecutor's Burden

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

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

A defendant is to be acquitted if the prosecution fails to establish each element of the offense beyond a reasonable doubt. Judges have been reluctant to reduce the beyond a reasonable doubt standard to a mathematical formula and stress that a "high level of probability"[2] is required and that jurors must reach a "state of near certitude" of guilt.[3] The classic definition of reasonable doubt provides that the evidence "leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge."[4]

A defendant is entitled to file a motion for judgment of acquittal at the close of the prosecution's case or prior to the submission of the case to the jury. This motion will be granted if the judge determines that the evidence is unable to support any verdict other than acquittal, viewing the evidence as favorably as possible for the prosecution. The judge, in the alternative, may adhere to the standard procedure of submitting the case to the jury following the close of the evidence and instructing the jurors to acquit if they have a reasonable doubt concerning one or more elements of the offense.[5]

Affirmative Defenses

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

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

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

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

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

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

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

Scholars continue to point to differences between categorizing an act as justified as opposed to excused, but these have little practical significance for most defendants.[10] You nevertheless

should reflect on whether you consider the acts discussed in this chapter as legally justifiable.[11] The recognition of otherwise criminal acts as justifiable constitutes a morally significant statement concerning our social values.

There are various theories for the defense of justification, none of which fully account for each and every justification defense.[12]

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

A defendant who establishes a *perfect defense* is able to satisfy each and every element of a justification defense and is acquitted. An *imperfect defense* arises in those instances in which the requirements of the defense are not fully satisfied. For instance, a defendant may use excessive force in self-defense or possess a genuine, but unreasonable, belief in the need to act in self-defense. A defendant's liability in these cases is typically reduced, for example, in the case of a homicide to manslaughter and to a lower level of guilt in the case of other offenses.[13]

MITIGATING CIRCUMSTANCES

Evidence that is not relevant for justification or excuse may still be relied on during the sentencing stage as a mitigating circumstance that may reduce a defendant's punishment. The jury in death penalty cases is specifically required to consider mitigating as well as aggravating circumstances in determining whether the defendant should be subject to capital punishment or receive a life sentence. An example is *State v. Moore,* in which a nineteen-year-old defendant was convicted of murder during an aggravated robbery and kidnapping. The Ohio Supreme Court affirmed the defendant's death sentence and ruled that the defendant's youth, lack of criminal record, remorse, and religious conversion only modestly mitigated the offense and were clearly outweighed by the aggravating circumstances of the offense. The Ohio Supreme Court also ruled that the defendant's alcohol and drug addiction were not mitigating.[14]

A defendant's *"good motive"* in committing a mercy killing of a severely sick family member may not be considered in determining guilt or innocence and is only considered at sentencing. The law is concerned with *what* crime an individual committed, not *why* he or she committed the crime. During the Vietnam conflict, the Fourth Circuit Court of Appeals ruled that a defendant's **good motive defense** of opposition to what he viewed as a morally reprehensible war could not justify his destruction of draft records. The court of appeals explained that absolving the defendant from guilt based on his "moral certainty" that the war in Vietnam is wrong also would require the acquittal of individuals who might commit breaches of the law to demonstrate their sincere belief in the war. The appellate court stressed that in both cases the defendants "must answer for their acts" to avoid a breakdown in law and order.[15]

At times, lawyers will attempt to indirectly introduce motive by arguing for **jury nullification**. The jury historically has possessed the authority to disregard the law and to acquit sympathetic defendants. This power is based on the jury's historical role as a check on overzealous prosecutors who bring charges that are contrary to prevailing social values. Examples include the acquittal of newspaper publisher Peter Zenger by an eighteenth-century American colonial jury and the acquittal of individuals who assisted fugitive slaves during the nineteenth century. Appellate courts, however, have consistently ruled that trial judges are not obligated to instruct jurors that they possess the power of nullification and that jurors are to be instructed that they are required

to strictly apply the law in determining a defendant's guilt. The District of Columbia Circuit Court of Appeals observed that "what is tolerable or even desirable as an informal, self-initiated exception, harbors grave dangers to the system if it is opened to expansion and intensification through incorporation in the judge's instructions." Do you agree?[16]

SELF-DEFENSE

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

For a deeper look at this topic, visit the study site.

Self-defense is the most obvious exception to this rule and is recognized as a defense in all fifty states. Why does the law concede that an individual may use physical force in self-defense? One federal court judge noted the practical consideration that absent this defense, the innocent victim of a violent attack would be placed in the unacceptable position of choosing between "almost certain death" at the hands of his or her attacker or a "trial and conviction of murder later." More fundamentally, eighteenth-century English jurist William Blackstone wrote that it was "lawful" for an individual who is attacked to "repel force by force." According to Blackstone, this was a recognition of the natural impulse and right of individuals to defend themselves. A failure to recognize this right would inevitably lead to a disregard of the law.[17]

The Central Components of Self-Defense

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

- *Reasonable Belief.* An individual must possess a reasonable belief that force is required to defend himself or herself. In other words, the individual must believe and a reasonable person must believe that force is required in self-defense.
- *Necessity.* The defender must reasonably believe that force is required to prevent the imminent and unlawful infliction of death or serious bodily harm.
- *Proportionality.* The force employed must not be excessive or more than is required under the circumstances.
- *Retreat.* A defendant may not resort to deadly force if he or she can safely **retreat**. This generally is not required when the attack occurs in the home or workplace, or if the attacker uses deadly force.
- *Aggressor.* An **aggressor**, or individual who unlawfully initiates force, generally is not entitled to self-defense. An aggressor may claim self-defense only in those instances that an aggressor who is not employing deadly force is himself or herself confronted by deadly force. Some courts require that under these circumstances, the aggressor withdraws from the conflict if at all possible before enjoying the right of self-defense. There are courts willing to recognize that even an aggressor who employs deadly force may regain the right of self-defense by withdrawing following the initial attack. The other party then assumes the role of the aggressor.
- *Mistake.* An individual who is mistaken concerning the necessity for self-defense may rely on the defense so long as his or her belief is reasonable.
- *Imperfect Self-Defense.* An individual who honestly, but unreasonably, believes that he or she confronts a situation calling for self-defense and intentionally kills is held liable in many states for an intentional killing. Other states, however, follow the doctrine of **imperfect self-defense**. This provides that although the defendant may not be acquitted, fairness dictates that he or she should be held liable only for the less serious crime of manslaughter.

The next case in this chapter, *State v. Marshall,* provides a review of the basic principles and application of the law of self-defense and illustrates the core components and challenges of self-defense.

Model Penal Code

Section 3.04. Use of Force in Self-Protection

(1) [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.

(a) . . .

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take. . . .

Analysis

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

The Legal Equation

Self-defense = Reasonable belief
+ immediately necessary
+ to employ proportionate force
+ to protect oneself against unlawful force.

Did the defendant confront an imminent attack?

State v. Marshall, *179 S.E. 427 (N.C. 1935). Opinion by: Stacy, C.J.*

Facts

The homicide occurred in the defendant's filling station. The deceased had been drinking, and, with imbecilic courtesy, undertook to engage the defendant's wife in a whispered conversation. This was repulsed and the deceased ordered to leave the building. The defendant testified: "I ordered him out two or three times; he would not leave; and the next thing he said you G—d—s—o—b—and b—; pulled off his hat and slammed it on the counter with his right hand and said you haven't got the guts to shoot me, and that he would die like a man; and when he reached to pick up the hammer in the other hand,

I fired. . . . I fired because I thought he was going to kill me with the hammer, or hit me with the hammer and kill me, maybe. He cursed me; I got the pistol and ordered him out, . . . I was scared of the man. No, I was not mad. . . . When I shot him there was the width of the counter between us. We were between 2 1/2 and 3 1/2 feet apart. . . . I did not shoot to kill. . . . I saw him when he grabbed the hammer. I did not say he picked it up, but he grabbed it; he raised the hammer up when he fell back, but he did not have it in a striking position; he was reaching and he grabbed the hammer. I do not say he raised it up in a striking position before I shot. . . . I say he did not draw the hammer back to strike." Defendant's wife testified: "When Rex shot I saw him (deceased) grab for the hammer."

Issue

It appears, therefore, from the defendant's own testimony that he was not in imminent danger of death or great bodily harm when he shot the deceased; nor did he apprehend that he was in such danger. "I did not shoot to kill" is his statement, and it appears from the record that the deceased did not reach for the hammer until after he was shot. The clear inference is that the defendant used excessive force.

Reasoning

The right to kill in self-defense or in defense of one's family or habitation rests upon necessity, real or apparent . . . [O]ne may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. . . . [O]ne may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. . . . [T]he jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted. It is also established by the decisions that in the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be employed, the party charged will be guilty of manslaughter, at least. . . .

Holding

The defendant's conviction for manslaughter is affirmed.

Questions for Discussion

1. Was Marshall motivated by self-defense or by a desire to punish the deceased? Did Marshall have a reasonable basis for believing that the deceased planned to assault him? At what point would the defendant be justified in using his firearm? Should he wait until the trespasser was clearly ready to strike?
2. What force was Marshall justified in using under the circumstances?
3. Marshall was considered to have engaged in imperfect self-defense and was convicted of manslaughter. Explain the reasoning behind the verdict.

You Decide

8.1 Defendant Roberta Shaffer was separated from her husband and lived with her two children. Her boyfriend, to whom she was engaged, had lived in the house for roughly two years. He had beaten Shaffer on several occasions, and when she asked him to move out, he threatened to kill Shaffer and her children. She claimed that she loved her boyfriend and had urged him to seek psychiatric assistance. Shaffer and her boyfriend argued at breakfast one morning and he allegedly angrily responded that "I'll take care of you right now." The defendant threw a cup of coffee at him and ran to the basement where her children were playing. Shaffer's boyfriend allegedly opened the door at the top of the basement stairs and proclaimed that "If you don't come up these stairs, I'll come down and kill you and the kids." She started to telephone the police and hung up when her boyfriend said that he would leave the house. He soon thereafter reappeared at the top of the stairs, and the defendant, who was fairly experienced in the use of firearms, removed a .22-caliber rifle from the gun rack and loaded the gun. Her boyfriend descended two or three stairs when the defendant shot and killed him with a single shot. Five minutes elapsed from the time she fled to the basement to the firing of the fatal shot. Was this an act of justified self-defense in response to imminent threat? Did Shaffer employ proportionate force? Was this imperfect self-defense? Was Shaffer required to retreat inside her own home? See *Commonwealth v. Shaffer,* 326 N.E.2d 880 (Mass. 1975).

You can find the answer at www.sagepub.com/lippmanccl3e.

Reasonable Belief

The common law and most statutes and modern decisions require that an individual who relies on self-defense must act with a reasonable belief in the imminence of serious bodily harm or death. The Utah statute on self-defense (Utah Code Ann. § 76-2-402) specifies that a person is justified in threatening or using force against another in those instances in which he or she "reasonably believes that force is necessary . . . to prevent death or serious bodily injury." . . . The reasonableness test has two prongs:

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

An individual who acts with an honest and reasonable, but mistaken, belief that he or she is subject to an armed attack is entitled to the justification of self-defense. The classic example is the individual who kills an assailant who is about to stab him or her with a knife, a knife that later is revealed to be a realistic-looking rubber replica. As noted by Supreme Court Justice Oliver Wendell Holmes, Jr., "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[18] Absent a reasonableness requirement, it is feared that individuals might act on the basis of suspicion or prejudice or intentionally kill or maim and then later claim self-defense.

The Model Penal Code adopts a subjective approach and only requires that a defendant actually believe in the necessity of self-defense. The subjective approach has been adopted by very few courts. An interesting justification for this approach was articulated by the Colorado Supreme Court, which contended that the reasonable person standard was "misleading and confusing." The right to self-defense, according to the Colorado court, is a "natural right and is based on the natural law of self-preservation. Being so, it is resorted to instinctively in the animal kingdom by those creatures not endowed with intellect and reason, so it is not based on the 'reasonable man' concept."[19]

A number of courts are moving to a limited extent in the direction of the Model Penal Code by providing that a defendant acting in an honest, but unreasonable belief, is entitled to claim *imperfect self-defense* and should be convicted of voluntary manslaughter rather than intentional murder.[20] In *Harshaw v. State,* the defendant and deceased were arguing and the deceased threatened to retrieve his gun. They both retreated to their automobiles and the defendant grabbed his shotgun in time to shoot the deceased as he reached inside his automobile. The deceased was later found to have been unarmed. The Arkansas Supreme Court ruled that the judge should have instructed the jury on manslaughter because the jurors could reasonably have found that Harshaw acted "hastily and without due care" and that he merited a conviction for manslaughter rather than murder.[21]

The New York Court of Appeals wrestled with the meaning of "reasonableness" under the New York statute in the famous "subway murder trial" of Bernard Goetz. Did the law require a subjective standard in which the existence of the threat was "reasonable to the defendant" or an objective standard in which the existence of the threat was "reasonable to a reasonable person"? What is the best test in terms of the interests of society?

Did Goetz reasonably believe that he was threatened with death or great bodily harm?

People v. Goetz, *497 N.E.2d 41 (N.Y. 1986). Opinion by: Wachtler, C.J.*

A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for $5. The lower courts, concluding that prosecutor's charge to the Grand Jury on the defense of justification was erroneous, have dismissed the attempted murder, assault and weapons possession charges. We now reverse and reinstate all counts of the indictment.

Issue

Is the defense of self-defense based on a subjective standard or a reasonableness under the circumstances, objective standard?

Facts

We have summarized the facts as they appear from the evidence before the Grand Jury. . . .

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.

Defendant Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench towards 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 towards Chambers Street.

It appears from the evidence before the Grand Jury that 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 towards 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 [the four youths], 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 '[y]ou 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. . . . On January 25, 1985, the Grand Jury indicted defendant on one count of criminal possession of a weapon in the third degree . . . for possessing the gun used in the subway shootings, and two counts of criminal possession of a weapon in the fourth degree . . . 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. . . . On March 27, 1985, the second Grand Jury filed a ten-count indictment, containing four charges of attempted murder . . . four charges of assault in the first degree . . . one charge of reckless endangerment in the first degree . . . and one charge of criminal possession of a weapon in the second degree (possession of loaded firearm with intent to use it unlawfully against another). . . .

On October 14, 1985, Goetz moved to dismiss the charges contained in the second indictment alleging, among other things, that the evidence before the second Grand Jury was not legally sufficient to establish the offenses charged . . . and 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]." . . .

In an order dated January 21, 1986, the Supreme Court . . . granted Goetz's motion to the extent that it dismissed all counts of the second indictment, other than the reckless endangerment charge, with leave to resubmit these charges to a third Grand Jury. 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.

On appeal by the People, a divided Appellate Division . . . affirmed Criminal Term's dismissal of the charges. The plurality opinion by Justice Kassal, concurred in by Justice Carro, agreed with Criminal Term's reasoning on the justification issue, stating that the grand jurors should have been instructed to consider only the defendant's subjective beliefs as to the need to use deadly force. . . . We agree with the dissenters that neither the prosecutor's charge to the Grand Jury on justification nor the information which came to light while the motion to dismiss was pending required dismissal of any of the charges in the . . . indictment.

Reasoning

New York Penal Law (NYPL) section 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. New York Penal Law section 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 believes to be the use or imminent use of unlawful physical force by such other person." Subdivision (1) contains certain exceptions to this general authorization to use force, such as where the actor himself was the initial aggressor. Subdivision (2) sets forth further limitations on these general principles with respect to the use of deadly physical force and provides that a person may not use deadly physical force under circumstances specified in subdivision one unless: "(a) He reasonably believes 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) also provides that even under these circumstances a person ordinarily must retreat "if he knows that he can with complete safety as to himself and others avoid the necessity of [using deadly physical force] by retreating."

Thus, consistent with most justification provisions, NYPL section 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.

Holding

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 NYPL 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. . . .

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 NYPL 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 NYPL 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.

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. The plurality's interpretation, as the dissenters recognized, excises the impact of the word "reasonably." . . . [W]e have frequently noted that a determination of reasonableness must be based on the "circumstance" 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, the order of the Appellate Division should be reversed, and the dismissed counts of the indictment reinstated.

