

CHAPTER EIGHT: JUSTIFICATIONS

INTRODUCTION

Article 35 of the New York Penal Law pertains to the defense of justification where justifications are defined in sections 35.05 through 35.30.

The justification defense in New York has a fairly recent past. The defense was codified only in 1968 and is still going through a definitional evolution in areas such as reasonableness, consent, and the duty to retreat. This chapter will treat these concepts through cases that have contributed to greater articulation of areas that have affected the lives of New York citizens.

This chapter will begin by explaining the changes in justification in the Penal Law. The chapter will then describe the role of the burden of proof for both the defense and prosecution. Next, the defense of necessity will be discussed, including the choice of evils test.

The chapter will then discuss the differences between the use of ordinary and deadly physical force, as well as the elemental requirements for both defenses. Several issues that will be focused on are the *mens rea* requirement, the reasonableness requirement, and the duty to retreat. Finally, the chapter will close with a discussion about the consent justification defense.

AFFIRMATIVE DEFENSE

Both justification and excuse (Chapter Nine) are defined by statute as affirmative defenses. As such, the traditional prosecutorial burden of proof shifts to the defense. As defined by Article 25, in affirmative defense cases, the defense has the burden of proof beyond a preponderance of the evidence. Thus, the defendant retains the burdens of both production and persuasion.

Section 25.00 of Article 25, Defenses; burden of proof, states:

1. When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.
2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

CHANGES IN THE PENAL LAW

Prior to 1965, the defense of justification in New York had never been fully articulated in the Penal Law. In 1965 however, a new concept, justifiable deadly force, was defined in the law through the adoption of the revised Penal Law. The 1965 revision restricted the use of lethal force only to preserve innocent life. The revision also preserved the right to resist an unlawful arrest.

The initial revisions, however, met with strong resistance from police administrators and were subsequently amended and passed again in 1968. According to Richard Denzer, the Executive Director of the New York Temporary Commission on Revision of the Penal Law and Criminal Code, a difficult area in the New York Penal Law to change was the justification provisions. "We leaned a little too far to

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the left, to the civil libertarians' approach, and the roof fell in on us." The new provisions thus more broadly permitted police officers' use of deadly force.¹

The result has been the following major provisions of Article 35, Defense of Justification. First, section 35.20 includes an expanded justifiable use of force from the 1965 revision. The new rule allows the use of force to prevent or terminate damage to premises (§35.20(1)) or, if the person is in possession of the premises, to prevent or terminate criminal trespass (§35.20(2)). The new Penal Law further justifies deadly force if the citizen reasonably believes it necessary to prevent or terminate an arson (§35.20(1) and (2)) or burglary (§35.20(3)).

Section 35.20 justifies the use physical force in defense of one's premises and in defense of a person in the course of a burglary.

1. Any person may use physical force upon another person when he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of a crime involving damage to premises. Such person may use any degree of physical force, other than deadly physical force, which he or she reasonably believes to be necessary for such purpose, and may use deadly physical force if he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of arson.
2. A person in possession or control of any premises, or a person licensed or privileged to be thereon or therein, may use physical force upon another person when he or she reasonably believes such to be necessary to prevent or terminate what he or she reasonably believes to be the commission or attempted commission by such other person of a criminal trespass upon such premises. Such person may use any degree of physical force, other than deadly physical force, which he or she reasonably believes to be necessary for such purpose, and may use deadly physical force in order to prevent or terminate the commission or attempted commission of arson...or in the course of a burglary or attempted burglary, as prescribed in subdivision three.
3. A person in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling or building, may use deadly physical force upon such other person when he or she reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.