Questions for Discussion

1. Goetz was acquitted of attempted murder and assault. He was found to have been justified in shooting the four young men in the subway car. Goetz was convicted of unlawful possession of a firearm and was sentenced to one year in prison. He was released after eight months in jail. The jury was composed of eight men and four women, ten whites and two African Americans. Do you agree that Goetz acted in self-defense? In 1996, a six-member civil jury ordered Goetz to pay $18 million in compensatory damages and $25 million in punitive damages. The Goetz case is discussed in George P. Fletcher's *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York: The Free Press, 1988).

2. Would problems arise in the event that the law of self-defense was based on a purely subjective test? Are there arguments in support of this approach? In most cases, would it matter whether a jury applied an objective or subjective test?

3. What circumstances should the jury consider in determining the reasonableness of Goetz's actions? Should Goetz's past experiences be considered? The fact that the shooting occurred in the subway? The physical size, age, dress, and behavior of the young males? What about the fact that Ramseur and Cabey had screwdrivers?

4. A number of commentators contend that any explanation of the verdict in the Goetz case must consider the race of the individuals involved. Goetz was Caucasian, while the four young people were African American. Professor George Fletcher raises the issue whether the same verdict would have been returned had Goetz been an African American and his attackers Caucasian juveniles. What is your opinion? Did Goetz stereotype the young men and assume that he was about to be robbed? Was his response based on revenge or self-defense? What would your reaction have been in the event that you found yourself in Goetz's position?

Cases and Comments

The Reasonable Woman. Defendant Yvonne Wanrow was convicted of murder and assault. Her conviction was reversed by the Washington Supreme Court. William Wesler was accused of molestation by Ms. Hooper's children. Hooper's landlord shared that Wesler had earlier attempted to molest a young child who had previously lived in Hooper's house and that Wesler had been committed to a mental asylum; the landlord advised Ms. Hooper that she should arm herself with a baseball bat. Yvonne Wanrow's two children were staying with Hooper at the time, and the two women and several other adults agreed to spend the night together to provide mutual support and security against possible retaliation by Wesler. Two of the men staying with Hooper visited Wesler and persuaded him to accompany them to Hooper's house to discuss the allegations. This led to a noisy and high-pitched verbal exchange. At one point, Wesler provocatively approached a young child sleeping on the couch and Hooper screamed for Wesler to leave her home. Ms. Wanrow, who was five foot four inches in height, had a broken leg, and was using a crutch, had placed a pistol in her purse. She testified that she turned around and found herself confronting the six-foot, two-inch Wesler and that she shot him as a reflex response.

The Washington Supreme Court determined that the judge's self-defense instructions to the jury were deficient, and that although the jury was instructed to consider the relative size and strength of the persons involved, they should also have been instructed to "afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination." The jury had been directed to evaluate the defendant's conduct in accordance with the reactions of a "reasonably and ordinarily cautious and prudent man." The Washington Supreme Court explained that women suffer from a lack of training in the skills required to "effectively repeal a male assailant without resorting to the use of deadly weapons" and that the jury instructions should have directed the jury to consider the defendant's gender. The court also ruled that the trial court had properly declined to permit the defendant to rely on an expert witness to present evidence on the effects of the defendant's Indian culture on her perception and actions. Should juries be instructed to consider the reasonableness of a defendant's actions in light of his or her gender? What else should the jury be instructed to consider? See *State v. Wanrow,* 559 P.2d 548 (Wash. 1977).

You Decide

8.2 A group of five young Latino men was crossing the street when a car speeding around the corner suddenly braked to permit the young men to cross the street. Some of the young men, including the defendant, yelled at the driver to slow down. The driver, Alex Bernal, responded that he was looking for his daughter and that they should move out of the way. Bernal pulled the car to the side of the road and the defendant approached the passenger side of the car. Heated words were exchanged and Bernal exited the auto, removed his shoes, and began kicking into the air without hitting anyone. At some point during the ensuing exchange, Bernal appears to have swung at the defendant and the defendant responded by thrusting a knife into Bernal's heart. Bernal later died; the autopsy indicated that he had been stabbed three times. The defendant testified that he only intended to scare the unarmed Bernal and stab him in the leg, and that he was motivated by a desire to protect his brother

from possible injury. The trial court ruled that the testimony of expert witness and sociologist Professor Martin Sanchez Jankowski was irrelevant and inadmissible. Professor Jankowski would have testified that (1) street fighters in the Hispanic culture do not retreat; (2) the Hispanic culture is based on honor; and (3) the defendant's testimony indicates that he was concerned with protecting his younger brother. Should the California Court of Appeal reverse the defendant's conviction because of the failure of the trial court judge to permit the jury to hear Professor Jankowski's testimony? See *People v. Romero,* 81 Cal. Rptr. 2d 823 (Cal. Ct. App. 1999).

You can find the answer at www.sagepub.com/lippmanccl3e.

Imminence

A defendant must reasonably believe that the threatened harm is imminent, meaning that the harm "is about to happen." The requirement that the defendant act out of necessity is based on several considerations:

- *Resolution of Disputes*. The law encourages the peaceful resolution of disputes where possible.
- *Last Resort.* Individuals should only resort to self-help where strictly required.
- *Evidence.* The existence of a clear and measurable threat provides confidence that the defendant is acting out of self-defense rather than out of a desire to punish the assailant or to seek revenge. Also, the existence of a clear threat assists in determining whether there is proportionality between the threatened harm and defensive response.

In *State v. Schroeder,* the nineteen-year-old defendant stabbed a violent cellmate who threatened to make Schroeder his "sex slave" or "punk." Schroeder testified that he felt vulnerable and afraid and woke up at 1:00 a.m. and stabbed his cellmate in the back with a table knife and hit him in the face with a metal ashtray. The Nebraska Supreme Court ruled that the threatened harm was not imminent and that there was a danger in legalizing "preventive assaults."[22]

Some courts have not insisted on a strict imminence standard. An Illinois case, for instance, ruled that a cab driver acted in self-defense in shooting and killing an individual who, along with other gang members, was involved in beating up an elderly man. The assailants threw a brick at the cab in retaliation for the driver's yelling at the gang and allegedly started to move toward the taxi. The Illinois Supreme Court concluded that the attackers possessed the capacity and intent to attack the driver, who was carrying money and was aware that a number of drivers recently had been attacked. On the other hand, consider the fact that the driver could have fled, shot over the heads of the assailants, or waited until the young people presented a more immediate threat.[23]

The Model Penal Code adopts this type of broad approach and provides that force is justifiable when the actor believes that he or she will be attacked on "the present occasion" rather than imminently. The commentary to the Model Penal Code notes that this standard would permit individuals to employ force in self-defense to prevent an individual who poses a threat from summoning reinforcements. The broad Model Penal Code test has found support in the statutes of a number of states, including Delaware, Hawaii, Nebraska, New Jersey, and Pennsylvania. A dissenting judge in *Schroeder* cited the Model Penal Code and argued that the young inmate should have been acquitted on the grounds of self-defense. After all, he could not be expected to remain continuously on guard against an assault by his older cellmate or the cellmate's friends.

The clash between the common law imminence requirement and the Model Penal Code's notion that self-defense may be justified where necessary to prevent an anticipated harm is starkly presented in cases in which defendants invoke the so-called battered spouse defense. In *State v. Norman,* the next case in the chapter, a woman who has been the victim of continual battering by her husband over a number of years kills her abusive spouse while he is sleeping. In reading this case, consider whether we should broadly interpret the imminence standard and, if not, what standard should be adopted.

Did Norman confront an imminent threat from her abusive husband?

State v. Norman, *366 S.E.2d 586 (N.C. Ct. App. 1988). Opinion by: Parker, J.*

The primary issue presented on this appeal is whether the trial court erred in failing to instruct on self-defense. We answer in the affirmative and grant a new trial.

Facts

At trial the State presented the testimony of a deputy sheriff of the Rutherford County Sheriff's Department who testified that on 12 June 1985, at approximately 7:30 p.m., he was dispatched to the Norman residence. There, in one of the bedrooms, he found decedent, John Thomas "J.T." Norman (herein decedent or Norman) dead, lying on his left side on a bed. The State presented an autopsy report, stipulated to by both parties, concluding that Norman had died from two gunshot wounds to the head. . . .

Defendant and Norman had been married twenty-five years at the time of Norman's death. Norman was an alcoholic. He had begun to drink and to beat defendant five years after they were married. The couple had five children, four of whom are still living. When defendant was pregnant with her youngest child, Norman beat her and kicked her down a flight of steps, causing the baby to be born prematurely the next day.

Norman, himself, had worked one day a few months prior to his death; but aside from that one day, witnesses could not remember his ever working. Over the years and up to the time of his death, Norman forced defendant to prostitute herself every day in order to support him. If she begged him not to make her go, he slapped her. Norman required defendant to make a minimum of one hundred dollars per day; if she failed to make this minimum, he would beat her.

Norman commonly called defendant "Dog," "Bitch," and "Whore," and referred to her as a dog. Norman beat defendant "most every day," especially when he was drunk and when other people were around, to "show off." He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant's skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face. . . . Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl.

Norman often stated both to defendant and to others that he would kill defendant. He also threatened to cut her heart out.

On or about the morning of 10 June 1985, Norman forced defendant to go to a truck stop or rest stop on Interstate 85 in order to prostitute to make some money. Defendant's daughter and defendant's daughter's boy friend accompanied defendant. Some time later that day, Norman went to the truck stop, apparently drunk, and began hitting defendant in the face with his fist and slamming the car door into her. He also threw hot coffee on defendant. . . .

On 11 June 1985, Norman was extremely angry and beat defendant. . . . Defendant testified that during the entire day, when she was near him, her husband slapped her, and when she was away from him, he threw glasses, ashtrays, and beer bottles at her. Norman asked defendant to make him a sandwich; when defendant brought it to him, he threw it on the floor and told her to make him another. Defendant made him a second sandwich and brought it to him; Norman again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. Defendant made a third sandwich using a paper towel to handle the bread. Norman took the third sandwich and smeared it in defendant's face.

On the evening of 11 June 1985, at about 8:00 or 8:30, a domestic quarrel was reported at the Norman residence. The officer responding to the call testified that defendant was bruised and crying and that she stated her husband had been beating her all day and she could not take it any longer. The officer advised defendant to take out a warrant on her husband, but defendant responded that if she did so, he would kill her. A short time later, the officer was again dispatched to the Norman residence. There he learned that defendant had taken an overdose of "nerve pills," and that Norman was interfering with emergency personnel who were trying to treat defendant. Norman was drunk and was making statements such as, "If you want to die, you deserve to die. I'll give you more pills," and "Let the bitch die. . . . She ain't nothing but a dog. She don't deserve to live." Norman also threatened to kill defendant, defendant's mother, and defendant's grandmother. The law enforcement officer reached for his flashlight or blackjack and chased Norman into the house. Defendant was taken to Rutherford Hospital. . . .

The next day, 12 June 1985, the day of Norman's death . . . Defendant was driving. During the

ride . . . Norman slapped defendant for following a truck too closely and poured a beer on her head. Norman kicked defendant in the side of the head while she was driving and told her he would "cut her breast off and shove it up her rear end."

. . . Witnesses stated that back at the Norman residence, Norman threatened to cut defendant's throat, threatened to kill her, and threatened to cut off her breast. Norman also smashed a doughnut on defendant's face and put out a cigarette on her chest.

In the late afternoon, Norman wanted to take a nap. He lay down on the larger of the two beds in the bedroom. Defendant started to lie down on the smaller bed, but Norman said, "No bitch . . . Dogs don't sleep on beds, they sleep in [*sic*] the floor." Soon after, one of the Normans' daughters, Phyllis, came into the room and asked if defendant could look after her baby. Norman assented. When the baby began to cry, defendant took the child to her mother's house, fearful that the baby would disturb Norman. At her mother's house, defendant found a gun. She took it back to her home and shot Norman.

Defendant testified that things at home were so bad she could no longer stand it. She explained that she could not leave Norman because he would kill her. She stated that she had left him before on several occasions and that each time he found her, took her home, and beat her. She said that she was afraid to take out a warrant on her husband because he had said that if she ever had him locked up, he would kill her when he got out. She stated she did not have him committed because he told her he would see the authorities coming for him and before they got to him he would cut defendant's throat. Defendant also testified that when he threatened to kill her, she believed he would kill her if he had the chance.

The defense presented the testimony of two expert witnesses in the field of forensic psychology. . . . Dr. Tyson concluded that defendant "fits and exceeds the profile, of an abused or battered spouse." . . . Dr. Tyson stated that defendant could not leave her husband because she had gotten to the point where she had no belief whatsoever in herself and believed in the total invulnerability of her husband. He stated, "Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. . . . When asked if it appeared to defendant reasonably necessary to kill her husband, Dr. Tyson responded, "I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family." . . .

Issue

The State contends that because decedent was asleep at the time of the shooting, defendant's belief in the necessity to kill decedent was, as a matter of law, unreasonable. The State further contends that even assuming . . . the evidence satisfied the requirement that defendant's belief be reasonable, defendant, being the aggressor, cannot satisfy the third requirement of perfect self-defense. . . . The question then arising on the facts in this case is whether the victim's passiveness at the moment the unlawful act occurred precludes defendant from asserting perfect self-defense.

Reasoning

Applying the criteria of **perfect self-defense** to the facts of this case, we hold that the evidence was sufficient to submit an issue of perfect self-defense to the jury. An examination of the elements of perfect self-defense reveals that both subjective and objective standards are to be applied in making the crucial determinations. The first requirement that it appear to defendant and that defendant believe it necessary to kill the deceased in order to save herself from death or great bodily harm calls for a subjective evaluation. This evaluation inquires as to what the defendant herself perceived at the time of the shooting. The trial was replete with testimony of forced prostitution, beatings, and threats on defendant's life. The defendant testified that she believed the decedent would kill her, and the evidence showed that on the occasions when she had made an effort to get away from Norman, he had come after her and beat her. Indeed, within twenty-four hours prior to the shooting, defendant had attempted to escape by taking her own life and throughout the day on 12 June 1985 had been subjected to beatings and other physical abuse, verbal abuse, and threats on her life up to the time when decedent went to sleep. Experts testified that in their opinion, defendant believed killing the victim was necessary to avoid being killed. . . .

Unlike the first requirement, the second element of self-defense—that defendant's belief be reasonable in that the circumstances as they appeared to defendant would be sufficient to create such a belief in the mind of a person of ordinary firmness—is measured by the objective standard of the person of ordinary firmness under the same circumstances. Again, the record is replete with sufficient evidence to permit but not compel a juror, representing the person of ordinary firmness, to infer that defendant's belief was reasonable under the circumstances in which she found herself. Expert witnesses testified that defendant exhibited severe symptoms of battered spouse syndrome, a condition that develops from repeated cycles of violence by the victim against the defendant. Through this repeated, sometimes constant, abuse, the battered spouse acquires what the psychologists denote as a state of "learned helplessness," defendant's state of mind as described by Drs. Tyson and Rollins. . . . In the instant case, decedent's excessive anger, his constant beating and battering of defendant on 12 June 1985, her fear that the beatings would resume, as well as previous efforts by defendant to extricate herself

from this abuse are circumstances to be considered in judging the reasonableness of defendant's belief that she would be seriously injured or killed at the time the criminal act was committed. The evidence discloses that defendant felt helpless to extricate herself from this intolerable, dehumanizing, brutal existence. Just the night before the shooting, defendant had told the sheriff's deputy that she was afraid to swear out a warrant against her husband because he had threatened to kill her when he was released if she did. The inability of a defendant to withdraw from the hostile situation and the vulnerability of a defendant to the victim are factors considered by our Supreme Court in determining the reasonableness of a defendant's belief in the necessity to kill the victim. . . .

To satisfy the third requirement, defendant must not have aggressively and willingly entered into the fight without legal excuse or provocation. By definition, aggression in the context of self-defense is tied to provocation. The existence of battered spouse syndrome, in our view, distinguishes this case from the usual situation involving a single confrontation or affray. The provocation necessary to determine whether defendant was the aggressor must be considered in light of the totality of the circumstances. . . .

Holding

Mindful that the law should never casually permit an otherwise unlawful killing of another human being to be justified or excused, this Court is of the opinion that with the battered spouse there can be, under certain circumstances, an unlawful killing of a passive victim that does not preclude the defense of perfect self-defense. Given the characteristics of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense. Such a standard, in our view, would ignore the realities of the condition. This position is in accord with other jurisdictions that have addressed the issue. . . .

In this case, decedent, angrier than usual, had beaten defendant almost continuously during the afternoon and had threatened to maim and kill defendant. . . . A jury, in our view, could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself, and that defendant's act was not without the provocation required for perfect self-defense. The expert testimony considered with the other evidence would permit reasonable minds to infer that defendant did not use more force than reasonably appeared necessary to her under the circumstances to protect herself from death or great bodily harm.

Based on the foregoing analysis, we are of the opinion that, in addition to the instruction on voluntary manslaughter, defendant was entitled to an instruction on perfect self-defense. . . . The jury is to regard evidence of battered spouse syndrome merely as some evidence to be considered along with all other evidence in making its determination whether there is a reasonable doubt as to the unlawfulness of defendant's conduct. . . . New trial.

Questions for Discussion

1. The jury convicted Norman of voluntary manslaughter and, as a result, did not accept that the defendant's killing of her husband was a justified act of perfect self-defense. Summarize the appellate court's reasoning in ruling that the defendant was entitled to have the jury consider her claim of self-defense.
2. What are the dangers of too broad or too narrow a view of the imminence requirement for self-defense? Was the defendant's use of force proportionate to the threat that she confronted from her husband?
3. Does reliance on the "battered spouse syndrome" risk that experts will attribute traits of "helplessness" to the defendant that, in fact, she does not possess?
4. Can men involved in heterosexual or homosexual relationships rely on the "battered spouse syndrome?" Can women rely on it who are involved in homosexual relationships?

Cases and Comments

1. ***The North Carolina Supreme Court.*** The North Carolina Supreme Court reversed the appellate court and ruled that the trial court properly declined to instruct the jury on self-defense. The supreme court ruled that the evidence did not "tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm." The court further observed that the "relaxed requirements" for self-defense would "legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' . . . subjective speculation as the probability of future felonious assaults by their husbands." Do you agree? See *State v. Norman,* 378 S.E.2d 8 (N.C. 1989). An additional case on the right of an abused spouse to rely on self-defense is *State v. Stewart,* 763 P.2d 572 (Kan. 1988).

2. ***Domestic Violence.*** A 2005 study by the World Health Organization of women in ten countries concluded that domestic violence is frighteningly common and is accepted as normal within many societies. The percentage of women reported to have been physically or sexually assaulted in their lifetime ranges from fifteen percent in Japan to seventy-one percent in Ethiopia. In the United States, a 2011 Centers for Disease Control and Prevention study reports that that one in four women surveyed had been assaulted by a husband or boyfriend. One in five women had been the victim of a rape or attempted rape at some point in their lives. Most victims had been raped by an intimate partner or by an acquaintance. One-third of women had been victims of a rape, beating, or stalking, or a combination of assaults.

You Decide

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

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

The "battered child syndrome" results from a pattern of abuse and anxiety. "Battered children" live in a state of constant alert ("hypervigilant"), caution ("hypermonitoring"), and develop a lack of confidence and an inability to seek help ("learned helplessness"). Did Andrew believe and would a reasonable person believe that Andrew confronted an imminent threat of great bodily harm or death? The Washington Supreme Court clarified that imminent means "near at hand . . . hanging threateningly over one's head . . . menacingly near." The trial court refused to instruct the jury to consider whether Andrew was entitled to invoke self-defense. Should the Washington Supreme Court uphold or reverse the decision of the trial court? See *State v. Janes*, 850 P.2d 495 (Wash. 1993).

You can find the answer at www.sagepub.com/lippmanccl3e.

Excessive Force

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

In *State v. Pranckus,* the Connecticut Appellate Court ruled that the defendant could not have reasonably believed that the use of a kitchen knife with an eight-inch blade was required to defend himself in a fistfight. The defendant charged at the victims and stabbed each of the victims twice, killing one of them. The Connecticut court noted that both victims suffered wounds on their backs, indicating that they were fleeing and that the defendant was sufficiently confident of his ability to defend himself that he later attempted to continue the fight without a weapon.[24]

The requirement of proportionality is not accepted in various foreign countries that stress the privilege of individuals to respond without limitation to an attack. Should there be a restriction on the right of an innocent individual to respond to an attack?[25]

Retreat

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

Virtually every jurisdiction provides that there is no duty or requirement to retreat before resorting to *nondeadly force*. A majority of jurisdictions follow the same **stand your ground rule** in the case of *deadly force,* although a "significant minority" require retreat to the wall. The stand your ground rule is also followed in most former communist countries in Europe and is based on several considerations:[26]

- The promotion of a courageous attitude.
- The refusal to protect a wrongdoer initiating an attack.
- The reluctance of courts to complicate their task by being placed in the position of having to rule on various issues surrounding the duty to retreat.
- The retreat rule may endanger individuals who are required to retreat and encourage wrongdoers who have no reason to fear for their lives.

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

The requirement of retreat is premised on the traditional rule that only necessary force may be employed in self-defense. The provision for retreat is balanced by the consideration that withdrawal is not required when the safety of the defender would be jeopardized. The **castle doctrine** is another generally recognized exception to the rule of retreat and provides that individuals inside the home are justified in "holding their ground."[27]

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

The next case in the chapter, *United States v. Peterson,* explores the right of an "aggressor" to self-defense, the duty to retreat, and the castle doctrine. Do you agree with the federal court's decision that Peterson is not entitled to claim self-defense?

Was Peterson required to retreat?

United States v. Peterson, *483 F.2d 1222 (D.C. Cir. 1973). Opinion by: Robinson, J.*

Issues

Peterson was indicted for second-degree murder and was convicted by a jury of manslaughter as a lesser included offense. Bennie L. Peterson . . . complains. . . . that the judge twice erred in the instructions given the jury in relation to his claim that the homicide was committed in self-defense. One error alleged was an instruction that the jury might consider whether Peterson was the aggressor in the altercation that resulted in the homicide. The other was an instruction that a failure by Peterson to retreat, if he could have done so without

jeopardizing his safety, might be considered as a circumstance bearing on the question whether he was justified in using the amount of force which he did.

Facts

The events immediately preceding the homicide are not seriously in dispute. The version presented by the Government's evidence follows. Charles Keitt, the deceased, and two friends drove in Keitt's car to the alley in the rear of Peterson's house to remove the windshield wipers from the latter's wrecked car. While Keitt was doing so, Peterson came out of the house. Peterson went back into the house, obtained a pistol, and returned to the yard. In the meantime, Keitt had reseated himself in his car, and he and his companions were about to leave. The car was characterized by some witnesses as "wrecked" and by others as "abandoned." The testimony left it clear that its condition was such that it could not be operated. It was parked on one side of the alley about fifteen feet from the gate in the rear fence which opened into Peterson's back yard. Keitt's car was stopped in the alleyway about four feet behind it. Upon his reappearance in the yard, Peterson paused briefly to load the pistol. "If you move," he shouted to Keitt, "I will shoot." He walked to a point in the yard slightly inside a gate in the rear fence and, pistol in hand, said, "If you come in here I will kill you." Keitt alighted from his car, took a few steps toward Peterson and exclaimed, "What the hell do you think you are going to do with that?" Keitt then made an about-face, walked back to his car and got a lug wrench. With the wrench in a raised position, Keitt advanced toward Peterson, who stood with the pistol pointed toward him. Peterson warned Keitt not to "take another step" and, when Keitt continued onward, shot him in the face from a distance of about ten feet. Death was apparently instantaneous. Shortly thereafter, Peterson left home and was apprehended twenty-odd blocks away. Keitt apparently had been drinking and an autopsy disclosed that he had a .29 percent blood alcohol content. Keitt fell in the alley about seven feet from the gate.

This description of the fatal episode was furnished at Peterson's trial by four witnesses for the Government. Peterson did not testify, but provided a statement to the police in which he related . . . that Keitt had removed objects from his car before, and on the day of the shooting he had told Keitt not to do so. After the initial verbal altercation, Keitt went to his car for the lug wrench, so he, Peterson, went into his house for his pistol. When Keitt was about ten feet away, he pointed the pistol "away of his right shoulder;" adding that Keitt was running toward him, Peterson said he "got scared and fired the gun. He ran right into the bullet." "I did not mean to shoot him," Peterson insisted, "I just wanted to scare him."

At trial, Peterson moved for a judgment of acquittal. The jury returned a verdict finding Peterson guilty of manslaughter. Judgment was entered conformably with the verdict, and this appeal followed.

Reasoning

Peterson's consistent position is that as a matter of law his conviction of manslaughter—alleviated homicide—was wrong and that his act was one of self-preservation—justified homicide. The Government, on the other hand, has contended from the beginning that Keitt's slaying fell outside the bounds of lawful self-defense. The questions remaining for our decision inevitably track back to this basic dispute.

The law of self-defense is a law of necessity . . . the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. The "necessity must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable as excusable." Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts. So it is that necessity is the pervasive theme of the well defined conditions which the law imposes on the right to kill or maim in self-defense. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances. It is clear that no less than a concurrence of these elements will suffice. Here the parties' opposing contentions focus on the roles of two further considerations. One is the provoking of the confrontation by the defender. The other is the defender's failure to utilize a safe route for retreat from the confrontation. The essential inquiry, in final analysis, is whether and to what extent the rule of necessity may translate these considerations into additional factors in the equation. To these questions, in the context of the specific issues raised, we now proceed.

The trial judge's charge authorized the jury, as it might be persuaded, to convict Peterson of second-degree murder or manslaughter, or to acquit by reason of self-defense. On the latter phase of the case, the judge instructed that with evidence of self-defense present, the Government bore the burden of proving beyond a reasonable doubt that Peterson did not act in self-defense; and that if the jury had a reasonable doubt as to whether Peterson acted in self-defense, the verdict must be not guilty. The judge further instructed that the circumstances under which Peterson acted,

however, must have been such as to produce a reasonable belief that Keitt was then about to kill him or do him serious bodily harm and that deadly force was necessary to repel him. In determining whether Peterson used excessive force in defending himself, the judge said, the jury could consider all of the circumstances under which he acted.

These features of the charge met Peterson's approval, and we are not summoned to pass on them. There were, however, two other aspects of the charge to which Peterson objected, and which are now the subject of vigorous controversy. The first of Peterson's complaints centers upon an instruction that the right to use deadly force in self-defense is not ordinarily available to one who provokes a conflict or is the aggressor in it. Mere words, the judge explained, do not constitute provocation or aggression; and if Peterson precipitated the altercation but thereafter withdrew from it in good faith and so informed Keitt by words or acts, he was justified in using deadly force to save himself from imminent danger or death or grave bodily harm. And, the judge added, even if Keitt was the aggressor and Peterson was justified in defending himself, he was not entitled to use any greater force than he had reasonable ground to believe and actually believed to be necessary for that purpose. Peterson contends that there was no evidence that he either caused or contributed to the conflict, and that the instructions on that topic could only mislead the jury.

It has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill. The right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life. The fact that the deceased struck the first blow, fired the first shot or made the first menacing gesture does not legalize the self-defense claim if in fact the claimant was the actual provoker. In sum, one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation. Only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense.

This body of doctrine traces its origin to the fundamental principle that a killing in self-defense is excusable only as a matter of genuine necessity. Quite obviously, a defensive killing is unnecessary if the occasion for it could have been averted, and the roots of that consideration run deep with us. A half-century ago, in *Laney v. United States,* this Court declared that, before a person can avail himself of the plea of self-defense against the charge of homicide, he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity.

In the case at bar, the trial judge's charge fully comported with these governing principles. The remaining question, then, is whether there was evidence to make them applicable to the case. A recapitulation of the proofs shows beyond peradventure that there was.

It was not until Peterson fetched his pistol and returned to his back yard that his confrontation with Keitt took on a deadly cast. Prior to his trip into the house for the gun, there was, by the Government's evidence, no threat, no display of weapons, no combat. There was an exchange of verbal aspersions and a misdemeanor against Peterson's property was in progress but, at this juncture, nothing more. Even if Peterson's postarrest version of the initial encounter were accepted—his claim that Keitt went for the lug wrench before he armed himself—the events which followed bore heavily on the question as to who the real aggressor was.

The evidence is uncontradicted that when Peterson reappeared in the yard with his pistol, Keitt was about to depart the scene. Richard Hilliard testified that after the first argument, Keitt reentered his car and said "Let's go." This statement was verified by Ricky Gray, who testified that Keitt "got in the car and . . . they were getting ready to go;" he, too, heard Keitt give the direction to start the car. The uncontroverted fact that Keitt was leaving shows plainly that so far as he was concerned the confrontation was ended. It demonstrates just as plainly that even if he had previously been the aggressor, he no longer was.

Not so with Peterson, however, as the undisputed evidence made clear. Emerging from the house with the pistol, he paused in the yard to load it, and to command Keitt not to move. He then walked through the yard to the rear gate and, displaying his pistol, dared Keitt to come in, and threatened to kill him if he did. While there appears to be no fixed rule on the subject, the cases hold, and we agree, that an affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the right of homicidal self-defense. We cannot escape the abiding conviction that the jury could readily find Peterson's challenge to be a transgression of that character.

The situation at bar is not unlike that presented in *Laney.* There the accused, chased along the street by a mob threatening his life, managed to escape through an areaway between two houses. In the back yard of one of the houses, he checked a gun he was carrying and then returned to the areaway. The mob beset him again, and during an exchange of shots one of its members was killed by a bullet from the accused's gun. In affirming a conviction of manslaughter, the court reasoned that when defendant escaped from the mob into the back yard . . . he was in a place of comparative safety, from which, if he desired to go home, he

could have gone by the back way, as he subsequently did. . . . His appearance on the street at that juncture could mean nothing but trouble for him. Hence, when he adjusted his gun and stepped out into the areaway, he had every reason to believe that his presence there would provoke trouble. We think his conduct in adjusting his revolver and going into the areaway was such as to deprive him of any right to invoke the plea of self-defense.

We think the evidence plainly presented an issue of fact as to whether Peterson's conduct was an invitation to and provocation of the encounter which ended in the fatal shot. We sustain the trial judge's action in remitting that issue for the jury's determination.

The second aspect of the trial judge's charge as to which Peterson asserts error concerned the undisputed fact that at no time did Peterson endeavor to retreat from Keitt's approach with the lug wrench. The judge instructed the jury that if Peterson had reasonable grounds to believe and did believe that he was in imminent danger of death or serious injury, and that deadly force was necessary to repel the danger, he was required neither to retreat nor to consider whether he could safely retreat. Rather, said the judge, Peterson was entitled to stand his ground and use such force as was reasonably necessary under the circumstances to save his life and his person from pernicious bodily harm. But, the judge continued, if Peterson could have safely retreated but did not do so, that failure was a circumstance which the jury might consider, together with all others, in determining whether he went further in repelling the danger, real or apparent, than he was justified in going.

Peterson contends that this imputation of an obligation to retreat was error, even if he could safely have done so. He points out that at the time of the shooting he was standing in his own yard, and argues he was under no duty to move. We are persuaded to the conclusion that in the circumstances presented here, the trial judge did not err in giving the instruction challenged. Within the common law of self-defense there developed the rule of "retreat to the wall," which ordinarily forbade the use of deadly force by one to whom an avenue for safe retreat was open. This doctrine was but an application of the requirement of strict necessity to excuse the taking of human life, and was designed to insure the existence of that necessity. Even the innocent victim of a vicious assault had to elect a safe retreat, if available, rather than resort to defensive force which might kill or seriously injure.

In a majority of American jurisdictions, contrarily to the common law rule, one may stand his ground and use deadly force whenever it seems reasonably necessary to save himself. While the law of the District of Columbia on this point is not entirely clear, it seems allied with the strong minority adhering to the common law. In 1856, the District of Columbia Criminal Court ruled that a participant in an affray "must endeavor to retreat, . . . that is, he is obliged to retreat, if he can safely." The court added that "[a] man may, to be sure, decline a combat when there is no existing or apparent danger, but the retreat to which the law binds him is that which is the consequence." In a much later era this court, adverting to necessity as the soul of homicidal self-defense, declared that "no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict." That is not to say that the retreat rule is without exceptions. Even at common law it was recognized that it was not completely suited to all situations. Today it is the more so that its precept must be adjusted to modern conditions nonexistent during the early development of the common law of self-defense. One restriction on its operation comes to the fore when the circumstances apparently foreclose a withdrawal with safety.