Second, section 35.27, use of physical force in resisting arrest prohibited, states that a person "may not use physical force to resist an arrest." This rule was explicitly codified because, previous to 1968, case law encouraged persons falsely arrested to start a street brawl with the arresting officer. The framers of the revised law, however, recognize that, even with an unlawful arrest, the arrestee could receive redress in the civil court system.²

Third, section 35.30, use of physical force in making an arrest or in preventing an escape, expanded the use of deadly force for police and peace officers and private citizens. Subsequent to the originally revised law in 1965, the Buffalo Police Department strongly objected to the limitations on officers' use of deadly physical force.³ Subsection (1) thus expanded a police or peace officer's use of

deadly force when arresting or preventing the escape of persons whom the officer reasonably believed either attempted or committed a felony by physical force, or committed or attempted to a commit kidnap, arson, burglary in the first degree, or escape in the first degree. Further, a police or peace officer is justified in using deadly force against an escapee who is armed or an escapee who is threatening to use imminent deadly physical force. Subsection (2), however, qualifies an officer's use of deadly force. An officer who justifiably uses deadly physical force may nevertheless be criminally responsible for the reckless assault or homicide of an innocent person from the force used in that arrest or escape prevention.

Finally, the use of deadly physical force by citizens was expanded under Section 35.30(4). Under the former Penal Law and revised Penal Law, the citizen was not authorized to use deadly force to effect an arrest except upon reasonable belief that the person sought to be arrested was using or about to use deadly force against the citizen or another. This rule was rooted in an aversion of the ordinary citizen seeking vigilante justice by stalking an alleged criminal and capturing him dead or alive. On the other hand, the vision of a man who arrives home and upon seeing his home burglarized and his wife raped sees the culprit fleeing down the street, but cannot legally chase the culprit was also very troublesome for the Penal Law revisionists.⁴

Under the revised Penal Law, unlike the qualification that subjects police and peace officers to criminal liability for recklessness, the amended law contains no provision making the citizen criminally responsible for reckless assault or homicide of an innocent person. The court in *People v. Pena* speculated that the Legislature's distinction in codifying citizens' use of force from police or peace officers' stems from the idea that an officer need not be correct in her reasonable belief that the person sought to be arrested committed the felony. The citizen, however, must be correct in his reasonable belief that the person he is seeking to arrest either committed an enumerated felony (murder, manslaughter in the first degree, robbery, forcible rape, or forcible criminal sexual act) or that such person is in immediate flight from the commission of the felony. Since officers are specially trained in the responsible use of firearms and stressful situations, the Legislature:

wanted some statutory incentive for the police to act responsibly in the use of their broad power to use deadly physical force by holding them responsible for reckless conduct...For the citizen who could not be presumed to have had training in the use of deadly physical force, and who would be acting often under stress,...and who would often otherwise be a responsible member of the community, the Legislature chose not to hold that citizen accountable for an otherwise justifiable use of force that resulted in injury or death to the wrong person.⁵

RESOURCES

The following link provides the complete text of the Article 25.
<http://wings.buffalo.edu/law/bclc/web/NewYork/nyart25.htm>

The following link provides the complete text of the Article 35.
<http://caselaw.lp.findlaw.com/nycodes/c82/a12.html>

This link includes the text of one of the cases that will be highlighted later in the chapter:
People v. McManus.
<http://wings.buffalo.edu/law/bclc/web/nymcmanus.htm>

BURDEN OF PROOF

New York is one of the jurisdictions in the United States where the prosecution retains the burden of persuasion. Justification is an ordinary, rather than affirmative, defense. The defendant has the burden of production, but does not have the burden of establishing his defense by a preponderance of the evidence. Rather, if the defendant's burden of production is met, then the State must disprove the defense beyond a reasonable doubt. Ultimately, the judge has the duty to instruct the jury on the law of justification whenever the defendant presents evidence of justification in the case.⁶

NECESSITY

Section 35.05 defines justification generally. Note that subdivision (2) requires the defendant to establish a prima facie case and the judge to instruct the jury when a justification defense has been established.

Necessity, which is fundamentally a balancing test to determine whether a criminal act was committed to prevent a greater harm, is defined in §35.05(2). This is the legal test rather than an analysis that the choice made was guaranteed to result in a correct outcome.