The doctrine of retreat was never intended to enhance the risk to the innocent; its proper application has never required a faultless victim to increase his assailant's safety at the expense of his own. On the contrary, he could stand his ground and use deadly force otherwise appropriate if the alternative were perilous, or if to him it reasonably appeared to be. A slight variant of the same consideration is the principle that there is no duty to retreat from an assault producing an imminent danger of death or grievous bodily harm. "Detached reflection cannot be demanded in the presence of an uplifted knife," nor is it "a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him."

The trial judge's charge to the jury incorporated each of these limitations on the retreat rule. Peterson, however, invokes another—the so-called "castle" doctrine. It is well settled that one who through no fault of his own is attacked in his home is under no duty to retreat therefrom. The oft-repeated expression that "a man's home is his castle" reflected the belief in olden days that there were few if any safer sanctuaries than the home. The "castle" exception, moreover, has been extended by some courts to encompass the occupant's presence within the curtilage outside his dwelling. Peterson reminds us that when he shot to halt Keitt's advance, he was standing in his yard and so, he argues, he had no duty to endeavor to retreat.

Despite the practically universal acceptance of the "castle" doctrine in American jurisdictions wherein the point has been raised, its status in the District of Columbia has never been squarely decided. But whatever the fate of the doctrine in the District law of the future, it is clear that in absolute form it was inapplicable here. The right of self-defense, we have said, cannot be claimed by the aggressor in an affray so long as he retains that unmitigated role. It logically follows that any rule of no-retreat which may protect an innocent victim of the affray would, like other incidents of a forfeited right of

self-defense, be unavailable to the party who provokes or stimulates the conflict. Accordingly, the law is well settled that the "castle" doctrine can be invoked only by one who is without fault in bringing the conflict on. That, we think, is the critical consideration here.

Holding

We need not repeat our previous discussion of Peterson's contribution to the altercation which culminated in Keitt's death. It suffices to point out that by no interpretation of the evidence could it be said that Peterson was blameless in the affair. And while, of course, it was for the jury to assess the degree of fault, the evidence well nigh dictated the conclusion that it was substantial.

The only reference in the trial judge's charge intimating an affirmative duty to retreat was the instruction that a failure to do so, when it could have been done safely, was a factor in the totality of the circumstances which the jury might consider in determining whether the force which he employed was excessive. We cannot believe that any jury was at all likely to view Peterson's conduct as irreproachable. We conclude that for one who, like Peterson, was hardly entitled to fall back on the "castle" doctrine of no retreat, that instruction cannot be just cause for complaint.

As we have stated, Peterson moved for a judgment of acquittal at trial, and in this court renews his contention that the evidence was insufficient to support a conviction of manslaughter. His position is that the evidence, as a matter of law, established a right to use deadly force in self-defense. In considering that contention, we must accept the evidence "in the light most favorable to the Government, making full allowance for the right of the jury to draw justifiable inferences of fact from the evidence adduced at trial and to assess the credibility of the witnesses before it." We have already concluded that the evidence generated factual issues as to the effect, upon Peterson's self-defense claim, of his aggressive conduct and his failure to retreat. The judgment of conviction appealed from is accordingly affirmed.

Questions for Discussion

1. Outline the facts in *United States v. Peterson.*
2. Why does the court of appeals conclude that Peterson was an aggressor who was not entitled to a claim of self-defense?
3. Explain why the court of appeals imposed an obligation on Peterson to retreat before employing deadly force. What type of acts would have fulfilled Peterson's duty to retreat?
4. Why, if Peterson was standing in his own yard, could he not rely on the castle doctrine?
5. Does it make sense to hold Peterson criminally liable for killing a trespasser who was vandalizing Peterson's automobile and whom he had warned not to enter his yard?
6. Do you believe that individuals should be authorized to "hold their ground" under all circumstances rather than retreat?
7. Are the requirements of the law of self-defense too confusing to be understood by most people?
8. Should the area surrounding the home be considered part of a dwelling for purposes of the castle doctrine? What of a porch? In *State v. Blue*, 565 S.E.2d 133 (N.C. 2002), the North Carolina Supreme Court observed that many of the same activities that take place in the home take place on a porch. Should this depend on factors such as the size of the porch, whether the porch is enclosed, and the time of year?

Cases and Comments

The Castle Doctrine and Domestic Violence. John Gartland was found to have abused his wife Ellen for some years and the two had lived in separate bedrooms for ten years. They fought earlier in the evening at a bar and when they returned home, John accused Ellen of hiding the remote control to the television. John later entered her bedroom and threatened to "hurt" her. As he approached Ellen, she grabbed her son's shotgun from the bedroom closet. John vowed to kill her and she shot and killed John as he lunged forward. Ellen was convicted of reckless manslaughter. New Jersey is among the minority of states that impose a duty to retreat on an individual in his or her own home in those instances in which an individual is assaulted by a cohabitant. The New Jersey Supreme Court determined that Ellen did not have the exclusive right to occupy her bedroom and that John had regular access to the room. As a consequence, Ellen possessed a duty to retreat so long as this could have been safely accomplished prior to resorting to deadly force. See *State v. Gartland,* 694 A.2d 564 (N.J. 1997).

Rhode Island, Massachusetts, and North Dakota follow New Jersey and have statutes imposing a duty to retreat when an individual is attacked by a co-inhabitant of the home.

In 2009, the West Virginia Supreme Court of Appeals in *State v. Harden* reconsidered the "no retreat rule" for victims of domestic violence. On September 5, 2004, Tanya Harden was arrested for shooting and killing her husband, Danuel Harden. Tanya claimed that she acted

in self-defense and that the killing was a response to a "night of domestic terror." The evidence indicated that her husband had been drinking heavily (his blood alcohol count at the time of death was 0.22%) and that his violent attack included "brutally beating the defendant with the butt and barrel of a shotgun, brutally beating the defendant with his fists, and sexually assaulting the defendant." The "night of terror" ended when Tanya shot and killed Danuel.

The prosecutor in addition to arguing that there was no reasonable basis for Tanya to believe that there was an imminent threat of serious injury or death contended that Tanya's use of deadly force was not reasonable because she could have retreated to safety. Her husband was "on that couch . . . and she has got control of that shotgun, she . . . could have called the law, and she could have walked out of that trailer. Period. But she didn't."

The West Virginia Supreme Court overturned existing precedent and held that "an occupant who . . . without provocation [is] attacked in his or her home, dwelling or place of temporary abode, by a co-occupant who also has a lawful right to be upon the premises, may invoke the law of self-defense" and has no duty to retreat before exercising the right of self-defense.

The court explained that women who flee the home in many instances are "caught, dragged back inside, and severely beaten again. [Even i]f she manages to escape . . . [w]here will she go if she has no money, no transportation, and if her children are left behind in the care of an enraged man?" The West Virginia Court also reasoned that it was unfair that a woman attacked in the home by a stranger may stand her ground while a woman who is attacked by her husband or partner must retreat. See *State v. Harden,* 679 S.E.2d 628 (W. Va. 2009).

You Decide

8.4 Aiken and the victim had been next-door neighbors in an apartment building in the Bronx, New York, for roughly forty years. The two families had a falling out in 1994 or 1995 when a disagreement arose when the victim accused the defendant of siphoning his family's cable and telephone service. The service providers found no basis for this accusation. In 1997, the victim stabbed Aiken in the back resulting in his hospitalization. The two families continued to live next to one another from 1997 to 1999. This could not have been pleasant because the victim continually "threatened to shoot, stab or otherwise injure defendant. He made these threats to defendant's face, to his father and to neighbors—at one point even brandishing a boxcutter." On December 21, 1999, Aiken and the victim argued through the shared bedroom wall between their apartments. The defendant took a metal pipe and dented his side of the wall. The victim's mother called the police, and the victim left his apartment to go downstairs and open the building's front door for the police. The defendant remained inside his apartment, walked to the front door several times, and then opened the door when he saw the victim standing outside his door with a friend. "Still holding the metal pipe he had earlier used to hit the wall, the defendant then engaged in an angry argument with the victim, who remained in [the defendant's] doorway. . . . [H]e [the defendant] continued standing in the doorway, never going into the hall, when the victim reached into his pocket, came up to defendant's face 'nose to nose,' and said 'he was going to kill' him." The defendant believed that he was about to be stabbed once again and hit the victim in the head with the metal pipe, killing the victim. The trial court instructed the jury that "a person may . . . not use defensive deadly force if he knows he can with complete safety to himself avoid such use of deadly physical force by retreating." The trial court refused the defendant's request to "charge the jury that, if a defendant is in his home and close proximity of a threshold of his home, there is no duty to retreat." Do you agree with these jury instructions? Was Aiken in his home? Did Aiken act in self-defense in killing the victim? See *People v. Aiken,* 828 N.E.2d 74 (N.Y. 2005).

You can find the answer at www.sagepub.com/lippmanccl3e.

DEFENSE OF OTHERS

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

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

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

In *People v. Young,* two plainclothes detectives arrested a teenager for blocking traffic. The defendant intervened and hit one of the "two white men" who was "pulling" on the African American teenager. The defendant was convicted under the alter ego rule for intervening to defend an individual who, in fact, did not possess a right to self-defense. The New York Court of Appeals affirmed the conviction, but asked "what public interest is promoted by a principle which would deter one from coming to the aid of a fellow citizen whom he has reasonable grounds to believe is in imminent danger of personal injury at the hands of assailants?"[28] The New York legislature responded by modifying the law to provide that a "person . . . may use physical force upon another person when and to the extent that he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person. . . ."[29]

Remember, you may intervene to protect another, but you are not required to intervene. George Fletcher notes that the desire to provide protection to those who intervene on behalf of others reflects the belief that an attack against a single individual is a threat to the rule of law that protects us all.[30] Do you agree with the New York Court of Appeals in *Young* that the law should provide protection to individuals who intervene? *State v. Fair* is a well-known case from New Jersey that explains the objective approach.[31]

DEFENSE OF THE HOME

The home has historically been viewed as a place of safety, security, and shelter. The eighteenth-century English jurist Lord Coke wrote that "[a] man's house is his castle—for where shall a man be safe if it be not his own house." Coke's opinion was shaped by the ancient Roman legal scholars who wrote that "one's home is the safety refuge for everyone." The early colonial states adopted the English common law right of individuals to use deadly force in those instances in which they reasonably believe that this force is required to prevent an imminent and unlawful entry. The common law rule is sufficiently broad to permit deadly force against a rapist, burglar, or drunk who mistakenly stumbles into the wrong house on his or her way to a surprise birthday party.[32]

States gradually abandoned this broad standard and adopted statutes that restricted the use of deadly force in defense of the home. There is no uniform approach today, and statutes typically limit deadly force to those situations in which deadly force is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit "a felony" in the dwelling. Other state statutes strictly regulate armed force and only authorize deadly force in those instances in which it is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit a "forcible felony" involving the threat or use of violence against an occupant.[33] The first alternative would permit the use of deadly force against an individual who is intent on stealing a valuable painting, whereas the second approach would require that the art thief threaten violence or display a weapon.

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

The most controversial and dominant trend is toward so-called **make my day laws** that authorize the use of "any degree of force" against intruders who "might use any physical force . . . no matter how slight against any occupant." Colorado Revised Statutes section 18-1-704.5 provides:

> [T]he citizens of Colorado have a right to expect absolute safety within their own homes. . . . [A]ny occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight against any occupant. Any occupant of a dwelling using physical force . . . shall be immune from criminal prosecution for the use of such force . . . [and immune from civil liability] for injuries or death resulting from the use of such force.

Florida Statutes section 776.013 presumes that an intruder who unlawfully enters a home, automobile, or boat intends to commit a forcible felony. An occupant may use nondeadly or deadly force and does not have the burden in court of establishing that the intruder intended to inflict death or great bodily harm.

In *State v. Anderson,* the Oklahoma Court of Criminal Appeals stressed that under the state's Make My Day Law, the occupant possesses unlimited discretion to employ whatever degree of force he or she desires to based "solely upon the occupant's belief that the intruder might use any force against the occupant." In practice, this is a return to the original common law rule because a jury would likely find reasonable justification to believe that almost any intruder poses at least a threat of "slight" physical force against an occupant.[34] The Make My Day Law raises the issue of the proper legal standard for the use of force in defense of the dwelling. Should a homeowner be required to wait until the intruder poses a threat of serious harm?

Professor Joshua Dressler argues that the various legal standards for protection of the dwelling make little difference because in an age marked by fear of "home invasion" and violent crime, a jury will almost always find the use of deadly force is justified against an intruder.[35] The next case, *People v. Ceballos,* discusses whether it is legal to employ a spring gun to protect against illegal entry into the home.

Was Ceballos justified in defending his home with a spring gun?

People v. Ceballos, *526 P.2d 241 (Cal. 1974). Opinion by: Burke, J.*

Facts

Defendant lived alone in a home in San Anselmo. The regular living quarters were above the garage, but defendant sometimes slept in the garage and had about $2,500 worth of property there. In March 1970 some tools were stolen from defendant's home. On May 12, 1970, he noticed the lock on his garage doors was bent and pry marks were on one of the doors. The next day he mounted a loaded .22 caliber pistol in the garage. The pistol was aimed at the center of the garage doors and was connected by a wire to one of the doors so that the pistol would discharge if the door was opened several inches.

The damage to defendant's lock had been done by a sixteen-year-old boy named Stephen and a fifteen-year-old boy named Robert. On the afternoon of May 15, 1970, the boys returned to defendant's house while he was away. Neither boy was armed with a gun or knife. After looking in the windows and seeing no one, Stephen succeeded in removing the lock on the garage doors with a crowbar, and, as he pulled the door outward, he was hit in the face with a bullet from the pistol.

Stephen testified: He intended to go into the garage "[for] musical equipment" because he had a debt to pay to a friend. His "way of paying that debt would be to take [defendant's] property and sell it" and use the proceeds to pay the debt. He "wasn't going to do it [i.e., steal] for sure, necessarily." He was there "to look around," and "getting in, I don't know if I would have actually stolen."

Defendant, testifying in his own behalf, admitted having set up the trap gun. He stated that after noticing the pry marks on his garage door on May 12, he felt he should "set up some kind of a trap, something to keep the burglar out of my home." When asked why he was trying to keep the burglar out, he replied, " . . . Because somebody was

trying to steal my property . . . and I don't want to come home some night and have the thief in there . . . usually a thief is pretty desperate . . . and . . . they just pick up a weapon . . . if they don't have one . . . and do the best they can." When asked by the police shortly after the shooting why he assembled the trap gun, defendant stated that "he didn't have much and he wanted to protect what he did have." The jury found defendant guilty of assault with a deadly weapon. . . .

Issue

Defendant contends that had he been present he would have been justified in shooting Stephen since Stephen was attempting to commit burglary . . . that . . . defendant had a right to do indirectly what he could have done directly, and that therefore any attempt by him to commit a violent injury upon Stephen was not "unlawful" and hence not an assault. The People argue that . . . as a matter of law a trap gun constitutes excessive force, and that in any event the circumstances were not in fact such as to warrant the use of deadly force. . . .

Reasoning

In the United States, courts have concluded that a person may be held criminally liable under statutes proscribing homicides and shooting with intent to injure, or civilly liable, if he sets upon his premises a deadly mechanical device and that device kills or injures another. . . . However, an exception to the rule that there may be criminal and civil liability for death or injuries caused by such a device has been recognized where the intrusion is, in fact, such that the person, were he present, would be justified in taking the life or inflicting the bodily harm with his own hands. . . . The phrase "were he present" does not hypothesize the actual presence of the person . . . but is used in setting forth in an indirect manner the principle that a person may do indirectly that which he is privileged to do directly.

Allowing persons, at their own risk, to employ deadly mechanical devices imperils the lives of children, firemen and policemen acting within the scope of their employment, and others. Where the actor is present, there is always the possibility he will realize that deadly force is not necessary, but deadly mechanical devices are without mercy or discretion. Such devices "are silent instrumentalities of death. They deal death and destruction to the innocent as well as the criminal intruder without the slightest warning. The taking of human life [or infliction of great bodily injury] by such means is brutally savage and inhuman."

It seems clear that the use of such devices should not be encouraged. Moreover, whatever may be thought in torts [a civil action for damages], the foregoing rule setting forth an exception to liability for death or injuries inflicted by such devices is inappropriate in penal law for it is obvious that it does not prescribe a workable standard of conduct; liability depends upon fortuitous results. We therefore decline to adopt that rule in criminal cases.

Furthermore, even if that rule were applied here, as we shall see, defendant was not justified in shooting Stephen. California Penal Code (CPC) section 197 provides: "Homicide is . . . justifiable . . . 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or, 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony. . . ." Since a homicide is justifiable under the circumstances specified in section 197, it follows that an attempt to commit a violent injury upon another under those circumstances is justifiable.

By its terms, subdivision 1 of CPC section 197 appears to permit killing to prevent any "felony," but in view of the large number of felonies today and the inclusion of many that do not involve a danger of serious bodily harm, a literal reading of the section is undesirable. . . . We must look further into the character of the crime, and the manner of its perpetration. When these do not reasonably create a fear of great bodily harm, as they could not if defendant apprehended only a misdemeanor assault, there is no cause for the exaction of a human life. . . . The term "violence or surprise" in subdivision 2 is found in common law authorities . . . and, whatever may have been the very early common law, the rule developed at common law that killing or use of deadly force to prevent a felony was justified only if the offense was a forcible and atrocious crime.

Examples of forcible and atrocious crimes are murder, mayhem, rape, and robbery. In such crimes "from their atrocity and violence human life [or personal safety from great harm] either is, or is presumed to be, in peril." . . .

Burglary has been included in the list of such crimes. However, in view of the wide scope of burglary . . . it cannot be said that under all circumstances burglary . . . constitutes a forcible and atrocious crime.

Where the character and manner of the burglary do not reasonably create a fear of great bodily harm, there is no cause for exaction of human life or for the use of deadly force. The character and manner of the burglary could not reasonably create such a fear unless the burglary threatened, or was reasonably believed to threaten, death or serious bodily harm.

Holding

In the instant case the asserted burglary did not threaten death or serious bodily harm, since no one but Stephen and Robert was then on the premises. . . . There is ordinarily the possibility that the defendant, were he present, would realize the true state of affairs and recognize the intruder as one whom he would not be justified in killing or wounding. We thus conclude that defendant was not justified under CPC section 197, subdivisions 1 or 2, in shooting Stephen to prevent him from committing burglary. . . .

Questions for Discussion

1. Ceballos contends that the spring gun resulted only in the employment of the same degree of force that he would have been justified in employing had he been present. The California Supreme Court rejects this standard on the ground that the mechanism is "brutally savage and inhumane." What is the basis for this conclusion? Does this suggest that spring guns are prohibited under all circumstances? Do you agree that Ceballos is proposing an "unworkable standard"?
2. Burglary involves breaking and entering with an intent to commit a felony. Why is burglary not considered a forcible and atrocious crime? What types of offenses are considered forcible and atrocious crimes?
3. Is the standard for the use of deadly force against intruders proposed by the court too complicated to be easily understood? Should you have the right to use deadly force against intruders in your house regardless of whether they pose a threat to commit a forcible and atrocious crime?
4. The Model Penal Code section 3.06(5) provides that a "device" such as a spring gun may only be employed in the event that it is not "designed to cause or known to create a substantial risk of causing death or serious bodily injury." Do you agree?

You Decide

8.5 Law is a thirty-two-year-old African American who moved into a white, middle-class neighborhood with his wife. His home was broken into within two weeks and his clothes and personal property were stolen. Law purchased a 12-gauge shotgun and installed double locks on his doors. One week later, a neighbor saw a flickering light in Law's otherwise darkened house at roughly 8:00 p.m., and because the home had previously been burglarized, the neighbor called the police. Officers Adams and Garrison examined whether windows in the house had been tampered with, and they shined their flashlights into the dwelling. Then they entered the back screened porch where they noticed that the windowpanes on the door to the house had been temporarily put into place with a few pieces of molding. They had no way of knowing that Law had placed the windows in the door in this fashion following the burglary. Officer Garrison removed the molding and glass and reached inside to open the door. He determined that it was a deadlock and decided that the door could not have been opened without a key. As the officer removed his hand from the window, he was killed by a shotgun blast. Officer Potts, the next officer to arrive, testified that he saw Officer Adams running to his squad car yelling that he had been shot at from inside the home. A number of officers arrived, and believing there was a burglar in the house, they unleashed a massive attack as indicated by the fact that there were forty bullet holes in the kitchen door alone.

Law was in the bedroom with his wife and testified that he heard noise outside the house, and he went downstairs and armed himself with a shotgun he had purchased two days following the burglary. Law then went to the back door and observed a "fiddling around with the door" and then heard scraping on the windowpane along with a voice saying, "Let's go in." Law could not see the back porch because of curtains covering the window on the door. When Law heard the voice say, "Let's go in," he was admittedly scared and testified that he could have either intentionally or unintentionally pulled the trigger of the shotgun. At one point following his arrest, Law indicated to the police that he believed that the intruders were members of the Ku Klux Klan. The prosecutor conceded in closing argument that Law "probably thought he shot a burglar or whatever that was outside." Did Law act unreasonably and employ excessive force against the "intruders"? Was Law entitled to the justification of defense of habitation? See *Law v. State,* 318 A.2d 859 (Md. Ct. Spec. App. 1974). See also *Law v. State,* 349 A.2d 295 (Md. Ct. Spec. App. 1975).

You can find the answer at www.sagepub.com/lippmanccl3e.

EXECUTION OF PUBLIC DUTIES

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

There are few areas as controversial as the employment of deadly force by police officers in arresting a fleeing suspect. This, in effect, imposes a fatal punishment without trial. Professor Joshua Dressler writes that until the fourteenth century, law enforcement officers possessed the right to employ deadly force against an individual whom the officer reasonably believed had committed a felony. This was the case even in those circumstances in which a felon could have been apprehended without the use of deadly force. Dressler writes that the authorization of deadly force was based on the notion that felons were "outlaws at war with society" whose lives could be taken to safeguard society. This presumption was strengthened by the fact that felons were subject to capital punishment and to the forfeiture of property. Felons were considered to have forfeited their right to life and the police were merely imposing the punishment that awaited them in any event.[36] The police officer, as noted by the Indiana Supreme Court, is a "minister of justice, and is entitled to the peculiar protection of the law. Without submission to his authority there is no security and anarchy reigns supreme. He must of necessity be the aggressor, and the law affords him special protection."[37] In contrast, only reasonable force could be applied to apprehend a **misdemeanant**. Misdemeanors were punished by a modest fine or brief imprisonment and were not considered to pose a threat to the community. As a consequence, it was considered inhumane for the police to employ deadly force against individuals responsible for minor violations of the law.[38]

The arming of the police and the **fleeing felon rule** were reluctantly embraced by the American public that, although distrustful of governmental power, remained fearful of crime. With a population of three million, Chicago was one of the most violent American cities in the 1920s. A crime survey covering 1926 and 1927 concluded that although most police killings were justified, in other cases "it would seem that the police were hasty and there might be some doubt as to the justification; but in every such instance the coroner's jury returned a verdict of justifiable homicide and no prosecutions resulted. From this we may conclude that the police of the city of Chicago incur no hazard by shooting to kill within their discretion."[39] Some state legislatures attempted to moderate the fleeing felon rule by adopting the standard that a police officer who reasonably believed that deadly force was required to apprehend a suspect would be held criminally liable in the event that he was shown to have been mistaken.[40]

The judiciary began to seriously reconsider the application of the fleeing felon rule in the 1980s. Only a small number of felonies remained punishable by death, and offenses in areas such as white-collar crime posed no direct danger to the public. The rule permitting the employment of deadly force against fleeing felons developed prior to arming the police with firearms in the mid-nineteenth century. As a result, deadly force under the fleeing felon rule was traditionally employed at close range and was rarely invoked to apprehend a felon who escaped an officer's immediate control.[41] An additional problematic aspect of the fleeing felon rule was the authorization for private citizens to employ deadly force, although individuals risked criminal liability in the event that they were proven to have been incorrect.[42]

The growing recognition that criminal suspects retained various constitutional rights also introduced a concern with balancing the interests of suspects against the interests of the police and society.

A number of reasons are offered to justify a limitation on the use of deadly force to apprehend suspects:

1. The shooting of suspects may lead to *community alienation and anger,* particularly in instances in which the evidence indicates that there was no need to employ deadly force or the deceased is revealed to have been unarmed or innocent.
2. *Bystanders* may be harmed or injured by stray bullets.
3. *Substantial monetary damages* may be imposed on a municipality in civil suits alleging that firearms were improperly employed.
4. *Police officers* who employ deadly force can suffer *psychological stress,* strain, and low morale, and may change careers or retire.

The Modern Legal Standard

In 1985, the U.S. Supreme Court reviewed the fleeing felon rule in the next case in the chapter, *Tennessee v. Garner.* The case was brought under a civil rights statute by the family of the deceased

who was seeking monetary damages for deprivation of the "rights . . . secured by the Constitution," (42 U.S.C. § 1983). The Supreme Court determined that the police officer violated Garner's Fourth Amendment right to be free from "unreasonable seizures." Although this was a civil rather than criminal decision, the judgment established the standard to be employed in criminal prosecutions against officers charged with the unreasonable utilization of deadly force.

We may question whether it is fair to place the fate of a police officer in the hands of a judge or jury who may not fully appreciate the pressures confronting an officer required to make a split-second decision whether to employ armed force. Others point to the fact that the use of deadly force typically occurs in situations in which there are few witnesses and the judge and jury must rely on the well-rehearsed testimony of the police. What do you think of the standard established in *Garner?*

Model Penal Code

Section 3.07. Use of Force in Law Enforcement

(1) Use of Force Justifiable to Effect an Arrest. . . . The use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) Limitation on the Use of Force.

- (a) The use of force is not justifiable under this section unless:
  - (i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
  - (ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.
- (b) The use of deadly force is not justifiable under this Section unless:
  - (i) the arrest is for a felony; and
  - (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
  - (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
  - (iv) the actor believes that:
    - (A) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
    - (B) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Analysis

1. The Model Penal Code substantially restricts the common law on the employment of deadly force against fleeing felons.
2. Deadly force is limited to the police or to individuals assisting an individual believed to be a police officer. This limits the utilization or supervision of the use of deadly force to individuals trained in the employment of firearms.
3. The employment of deadly force is restricted to felonies that the police officer believes involves the use or threatened use of deadly force or to situations in which the police officer believes that a delay in arrest will create a substantial risk that the person to be arrested will cause death or serious bodily harm.
4. The police officer possesses a reasonable belief that there is no substantial risk to innocent individuals.

The Legal Equation

Deadly force

An arrest = Fleeing felon

+ law enforcement officer and civilian acting under officer's direction
+ felony arrest
+ no substantial risk of injury to innocents
+ felony involves use or threatened use of deadly force
+ substantial risk of death or serious injury or death if apprehension delayed
+ warning where feasible.

Was the officer justified in killing the burglar?

Tennessee v. Garner, *471 U.S. 1 (1985). Opinion by: White, J.*

Issue

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Facts

At about 10:45 p.m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a six-foot-high chain-link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5'5" or 5'7" tall [In fact, Garner, an eighth grader, was 15. He was 5'4" tall and weighed around 100 or 110 pounds]. While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body. . . .

Garner had rummaged through one room in the house, in which, in the words of the owner, "[all] the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over." The owner testified that his valuables were untouched but that, in addition to the purse and the 10 dollars, one of his wife's rings was missing. The ring was not recovered.

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that "[if], after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40-7-108 (1982). The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. Although the statute does not say so explicitly,

Tennessee law forbids the use of deadly force in the arrest of a misdemeanant. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U.S.C. § 1983 for asserted violations of Garner's constitutional rights. . . . After a three-day bench trial, the District Court entered judgment for all defendants. . . . [I]t . . . concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." The Court of Appeals reversed . . .

Reasoning

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. . . . There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. A police officer may arrest a person if he has probable cause to believe that person committed a crime. . . . Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about how that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. . . .

The same balancing process . . . demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement. . . ."

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. . . . [W]hile the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. . . . Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life [the use of punishment to discourage flight has been largely ignored. The Memphis City Code punishes escape with a $50 fine].

Holding

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. . . . The fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. While we agree that burglary is a serious crime,

we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. Statistics demonstrate that burglaries only rarely involve physical violence. During the ten-year period from 1973 through 1982, only 3.8 percent of all burglaries involved violent crime. . . .

We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. . . .

Dissenting, *O'Connor, J.,* with whom *Burger, C.J.,* and *Rehnquist, J.,* join.

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries not only represent the illegal entry into a person's home, but also "[pose] real risk of serious harm to others." According to recent Department of Justice statistics, "[three-fifths] of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." During the period 1973 through 1982, 2.8 million such violent crimes were committed in the course of burglaries. Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertion that "burglaries only rarely involve physical violence." . . .

Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent fifteen-year-old without sorrow, much less disapproval. . . . The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime. . . .

I cannot accept the majority's creation of a constitutional right to flight for burglary suspects seeking to avoid capture at the scene of the crime. . . . I respectfully dissent.

Questions for Discussion

1. Did Officer Hymon's shooting of the suspect comply with the Tennessee statute? How does the Tennessee statute differ from the holding in *Garner*? Do you believe that the Supreme Court majority places too much emphasis on protecting the fleeing felon?
2. Justice O'Connor writes at one point in her dissent that the Supreme Court majority offers no guidance on the factors to be considered in determining whether a suspect poses a significant threat of death or serious bodily harm and does not specify the weapons, ranging from guns to knives to baseball bats, that will justify the use of deadly force. Is Justice O'Connor correct that the majority's "silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances"?
3. Summarize the facts that Officer Hymon considered in the "split second" that he decided to fire at the suspect. Was his decision reasonable? What of Justice O'Connor's conclusion that the Supreme Court decision will lead to a large number of cases in which lower courts are forced to "struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime."
4. Is Justice O'Connor correct that the Supreme Court majority unduly minimizes the serious threat posed by burglary? Should the Supreme Court be setting standards for police across the country based on the facts in a single case?

Cases and Comments

1. ***The Objective Test for Excessive Force Under the Fourth Amendment.*** The U.S. Supreme Court clarified the standard for evaluating the use of excessive force by police under the Fourth Amendment in *Graham v. Connor* in 1989. Graham, a diabetic, asked Berry to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction. Graham encountered a long line and hurried out of the store and asked Berry to drive him to a friend's house instead. This aroused the suspicion of a police officer who pulled Berry's automobile over and called for backup officers to assist him in investigating what occurred in the store. The backup officers handcuffed Graham and dismissed Berry's warning

that Graham was suffering from a "sugar reaction." Graham began running around the car, sat down on the curb and briefly collapsed. An officer, concluding that Graham was drunk, cuffed his hands behind his back, placed him face down on the hood, and responded to Graham's pleas for sugar by shoving his face against the car. Four officers grabbed Graham and threw him headfirst into the police car. The police also refused to permit a recently arrived friend of Graham's to give Graham orange juice. The officers then received a report that Graham had done nothing wrong at the convenience store and released him. Graham sustained a broken foot, cuts on his wrists, a bruised forehead, injured shoulder, and claimed to experience a continual ringing in his ear.

The U.S. Supreme Court ruled that claims that the law enforcement officers employed excessive force in the course of an arrest, investigatory stop, or other seizure of a suspect should be analyzed under the Fourth Amendment reasonableness standard. This entails an inquiry into whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them without regard to their underlying intent or motivation.

The reasonableness of the use of force according to the Supreme Court "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." This analysis should focus on the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or other individuals, and whether the suspect is actively resisting arrest or evading arrest by flight.

Would you find it difficult as a juror to place yourself in the position of an officer confronting an aggressive and possibly armed or physically imposing suspect? Is it fairer for courts to utilize a "reasonable officer under the circumstances standard" or to use a test that asks whether the degree of force is "understandable under the circumstances?" Are courts "second-guessing" the police? See *Graham v. Connor,* 490 U.S. 386 (1989).

2. ***Hot Pursuit.*** In *Scott v. Harris,* the U.S. Supreme Court confronted the question: May "an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders"? In March 2001, a Georgia county deputy clocked Harris's vehicle traveling at seventy-three mph on a road with a fifty-five-mph speed limit. The deputy activated his blue flashing lights indicating that Harris should pull over to the side of the road. He instead sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding eighty-five mph. Deputy Timothy Scott heard the radio communication and joined the pursuit along with other officers. "Scott took over as the lead pursuit vehicle. Six minutes and nearly ten miles after the chase had begun, Scott requested permission to terminate the episode by employing a 'Precision Intervention Technique' (PIT) maneuver, which causes the fleeing vehicle to spin to a stop." Scott had received permission to execute this maneuver by his supervisor, who had told him to "go ahead and take him out." Scott concluded that it was safer to apply his push bumper to the rear of respondent's vehicle. As a result, Harris lost control of his vehicle and the automobile left the roadway, ran down an embankment, overturned, and crashed. Harris was badly injured and was rendered a quadriplegic. He filed a civil suit against Deputy Scott and others alleging "violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment." The U.S. Court of Appeals for the Eleventh Circuit "affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial." The Court of Appeals concluded that Scott's actions constituted "deadly force" under *Tennessee v. Garner* and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure [and] a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights."

In 2007, U.S. Supreme Court Justice Antonin Scalia writing for the Supreme Court majority held that Officer Scott had acted in a reasonable fashion. He noted that there was a videotape of the high-speed pursuit that portrays a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." In evaluating the reasonableness of Officer Scott's actions, Justice Scalia held that the Supreme Court must balance "the risk of bodily harm that Scott's actions posed to Harris" against "the threat to the public that Scott was trying to eliminate." Harris's high-speed flight "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." On the other hand, Officer Scott's actions "posed a high likelihood of serious injury or death to Harris—though not the near certainty of death posed by, say, shooting a fleeing felon in the back of the head, or pulling alongside a fleeing motorist's car and shooting the motorist." In this situation, Justice Scalia found that Officer Scott had acted reasonably to protect the innocent members of the public who were placed at risk.

What of abandoning the pursuit? Justice Scalia noted that this would not have insured that Harris would have felt sufficiently free from apprehension by the police to slow down and it would reward a

motorist who fled from the police and who placed the public at risk. "The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. . . . The car chase that [Harris] initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise."

Justice Stevens, in dissent, argued that the reasonable course would have been to abandon the pursuit and proposed the following rule: "When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated. . . . Pursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public." As a judge, how would you decide this case? See *Scott v. Harris,* 550 U.S. 374 (2007).

You Decide

8.6 Officer Pfeffer was off duty and spending the day at home. His wife, Sally, noticed a man, later identified as Paul Billingsley, cross the street and attempt to enter their front yard. He was prevented by the bushes from entering the yard and then walked down the sidewalk and entered a neighbor's driveway. Sally called Officer Pfeffer's attention to Billingsley's movements and watched as Billingsley unsuccessfully attempted to enter the locked back door of two homes, before gaining entrance to the home of Gary Machal. Officer Pfeffer asked his wife to call 911, retrieved his service revolver, and confronted Billingsley in Machal's home. Pfeffer drew his revolver and informed Billingsley that he was a police officer and ordered the intruder to halt and to raise his hands. Billingsley had a purse in his left hand and Pfeffer could not observe his right hand. Billingsley ran out the back door onto the deck and jumped some fifteen feet over the railing to the ground. Pfeffer ran to the railing and ordered the suspect to halt. Billingsley landed in a crouched position and then "rotated his left shoulder." Officer Pfeffer fired a shot that struck Billingsley in the lower right back and exited out his groin. Pfeffer did not observe a weapon and the suspect was determined to be unarmed. Billingsley filed an action under 42 U.S.C. § 1983 for a violation of his Fourth Amendment rights. Consider the arguments that might be offered by the prosecution and defense. Was Officer Pfeffer justified in resorting to deadly force? See *Billingsley v. City of Omaha,* 277 F.3d 990 (8th Cir. 2002).

You can find the answer at www.sagepub.com/lippmanccl3e.

CRIME IN THE NEWS

In 2005, Florida passed a so-called "Castle Law," also popularly referred to as the Stand Your Ground law, which expanded the right of self-defense. In the last five years, 31 states have adopted some or all the provisions of the Florida law. These laws are inspired by the common law doctrine that authorizes individuals to employ deadly force without the obligation to retreat against individuals unlawfully entering their home who are reasonably believed to pose a threat to inflict serious bodily harm or death. Individuals under the castle laws possess the right to stand their ground whether they are inside the home or outside the home.

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

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

Home. Individuals are presumed to be justified in using deadly force against intruders who forcefully and unlawfully enter their residence or automobile.

Public place. An individual in any location where he or she "has a right to be" is presumed to be justified in the use of deadly force and has no duty to retreat when he or she reasonably believes that such force is required

to prevent imminent death or great bodily harm to himself or herself or to another or to prevent a forcible felony.

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

In the past under the Florida law, a jury when confronted with a claim of self-defense by an individual in the home who employed deadly force was asked to decide whether the defendant reasonably believed that an intruder threatened death or serious bodily injury. Under the new Florida law, the issue is whether an intruder forcibly and unlawfully entered the defendant's home.

The immunity provision prevents an individual who possesses a credible claim of self-defense from being brought to trial in criminal or civil court.

The central criticism of the "Castle Doctrine" laws is that the laws create a climate in which people will resort to deadly force in situations in which they previously may have avoided armed violence. This, according to critics, threatens to turn communities into "shooting galleries" reminiscent of the "old West." More than 35 percent of American households contain a firearm, and there are well over a million gun crimes committed in the United States each year. According to critics of the law, the Castle Doctrine laws will increase the number of cases involving claims of self-defense. Claims of self-defense in Florida have more than doubled since the law was passed. Last year there were 278 cases of justified homicide in the United States, the highest total in recent memory.

The early data indicates that self-defense cases in Florida are not being brought to trial The *St. Petersburg Times* studied 93 Florida cases between 2005 and 2010 involving claims of self-defense and found that in well over half of these cases, either individuals claiming self-defense were not charged with a crime or the charges were dropped by prosecutors or dismissed by a judge before trial.

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

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

In 2009, Billy Kuch wandered in a drunken stupor into the wrong home in his "cookie cutter neighborhood." He unsuccessfully tried to open the door. Gregory Stewart secured his wife and baby inside the home and emerged with his gun. Kuch raised his hands and asked for a light. He testified that he may have stumbled forward and Stewart fired a shot that ripped through the stomach and spleen hospitalizing Kuch for a month. The prosecutor decided that the shooting was undertaken in self-defense. Kuch questioned whether the 6-1, 250-pound Stewart felt threatened by his 5-9, 165-pound drunken, unarmed neighbor. Kuch's parents responded that they were not against gun ownership, but they were against a law that exempts from prosecution a person who kills. In the past, the law in Florida may have required Stewart to lock the door and call 911 rather than to confront Kuch.

The Florida Stand Your Ground law became the topic of intense national debate when George Zimmerman, a neighborhood watch coordinator, claimed that he had killed 17-year-old Treyvon Martin in self-defense. On April 11, 2012, a special prosecutor charged Zimmerman with second degree murder for the killing of the unarmed Treyvon Martin.

Do you favor the adoption of Florida-type Stand Your Ground Laws?

See more cases on the study site:
Hair v. State, *www.sagepub.com/lippmanccl3e.*

RESISTING UNLAWFUL ARRESTS

English common law recognized the right to resist an unlawful arrest by reasonable force. The only limitation was that this did not provide a defense to the murder of a police officer. The philosophical basis for the defense of resisting an unlawful arrest is explained in the famous case of *Queen v. Tooley,* in which Chief Justice Holt of the King's Bench pronounced that "if one is imprisoned upon an unlawful authority, it is sufficient provocation to all people out of compassion . . . it is a provocation to all the subjects of England."[43]

The U.S. Supreme Court, in *John Bad Elk v. United States,* in 1900, recognized that this rule had been incorporated into the common law of the United States. The Supreme Court ruled that "[i]f the officer had no right to arrest, the other party might resist the illegal attempt to arrest

him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest."[44] In 1948, the U.S. Supreme Court affirmed that "[o]ne has an undoubted right to resist an unlawful arrest . . . and courts will uphold the right of resistance in proper cases."[45]

The English common law rule was recognized as the law in forty-five states as late as 1963. Today, only twelve states continue to recognize the English rule and have not adopted the **American rule for resistance to an unlawful arrest**. The jurisdictions that retain the rule are generally located in the South, perhaps reflecting the region's historical distrust of government.[46] The abandonment of the recognition of a right to resist by a majority of states is because of the fact that the rule is no longer thought to make much sense. The common law rule reflected the fact that imprisonment, even for brief periods, subjected individuals to a "death trap" characterized by disease, hunger, and violence. However, today,

- Incarcerated individuals are no longer subjected to harsh, inhuman, and disease-ridden prison conditions that result in illness and death.
- An arrest does not necessarily lead to a lengthy period of incarceration. Individuals have access to bail and are represented by hired or appointed attorneys at virtually every stage of the criminal justice process.
- The complexity of the law often makes it difficult to determine whether an arrest is illegal. An officer might, in good faith, engage in what is later determined to be an illegal search, discover drugs, and arrest a suspect. The legality of the search and resulting arrest may not be apparent until an appeals court decides the issue.
- The development of sophisticated weaponry means that confrontations between the police and citizens are likely to rapidly escalate and result in severe harm and injury to citizens and to the police.
- Individuals have access to a sophisticated process of criminal appeal and may bring civil actions for damages.
- The common law rule promotes an unacceptable degree of social conflict and undermines the rule of law.[47]

Individuals continue to retain the right to resist a police officer's application of unnecessary and unlawful force in executing arrest. Judges reason that individuals are not adequately protected against the infliction of death or serious bodily harm by the ability to bring a civil or criminal case charging the officer with the application of excessive force.[48]

The **English rule for resistance to an unlawful arrest**, which provides that an individual may resist an illegal arrest, is still championed by some state courts. The Mississippi Supreme Court noted in *State v. King* that "every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary."[49]

Judge Sanders of the Washington Supreme Court dissented from his colleagues' abandonment of the English rule and observed that the police power is "not measured by how hard the officer can wield his baton but rather by the rule of law. Yet by fashioning the rule as it has, the majority legally privileges the aggressor while insulting the victim with a criminal conviction for justifiable resistance."[50] The Maryland Supreme Court observed that law enforcement officers were rarely called to account for illegal arrests by civil or criminal prosecutions and that the right to resist provides an effective deterrent to police illegality.[51]

See more cases on the study site: State v. Hobson, *www.sagepub.com/lippmanccl3e.*

Model Penal Code

Section 3.04. Use of Force in Self-Defense

(1) Use of Force Justifiable for Protection of the Person. . . . The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful. . . .

Analysis

An individual is not entitled to forcefully resist an unlawful arrest by a law enforcement officer. This restriction does not apply where the aggressor "is not known to the actor to be a peace officer." Self-defense, however, is permitted against a police officer's use of "more force than is necessary" to arrest an individual.

The Legal Equation

A lawful or unlawful arrest ≠ resistance by physical force.

Excessive force in an arrest = proportionate self-defense.

NECESSITY

The **necessity defense** recognizes that conduct that would otherwise be criminal is justified when undertaken to prevent a significant harm. This is commonly called "the **choice of evils**" because individuals are confronted with the unhappy choice between committing a crime or experiencing a harmful event. The harm to be prevented was traditionally required to result from the forces of nature. A classic example is the boat captain caught in a storm who disregards a "no trespassing sign" and docks his or her boat on an unoccupied pier. Necessity is based on the assumption that had the legislature been confronted with this choice, the legislators presumably would have safeguarded the human life of sailors over the property interest of the owner of the dock. As a result, elected officials could not have intended that the trespass statute would be applied against a boat captain confronting this situation.[52]

English common law commentators and judges resisted recognition of necessity. The eighteenth-century English justice Lord Hale objected that recognizing starvation as a justification for theft would lead servants to attack their masters. Roughly one hundred years later, English historian J.F. Stephen offered the often-cited observation that "[s]urely it is at the moment when temptation to crime is the strongest that the law should speak most clearly and emphatically to the contrary."[53]

In 1884, English judges confronted what remains the most challenging and intriguing necessity case in history, *The Queen v. Dudley and Stephens*. The three crew members of the yacht, the *Mignonette,* along with the seventeen-year-old cabin boy, were forced to abandon ship when a wave smashed into the stern. The four managed to launch a thirteen-foot dinghy with only two tins of turnips to sustain them while they drifted sixteen hundred miles from shore. On the fourth day, they managed to catch a turtle that they lived on for a week; they quenched their thirst by drinking their own urine and, at times, by drinking seawater. On the nineteenth day, Captain Thomas Dudley murdered young Richard Parker with the agreement of Edwin Stephens and over the objection of Edmund Brooks. The three survived only by eating Parker's flesh and drinking his blood until rescued four days later. The English court rejected the defense of necessity and the proposition that the members of the crew were justified in taking the life of Parker in order to survive. Lord Coleridge asked, "[b]y what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? . . . It is . . . our duty to declare that the prisoners' act in this case was willful murder. . . . [T]he facts . . . are no legal justification of the homicide. . . ."[54] The defendants were sentenced to death, but released within six months.[55]

The limitation of necessity to actions undertaken in response to the forces of nature has been gradually modified, and most modern cases arise in response to pressures exerted by social conditions and events. *State v. Salin* is representative of this trend. Salin, an emergency medical services technician, was arrested for speeding while responding to a call to assist a two-year-old child who was not breathing. The Delaware court agreed that Salin reasonably assumed that the child was in imminent danger and did not have time to use his cell phone to check on the child's progress. His criminal conviction was reversed on the grounds of

necessity. Judge Charles Welch concluded that Salin was confronted by a choice of evils and that his "slightly harmful conduct" was justified in order to "prevent a greater harm."[56]

There are several reasons for the defense of necessity:[57]

- *Respect.* Punishing individuals under these circumstances would lead to disrespect for the legal system.
- *Equity.* Necessity is evaluated on a case-by-case basis and introduces flexibility and fairness into the legal system.

The necessity defense nevertheless remains controversial and subject to criticism:[58]

- *Self-Help.* Individuals should obey the law and should not be encouraged to violate legal rules.
- *Mistakes.* Society suffers when an individual makes the wrong choice in the "choice of evils."
- *Politicalization of the Law.* The defense has been invoked by antiabortion and antinuclear activists and individuals who have broken the law in the name of various political causes.
- *Irrelevancy.* Relatively few cases arise in which the necessity defense is applicable, and too much time is spent debating a fairly insignificant aspect of the criminal law.

Roughly one-half of the states possess necessity statutes and the other jurisdictions rely on the common law defense of necessity. There is agreement on the central elements of the defense.[59]

- *There was an immediate and imminent harm.* In *State v. Green,* the defendant was assaulted and twice sodomized in his cell. He pretended to commit suicide on two occasions so as to be removed from his cell, but was informed that he would have to "fight it out, submit to the assaults or go over the fence." Three months later he was threatened with sexual assaults by five inmates and escaped from prison. The Missouri Supreme Court ruled that the trial court properly denied Green the defense of necessity because "[t]his is not a case where defendant escaped while being closely pursued by those who sought by threat of death or bodily harm to have him submit to sodomy."[60]
- *The defendant also must not have been substantially at fault in creating the emergency.* In *Humphrey v. Commonwealth,* the Virginia Court of Appeals recognized that the defendant, a convicted felon, was justified in violating a gun possession statute in an effort to protect himself from an armed attack. The court stressed that the appellant was "without fault in provoking the altercation."[61]
- *The harm created by the criminal act is less than that caused by the harm confronting the individuals.* Dale Nelson's truck became bogged down in a marshy area roughly 250 feet from the highway. He was fearful that the truck might topple over, and he and two companions unsuccessfully sought to free the vehicle. A passerby drove Nelson to the Highway Department yard where he ignored No Trespassing signs and removed a dump truck that also became stuck. He returned to the heavy equipment yard and took a front-end loader that he used to remove the dump truck. He freed the dump truck, but both the front-end loader and truck suffered substantial damage. Nelson was ultimately convicted of the reckless destruction of personal property and joyriding. The Alaska Supreme Court ruled that "the seriousness of offenses committed by Nelson were disproportionate to the situation he faced." Nelson's "fears about damage to his truck roof were no justification for his appropriation of sophisticated and expensive equipment."[62]
- *An individual reasonably expected a direct causal relationship between his acts and the harm to be averted.* In *United States v. Maxwell,* the First Circuit Court of Appeals dismissed the defendant's contention that he could have reasonably believed that disrupting military exercises at a naval base would cause the U.S. Navy to withdraw nuclear submarines from the coast of Puerto Rico. The court ruled that this was "pure conjecture" and that the defendant "could not reasonably have anticipated that his act of trespass would avert the harm that he professed to fear." Political activists have been equally unsuccessful in contending that they reasonably believed that acts such as splashing blood on walls of the Pentagon or the vandalizing of government property would impede the U.S. production of military weaponry.[63]
- *There were no available legal alternatives to violating the law.* The District of Columbia Court of Appeals confirmed the conviction of a defendant charged with the unlawful possession of

marijuana where the defendant failed to demonstrate that she had tried the dozens of drugs commonly prescribed to alleviate her medical condition.[64] Necessity also was not considered to justify the kidnapping and "deprogramming" of a youthful member of the Unification Church. The Colorado Court of Appeals explained that even assuming that the young woman confronted an imminent harm from a religious cult, her Swedish parents might have pursued legal avenues such as obtaining a court order institutionalizing the twenty-nine-year-old church member as an "incapacitated or incompetent person."[65]

- *The criminal statute that was violated does not preclude the necessity defense.* Courts examine the text or legislative history of a statute to determine whether the legislature has precluded a defendant from invoking the necessity defense. There is typically no clear answer, and judges often ask whether the legislature would have recognized that the statute may be violated on the grounds of necessity under the circumstances. In *United States v. Oakland Cannabis Buyers' Cooperative,* U.S. Supreme Court Justice Clarence Thomas ruled that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act."[66] In *United States v. Romano,* Romano was bloodied and battered and fleeing the scene of a fight when stopped by a police officer and charged with DWI (driving while intoxicated). A New Jersey superior court ruled that the state legislature did not preclude the necessity defense in those cases in which an intoxicated driver was fleeing a brutal and possibly deadly attack.[67]

The next case, *Commonwealth v. Kendall,* presents the issue whether a defendant arrested for driving under the influence of intoxicating liquor was entitled to a jury instruction on the defense of necessity. The defendant, at the time of his arrest, was rushing his seriously injured girlfriend to the hospital for medical care; he appealed the trial judge's determination that he had failed to exhaust all available legal alternatives. Ask yourself whether you agree with the decision of the Supreme Judicial Court of Massachusetts.

Model Penal Code

Section 3.02. Justification Generally: Choice of Evils

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

  (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

  (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

  (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evil or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Analysis

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

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

Several steps are involved under the Model Penal Code:

- *A Belief That Acts Are Necessary to Avoid a Harm.* The actor must "actually believe" the act is necessary or required to avoid a harm or evil to himself or to others. A druggist who sells a drug without a prescription must be aware that this is an act of necessity rather than ordinary law breaking.
- *Comparative Harm or Evils.* The harm or evil to be avoided is greater than that sought to be prevented by the law defining the offense. Human life generally is valued above property. A naval captain may enter a port from which the vessel is prohibited to save the life of a crew member. On the other hand, the possibility of financial ruin does not justify the infliction of physical harm. The question of whether an individual has made the proper choice is determined by the judge or jury rather than by the defendant's subjective belief.
- *Legislative Judgment.* A statute may explicitly preclude necessity; for instance, prohibiting abortions to save the life of the mother.
- *Creation of Harm.* An individual who intentionally sets a fire may not later claim necessity. However, an individual who negligently causes a fire may still invoke necessity to destroy property to control the blaze. He or she may be prosecuted for causing the fire.

The Legal Equation

Necessity = Criminal action believed to be necessary to prevent a harm
+ the harm prevented is greater than will result from the criminal act
+ absence of legal alternatives
+ legislature did not preclude necessity
+ did not intentionally create the harm.

Did the defendant exhaust all reasonable alternatives?

Commonwealth v. Kendall, *883 N.E.2d 269 (Mass. 2008). Opinion by: Spina, J.*

Issue

In this case, we consider whether the defendant, Clinton Kendall, was entitled to a jury instruction on the defense of necessity with respect to a charge of operating while under the influence of intoxicating liquor, where the defendant was driving in order to get his seriously injured girl friend to a hospital for medical care. A jury found the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor (OUI), and he was sentenced to two years of probation, with conditions.

Facts

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

After they walked back to the defendant's trailer, he opened the door for Maloney, and she went inside, stopping at the top of the stairs to remove her shoes. As the defendant entered the trailer, he stumbled and bumped into Maloney, causing her to fall forward and hit her head on the corner of a table. The impact opened a wound on her head, and she began to bleed

profusely. The defendant was unsuccessful in his efforts to stop the bleeding, so the two decided to seek immediate medical attention.

The trailer did not have a telephone, and neither Maloney nor the defendant had a cellular telephone. Approximately seventy-five to eighty other trailers were located in the mobile home park (each about twenty-five feet apart), at least one nearby neighbor (who lived about forty feet from the defendant) was at home during the time of the incident, and a fire station was located approximately one hundred yards from the neighbor's home. Nonetheless, Maloney and the defendant got into his car, and he drove her to the emergency room of Marlborough Hospital. A breathalyzer test subsequently administered to the defendant at the Marlborough police station, after he had been placed under arrest, showed a blood alcohol level of .23 per cent.

At the close of all the evidence at trial, defense counsel informed the judge that he intended to argue a defense of necessity to the charge of OUI, and he requested an appropriate jury instruction. The judge denied counsel's request for an instruction on necessity, concluding that evidence had not been presented to demonstrate that such a defense was applicable in the circumstances of this case, where the parties were in a highly populated area and the defendant could have availed himself of nearby resources to obtain medical attention for Maloney. As a consequence, during his closing statement, defense counsel did not mention the OUI charge to the jury.

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

Reasoning

In a prosecution for OUI, the Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's ability to operate a motor vehicle safely. The Commonwealth need not prove that the defendant actually drove in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely. . . .

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

The common-law defense of necessity is available in limited circumstances. It can only be raised if each of the following conditions is met: "(1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." In those instances where the evidence is sufficient to raise the defense of necessity, the burden is on the Commonwealth to prove the absence of necessity beyond a reasonable doubt.

In considering whether a defendant is entitled to a jury instruction on the defense of necessity, we have stated that a judge shall so instruct the jury only after the defendant has presented some evidence on each of the four underlying conditions of the defense. That is to say, an instruction on necessity is appropriate where there is evidence that supports at least a reasonable doubt whether operating a motor vehicle while under the influence of intoxicating liquor was justified by necessity. Notwithstanding a defendant's argument that the jury should be allowed to decide whether the defendant has established a necessity defense, a judge need not instruct on a hypothesis that is not supported by evidence in the first instance. Thus, if some evidence has been presented on each condition of a defense of necessity, then a defendant is entitled to an appropriate jury instruction.

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

When viewing the evidence in the light most favorable to the defendant, we conclude that he failed to present any evidence to support a reasonable doubt that his operation of a motor vehicle while under the influence of intoxicating liquor was justified by necessity. There is no question that Maloney's head wound was serious and that time was of the essence in securing medical treatment. Nonetheless, the record is devoid of evidence that the defendant made any effort to seek

assistance from anyone prior to driving a motor vehicle while intoxicated. The defendant did not try to contact a nearby neighbor to place a 911 emergency telephone call or, alternatively, to drive Maloney to the hospital. There is also no evidence that the defendant attempted to secure help from the fire station or Chinese restaurant, both in relatively close proximity to the defendant's trailer. This is not a case where, because of location or circumstances, there were no legal alternatives for abating the medical danger to Maloney. Moreover, there has been no showing by the defendant that available alternatives would have been ineffective, leaving him with no option but to drive while intoxicated.

Holding

Because the defendant did not present at least some evidence at trial that there were no effective legal alternatives for abating the medical emergency, we conclude that the judge did not err in refusing to allow counsel to present a defense of necessity and in denying his request for an instruction on such a defense.

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

The necessity defense recognizes that circumstances may force individuals to choose between competing evils. In particular, it may be reasonable at times for an individual to engage in the "lesser evil" of committing a crime in order to avoid greater harms; when this occurs, the individual should not be punished by the law for his actions.

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

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

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

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

Questions for Discussion

1. What are the elements of necessity under Massachusetts law?
2. Why does the Massachusetts Supreme Judicial Court uphold the decision of the trial court judge not to issue an instruction on the necessity defense?
3. Summarize the argument of the dissenting judges.
4. Do you agree with the majority decision or with the dissenting opinion?

Cases and Comments

1. ***Imminence.*** Steven Gomez was about to be released from prison in March 1992, when he was approached by a fellow inmate, Imran Mir, who was waiting trial on involvement in an international drug conspiracy. Mir solicited Gomez to murder six witnesses in Mir's case and offered $10,000 or half a kilogram of heroin for each witness Gomez killed. Gomez contacted government authorities and agreed to assist in gathering evidence against Mir. Mir provided Gomez with the names of the individuals to be killed, promised to supply the required weapons, and provided a $1,000 down payment. The government subsequently charged Mir with five counts of solicitation to commit murder. The indictment against Mir revealed Gomez's identity as the informant in the case.

In October 1992, Gomez was stopped by a man with a gun who threatened to kill him, and Gomez later learned that there was a contract out on his life. Gomez unsuccessfully sought assistance from U.S. Customs, which had promised him protection; his parole officer; the Sacramento County Sheriff; and Catholic and Protestant churches. He even resorted to detailing his plight in an interview with a local newspaper.

Gomez was scared and started sleeping in the park, living on the streets, spending the night at the homes of friends, and riding buses all night. At one point, he intentionally violated parole and during his month-long incarceration received a written threat. On February 1, 1993, one of his friends received a death threat meant for Gomez. Gomez reacted by arming himself with a 12-gauge shotgun. On February 4, 1993, two days after Gomez began carrying a weapon, he was arrested by Customs agents and was charged with possession of a firearm by a felon.

The Ninth Circuit Court of Appeals held that the threat against Gomez was more than a vague promise of future harm; Gomez possessed good reason to believe that Mir would seek retribution because his hiring of Gomez substantiated that he was willing to kill witnesses. Gomez confronted an international drug cartel boss who posed a danger that satisfied the "present and immediate" requirement of the necessity defense. The Ninth Circuit also noted that it was the government's filing of an indictment against Mir, rather than Gomez's behavior, that placed Gomez in this precarious position.

Gomez exhausted reasonable alternatives before arming himself and could not leave California and join his wife and son in Texas while on parole. In any event, Mir clearly possessed the resources to track down Gomez in Texas. Gomez also possessed a network of family and friends in California who assisted in hiding him from Mir. In short, there were few alternatives available to Gomez other than arming himself.

There was no indication that Gomez armed himself with a shotgun for any purpose other than self-defense. Gomez immediately dropped the firearm when confronted with customs agents to demonstrate his cooperation. The Ninth Circuit Court of Appeals concluded that the prosecution of Gomez for "trying to protect himself, when the government refused to protect him from the consequences of its own indiscretion, is not what we would expect from a fair-minded sovereign." How would you rule? See *United States v. Gomez,* 92 F.3d 770 (9th Cir. 1996).

2. ***Property Versus Human Life.*** In *State v. Celli,* defendants Brooks and Celli left Deadwood, South Dakota, in search of employment in Newcastle, Wyoming, a distance of roughly seventy-five miles. They planned to hitchhike in the sunny but chilly weather and dressed warmly. The two defendants failed to secure a ride and by late afternoon had walked roughly twelve miles. Celli slipped in the snow along the road and grabbed Brooks, and the two then tumbled down a steep embankment. In an effort to get back to the road, they were forced to cross a frozen stream and fell through the ice. Their shoes and pants were soaked. The temperature quickly dropped to below freezing and they unsuccessfully attempted to hitch a ride back to Deadwood. Brooks and Celli began the trek back and when they spotted a cabin, they broke the lock on the front door and found matches to start a fire with which to dry their clothes. They spent the night in the bed and, in the morning, shared a can of beans. A neighbor noticed the smoke and notified the police. The South Dakota Supreme Court reversed their conviction on fourth-degree burglary on a technicality and found it unnecessary to reach the issue whether the two were entitled to an instruction on the necessity defense. Were the defendants justified in breaking into the cabin and spending the night? See *State v. Celli,* 263 N.W.2d 145 (S.D. 1978).

3. ***Economic Necessity.*** Jesus Bernardo Fontes was arrested after he presented a false identification card to a convenience store clerk and attempted to cash a forged payroll check in the amount of $454.75. The defendant claimed that his three children, who ranged in age from sixteen months to eleven years, experienced serious health problems. The children had not eaten for more than twenty-four hours, and three different food banks had turned down his request for food. The defendant appealed the trial court's refusal to recognize the defense of necessity. Fontes feared that the lack of food would further complicate his children's health problems and lead to malnutrition and death. "While we are not without sympathy for the downtrodden, the law is clear that economic necessity alone cannot support a choice of crime." Should the judge have issued a jury instruction on (economic) necessity? See *People v. Fontes,* 89 P.3d 484 (Colo. Ct. App. 2003)?

You can find more cases on the study site: **The Queen v. Dudley and Stephens, State v. Caswell, People v. Gray, U.S. v. Schoon,** ***www.sagepub.com/lippmanccl3e.***

You Decide

8.7 Butterfield and his friend drank throughout the evening. Butterfield's friend carried the drunk defendant to his a garage apartment at about 1:45 a.m. As Butterfield entered his bedroom "he received a lick on his head which rendered him unconscious." When Butterfield awoke, he found himself lying on the floor in a pool of blood." Butterfield realized he was bleeding from the wound and that he required immediate medical attention. Butterfield lived alone and had no telephone in his apartment. He decided to drive to the hospital, fainted while driving, and wrecked his car. Butterfield was arrested for DWI and was sentenced to thirty days in jail and was fined $50.00. Was Butterfield entitled to the necessity defense? See *Butterfield v. State,* 317 S.W.2d 943 (Tex. Crim. App. 1958).

You can find the answer at www.sagepub.com/lippmanccl3e.

You Decide

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

You can find the answer at www.sagepub.com/lippmanccl3e.

CONSENT

The fact that an individual consents to be the victim of a crime ordinarily does not constitute a defense. For example, the Massachusetts Supreme Judicial Court held that an individual's consensual participation in a sadomasochistic relationship was not a defense to a charge of assault with a small whip. The Massachusetts judges stressed that as a matter of public policy, an individual may not consent to become a victim of an assault and battery with a dangerous weapon.[68]

Professor George Fletcher writes that although an individual is not criminally responsible for self-abuse or for taking his or her own life, those who assist him or her are criminally liable. Why does consent not constitute a justification?[69]

The most common explanation is that the criminal law punishes acts against individuals that harm and threaten society. The fact that an individual may consent to a crime does not mean that society does not have an interest in denouncing and deterring this conduct. The famous eighteenth-century English jurist William Blackstone observed that a criminal offense is a "wrong affecting the general public, at least indirectly, and consequently cannot be licensed by the individual directly harmed."[70]

For an international perspective on this topic, visit the study site.

- Condoning a crime under such circumstances undermines the uniform application of the law and runs the risk that perpetrators will become accustomed and attracted to a life of crime.
- A sane and sensible person would not consent to being a victim of a crime.
- The victim's consent could not possibly constitute a reasonable and rational decision and may be the result of subtle coercion. Society must step in under these circumstances to insure the safety and security of the individual.
- The perpetrator of a crime can easily claim consent, and courts do not want to unravel the facts.

In *State v. Brown,* a New Jersey Superior Court ruled that a wife's instructions to her husband that he was to beat her in the event that she consumed alcoholic beverages did not constitute a justification for the severe beating he administered. Judge Bachman ruled that to "allow an otherwise criminal act to go unpunished because of the victim's consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law."[71]

There are three exceptions or situations in which the law recognizes consent as a defense to criminal conduct:

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

Consent must be free and voluntary and may not be the result of duress or coercion. An individual may also limit the scope of consent by, for instance, only authorizing a doctor to operate on three of the five fingers on his or her left hand.

- *Legal Capacity.* Young people below the age of consent, the intoxicated, and those on drugs, as well as individuals suffering from a mental disease or abnormality, are not considered capable of consent.
- *Fraud or Deceit.* Consent is not legally binding in those instances in which it is based on a misrepresentation of the facts.
- *Forgiveness.* The forgiveness of a perpetrator by the victim following a crime does not constitute consent to a criminal act.

A Nassau County court ruled that the defendants went beyond the consent granted by fraternity pledges to "hazing." The judge found that the intentional and severe beating administered exceeded the terms of any consent and observed that "consent obtained through fraud . . . or through incapacity of the party assaulted, is no defense. The consent must be voluntary and intelligent. It must be free of force or fraud. . . . [T]he act should not exceed the extent of the terms of consent."[72]

The next case in the chapter, *State v. Dejarlais,* involves a court order protecting a female against harassment by her former boyfriend. The case asks whether the victim's continuing consensual relationship with her boyfriend following the issuance of the order of protection constitutes a defense.

Model Penal Code

Section 2.11. Consent

(1) 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 an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) 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:

  (a) the bodily injury consented to or threatened by the conduct consented to is not serious; or

  (b) 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; or

  (c) the consent establishes a justification of the conduct under Article 3 of the Code.

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

  (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmlessness of the conduct charged to constitute the offense; or

(c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or

(d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

Analysis

1. Section 2.11(1) notes that a lack of consent is an essential part of the definition of certain crimes that the prosecution must establish at trial beyond a reasonable doubt. Rape, for instance, requires a male's sexual penetration of a female without her consent.
2. Section 2.11(2)(b) repeats that consent constitutes a defense in the case of an offense causing minor injury or a foreseeable injury that occurs during a lawful sporting event. Section 2.11(2)(c) provides authorization for doctors to undertake emergency medical procedures on patients incapable of consent in those instances in which a reasonable person wishing to safeguard the welfare of the patient would consent.
3. There are four situations in which consent is not a defense under Section 211(3). The first involves an individual who is not entitled to consent, such as a stranger who consents to the "removal of another's property." The second covers a lack of personal capacity to consent. The third addresses an offense, such as the molestation or rape of a minor, in which the law seeks to protect individuals who are considered to be incapable of knowing and intelligently consenting. The last situation addresses consent obtained by fraud. A good example is a patient who consents to a medical procedure and after the administration of an anesthetic is sexually molested.

The Legal Equation

Consent ≠ A justification, generally.

Consent = A justification only for

1. minor physical injury;
2. foreseeable injury in legal sporting event; and
3. beneficial medical procedure; where

\+ consent is voluntarily given by an individual with legal capacity.

May the defendant raise the defense of consent to a violation of an order of protection?

State v. Dejarlais, *969 P. 2d 90 (Wash. 1998). Opinion by: Dolliver, J.*

Defendant Steven Dejarlais was convicted in Pierce County Superior Court of violating a domestic violence order for protection. . . . The Court of Appeals affirmed the defendant's convictions, and we granted his petition for review. We now affirm.

Facts

Ms. Shupe met the defendant in 1993 after separating from her husband. She filed for divorce in June 1993 and began seeing the defendant regularly. Their relationship

included his frequent overnight stays at her home. Ms. Shupe testified that, during divorce proceedings with her husband, a temporary parenting plan [the judge issued an order providing that Ms. Shupe and her husband were to share custody of the children until the issue of child custody was resolved] was filed, and she feared being found in violation of its terms because of her relationship with the defendant. She further testified her husband gave her $1,500 to help her move, and requested she petition for an order for protection against the defendant to avoid being found in violation of the parenting plan.

On September 9, 1993, Ms. Shupe signed a declaration in support of the request for a protection order, claiming she was a victim of defendant's harassment. She stated: "I met Steve back in February 1993. I'm married but going through a divorce. I decided to stop seeing him because it was becoming too much. He and my husband got into it a few times also. Steve follows me, calls numerous times a day, calls my work, comes to my work. He just don't get the hint it's over."

On September 23, 1993, an Order for Protection from Civil Harassment was entered [an order of protection issued by a Washington court is based on an allegation of domestic violence that includes physical harm or the fear of imminent physical harm or the stalking of one family or household member by another family or household member]. The Order restrained the defendant from contacting or attempting to contact Ms. Shupe in any manner, making any attempts to keep her under surveillance, and going within "100 feet" of her residence and workplace. The order stated it was to remain in effect until September 23, 1994, and that any willful disobedience of its provisions would subject the defendant to criminal penalties as well as contempt proceedings. Police Officer Stephen Mauer served the defendant with the order on November 23, 1993. Ms. Shupe testified her relationship with the defendant continued despite the order.

The defendant went to jail in May 1994, apparently for an offense unrelated to his relationship with Ms. Shupe. During that time, Ms. Shupe discovered he had been seeing another woman. Following his stay in jail, on May 22, 1994, the defendant went to Ms. Shupe's home and let himself in through an unlocked door. Ms. Shupe, who had been asleep on the floor by the couch, confronted the defendant, telling him she knew about the other woman and wanted nothing more to do with him. She did not tell him to leave, fearing he would get "mad and furious," but walked back to her bedroom. The defendant followed her, saying he would "have [her] one more time." . . . He threw her on the bed, and, disregarding her protestations and refusals, had intercourse with her twice.

The defendant was arrested and charged with one count of violation of a protection order and one count of rape in the second degree. At trial, the defendant testified he was aware of the protection order and clearly understood its terms. He testified he did not rape Ms. Shupe but that the two of them had consensual sex.

The trial court declined to give defense counsel's proposed instruction, which stated: "If the person protected by a Protection Order expressly invited or solicited the presence of the defendant, then the defendant is not guilty of Violation of Protection Order." . . . Instead, the trial court instructed the jury as follows: "A person commits the crime of violation of an order for protection when that person knowingly violates the terms of an order for protection."

The jury found the defendant guilty of violation of a protection order and rape in the third degree. The Court of Appeals affirmed his convictions. We granted review and now affirm, holding consent is not a defense to the charge of violating a domestic violence order for protection.

The defendant was convicted of a misdemeanor violation of a protection order under RCW 26.50.110(1) which provides that whenever an order for protection is granted and the respondent or person to be restrained knows of the order, a violation of the restraint provisions or of a provision excluding the person from a residence, workplace, school, or day care is a gross misdemeanor.

Issue

The defendant contends that, where a person protected by an order consents to the presence of the person restrained by the order, the jury should be instructed that consent is a defense to the charge of violating that order. We note at the outset that, even if consent were a defense to the crime of violating a protection order, it is far from clear that the contact in this case was consensual. Contrary to the defendant's proposed instruction, Ms. Shupe does not appear to have invited or solicited the defendant's presence on the night in question. More importantly, the jury found defendant guilty of rape in the third degree. . . . The protection order prohibited any contact; even if Ms. Shupe consented to earlier contacts or to defendant's presence at her home that day, the rape was clearly a nonconsensual contact. We nevertheless reach the issue defendant raises because he seems to suggest that Ms. Shupe's repeated invitations and ongoing acquiescence to defendant's presence constituted a blanket consent or waiver of the order's terms. We disagree.

Reasoning

A domestic violence protection order does not protect merely the "private right" of the person named as petitioner in the order. In fact, the court recognized, the statute reflects the Legislature's belief that the public

has an interest in preventing domestic violence. The Legislature has clearly indicated that there is a public interest in domestic violence protection orders. In its statement of intent for RCW 26.50, the Legislature stated that domestic violence, including violations of protective orders, is expressly a public, as well as private, problem, stating that domestic violence is a "problem of immense proportions affecting individuals as well as communities" which is at "the core of other social problems."

We agree. Indeed, the Legislature's intent is clear throughout the statute, and allowing consent as a defense is not only inconsistent with, but would undermine, that intent.

The order served on the defendant warned him "that any willful disobedience of the order's provisions would subject the respondent to criminal penalties and possibly contempt." We are convinced the Legislature did not intend for consent to be a defense to violating a domestic violence protection order.

The statute also requires police to make an arrest when they have probable cause to believe a person has violated a protection order. There is no exception to this mandate for consensual contacts; rather, the obligation to arrest does not even depend upon a complaint being made by the person protected under the order but only on the respondent's awareness of the existence of that order. . . .

Holding

Our reading of the statute is consistent with the Legislature's intent and clear statement of policy. Requests for modification of that policy should be directed to the Legislature not this court. The statute, when read as a whole, makes clear that consent should not be a defense to violating a domestic violence protection order. The defendant is not entitled to an instruction which inaccurately represents the law. We affirm the defendant's convictions.

Questions for Discussion

1. Why did Kimberly Shupe petition for an order of protection against Steven Dejarlais? Was it motivated by a desire to prevent Dejarlais from continuing to abuse or threaten her?
2. Shupe and Dejarlais continued their relationship for roughly six months following the order of protection. Why did Shupe suddenly complain that Dejarlais was violating the order?
3. Was there continuing consent by Kimberly Shupe to engage in a relationship with Dejarlais following the issuance of the order of protection? Should Dejarlais be able to use Shupe's continuing consent as a defense to his violation of the order of protection?
4. Does society have an interest in enforcing the order of protection that takes precedence over Shupe's consent to a continuing relationship with Dejarlais?

Cases and Comments

Sports. In *State v. Shelley,* Jason Shelley and Mario Gonzalez played on opposing teams during an informal basketball game at the University of Washington Intramural Activities Building. These games were not refereed and the players called fouls on opposing players. Gonzalez had a reputation for aggressive play and fouled Shelley several times. At one point, Gonzalez slapped at the ball and scratched Shelley's face and drew blood. Shelley briefly left and returned to the game. Shelley, after returning to the court, hit Gonzalez and broke his jaw in three places, requiring the jaw to be wired shut for six weeks. Shelley was convicted of assault in the second degree. Gonzalez testified that the assault was unprovoked. Shelley, however, contended that Gonzalez continually slapped and scratched him and that Shelley was getting increasingly angry. Shelley explained that the two went for a ball and claimed that Gonzalez raised his hand toward Shelley's face and that Shelley hit Gonzalez as a reflex reaction to protect himself from being scratched.

The Court of Appeals of Washington held that consent is a defense to assaults occurring as part of athletic contests. Absent this rule, most athletic contests would have to be prohibited. The court of appeals rejected the standard proposed by the prosecution that a victim cannot be considered to have consented to conduct that falls outside the rules of an athletic contest, explaining that various "excesses and inconveniences are to be expected beyond the formal rules of the game. . . . However, intentional excesses beyond those reasonably contemplated in the sport are not justified." The court of appeals adopted the Model Penal Code standard that "reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity are not forbidden by law." The issue is not the injury suffered by the alleged victim, but "whether the conduct of the defendant constituted foreseeable behavior in the play of the game. . . . [T]he injury must have occurred as a by-product of the game itself." The Court of Appeals

of Washington affirmed Shelley's conviction and held that there is "nothing in the game of basketball" that would recognize consent as a defense to the conduct engaged in by Shelley. See *State v. Shelley,* 929 P.2d 489 (Wash. Ct. App. 1997).

Compare *Shelley* to *People v. Schacker.* In this New York hockey case, the defendant Robert Schacker struck Andrew Morenberg in the back of the neck after the whistle had blown and play had stopped. Morenberg was standing near the goal net and struck his head on the crossbar of the net, causing a concussion, headaches, blurred vision, and memory loss. This was a "no-check" hockey league that involved limited physical contact between opposing players. The District Court for Suffolk County dismissed the charges of assault in the third degree against Schacker based on the fact that Morenberg had assumed the risk of injury during the normal course of a hockey game.

Are the differing results in *Shelley* and *Schacker* based on the distinction between basketball and hockey? Is the judge in *Schacker* correct that Morenberg's injury was "connected with the competition"? See *People v. Schacker,* 670 N.Y.S.2d 308 (N.Y. Dist. Ct. 1998).

You Decide

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

George responded, "No, I'm not going to hit you," and shoved Givens away from him. Givens kicked and punched George in his side; and, as Givens charged toward him, George punched Givens in the face. George then threw two more punches. Givens testified that at the time of the incident, he "was all jazzed up" from the game and "in an aggressive mood" and "kind of wanted to hit [George]" and he "kind of wanted [George] to hit [him]." Givens "suffered dental fractures and loose teeth. He also received two blows to the head, and testified that he may have lost consciousness for a brief moment." At the close of evidence, George objected to the jury charge because the court did not include an instruction on the defense of consent. Was the judge correct in not issuing an instruction on consent? See *Miller v. State,* 312 S.W.3d 209 (Tex. App. 2010).

You can find the answer at www.sagepub.com/lippmanccl3e.

CHAPTER SUMMARY

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

Self-defense, for instance, preserves the right to life and bodily integrity of an individual confronting an imminent threat of death or serious bodily harm. Individuals are also provided with the privilege of intervening to defend others in peril. Defense of the dwelling preserves the safety and security of the home. The execution of public duties justifies the acts of individuals in the criminal justice system that ordinarily would be considered criminal. A police officer, for instance, may use deadly force against a "fleeing felon" who poses an imminent threat to the police or to the public. The right to resist an illegal arrest is still recognized in various states, but has been sharply curtailed based on the fact that the state and federal governments provide effective criminal and civil remedies for the abuse of police powers. Necessity or "choice of evils" justifies illegal acts that alleviate an imminent and greater harm. The defense of consent is recognized in certain isolated instances in which the defendant's criminal conduct advances the social welfare. These include incidental contact, sports, and medical procedures.

The justifiability of a criminal act is ultimately a matter for the finder of fact, either the judge or jury, rather than the defendant. The law generally requires that individuals relying on self-defense or necessity believe their acts are justified and that a reasonable person would find that the act is justified under the circumstances.

CHAPTER REVIEW QUESTIONS

1. Distinguish the affirmative offenses of justification and excuse.
2. List the elements of self-defense. Explain the significance of reasonable belief, imminence, retreat, withdrawal, the castle doctrine, and defense of others.
3. What are the two approaches to intervention in defense of another? Which test is preferable?
4. What is the law pertaining to the defense of the home? Discuss the policy behind this defense. Compare the laws pertaining to defense of habitation and self-defense.
5. How does the rule regulating police use of deadly force illustrate the defense of execution of public duties? Does this legal standard "handcuff" the police?
6. Why have the overwhelming majority of states abandoned the defense of resistance to an illegal arrest? Distinguish this from the right to resist excessive force.
7. What are the elements of the necessity defense? Provide some examples of the application of the defense.
8. Why do most state legal codes provide that an individual cannot consent to a crime? What are the exceptions to this rule?
9. Write a brief essay outlining justification defenses.

LEGAL TERMINOLOGY

affirmative defenses
aggressor
alter ego rule
American rule for resistance to an unlawful arrest
burden of persuasion
burden of production
case-in-chief
castle doctrine
choice of evils
deadly force
English rule for resistance to an unlawful arrest
excuses
fleeing felon rule
good motive defense
imperfect self-defense
intervention in defense of others
jury nullification
justification
make my day laws
misdemeanant
necessity defense
nondeadly force
objective test for intervention in defense of others
perfect self-defense
presumption of innocence
rebuttal
retreat
retreat to the wall
self-defense
stand your ground rule
tactical retreat
true man
withdrawal in good faith

CRIMINAL LAW ON THE WEB

Log on to the Web-based student study site at www.sagepub.com/lippmanccl3e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and video links.

1. Read more about the events surrounding the Bernhard Goetz case and developments following the criminal trial. Would a jury acquit Goetz if he stood trial today?
2. Read about legal liability for violence in hockey.
3. Watch a video of the police hot pursuit in *Scott v. Harris*.

BIBLIOGRAPHY

American Law Institute, *Model Penal Code and Commentaries,* vol. 1, pt. 1 (Philadelphia: American Law Institute, 1985), pp. 31–307. A detailed and technical discussion of self-defense, defense of others, and defense of property.

Joshua Dressler, *Understanding Criminal Law,* 3rd ed. (New York: Lexis, 2001), chaps. 17–20. A clear discussion comparing justifications and excuses and discussing the law of self-defense, defense of others, and defense of property and habitation.

George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York: The Free Press, 1988). An analysis of the Bernhard Goetz case that explores the history and philosophical basis for self-defense.

Leo Katz, *Bad Acts and Guilty Minds: Conundrums of the Criminal Law* (Chicago: University of Chicago Press, 1987), pp. 8–81. A thought-provoking discussion of the philosophical bases of the necessity defense.

Wayne R. LaFave, *Criminal Law,* 3rd ed. (St. Paul, MN: West Publishing, 2000), pp. 477–523. A comprehensive explanation of justification defenses with useful citations to the leading cases and law review articles.

Arnold H. Loewy, *Criminal Law in a Nutshell,* 4th ed. (St. Paul, MN: West Publishing, 2003), chap. 6. A short and precise summary of justification defenses.

Herbert L. Packer, *The Limits of the Criminal Sanction* (Palo Alto, CA: Stanford University Press, 1968), pp. 113–121. A brief but insightful discussion of the reasons for justification defenses.