Section 35.05. Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree or is performed by a public servant in the reasonable exercise of his official powers, duties or functions, or
2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation...developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.

In New York state, in addition to the common law definition that:

- (1) the actor acted to avoid a grave harm not of his own making;
- (2) there are no adequate legal means to avoid the harm; and
- (3) the harm to be avoided is greater than the harm committed.

Section 35.05(2) also requires that:

- (4) the harm to be avoided must be imminent; and
- (5) the action taken must be reasonably expected to avert the imminent harm.

Choice of Evils

Also in §35.05(2), a person's conduct cannot be based upon prioritizing values that are antithetical to societal values. As the textbook asserts, defendants cannot effectively claim a necessity defense if they are protesting only against the morality and advisability of a statute under which they are charged. Thus, the choice of evils test is whether the actor's perception of harm is reasonable and that there was no legal alternative to his actions.

In *People v. Gray, et al.*, for example, the criminal court found that the protest activity of the advocacy group, Transportation Alternatives, was justified. Defendants were charged with disorderly conduct as a result of their participation in a demonstration at the entrance to the Queensboro Bridge during an evening rush hour. The Criminal Court of the City of New York acquitted the defendants based on the evidence which showed that: (1) they did not cause the perceived harm; (2) they attempted other legal avenues first with the Department of Transportation (such as petitioning, letter writing, phone calling, and lobbying) to no avail; (3) the harm of their actions did not outweigh the harm they were trying to prevent (i.e., pollution, illness, such as asthma, and death from vehicular traffic); (4) the harm to walkers and bicyclists was imminent and occurring daily; (5) defendants' belief was reasonable in that their behavior could reasonably end the perceived harm.⁷

Mens Rea

In its interpretation of section 35.05(2), the Court of Appeals has maintained that a defendant's assertion of justification does not require that the defendant indicate a specific *mens rea*. The court has not interpreted the defense in such a narrow way. In *People v. Padgett*, the defendant was convicted of criminal mischief for breaking the glass of a door as he tried to retreat from an "unprovoked assault by the bar owner." The state argued that the availability of the justification defense should be limited "to cases in which the conduct is admitted to have been intentional, but in avoidance of a greater injury." The Court of Appeals rejected this argument and added, the "[d]efendant's explanation indicates that he engaged in conduct in avoidance of [a] perceived attack...The fact that defendant never admitted that he *intended* (emphasis added) to cause the resulting property damage should not disentitle him to a charge that his conduct might not have been criminal under the circumstances." The conviction was reversed and a new trial was ordered.⁸

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PEOPLE V. McMANUS
Court of Appeals of New York
67 N.Y.2d 541 (1986)

Opinion By: Hancock, J.

The Court of Appeals addressed the issue of whether the defendant could use the justification defense for depraved indifference murder.

In this case, the defendant and his friend were approached by five males, one of whom put a pistol to the friend's stomach. When the defendant attempted to intervene, another drew a pistol on him. The defendant was ordered to give up his money, but he turned and ran. When he turned around, his friend was being beaten and robbed. The group then chased the defendant who ran home. The defendant retrieved a rifle from inside the house, went outside, and brandished it to the group which then fled. The defendant chased the group and the group came upon the defendant's friend. The group again began beating the friend who pleaded the defendant to fire the rifle. The defendant fired the rifle and hit one of the group members who died from the gunshot.

During the trial, members of the group testified for the People that none of them was armed or assaulted the defendant and his companion. The defense, however, sought to have the court instruct the jury on the justification defense. The court did instruct the jury on the defense for the charge of intentional murder but not for the depraved indifference charge. The jury acquitted the defendant of intentional murder, failed to reach a verdict on the lesser included charge of manslaughter under extreme emotional disturbance, and convicted the defendant for depraved indifference murder.

The Appellate Division unanimously affirmed the conviction. The Appellate Division's reasoning that the lower court's instruction on justification for depraved indifference murder count was properly refused since they are incompatible concepts. The defense cannot justify a reckless disregard of an unjustified risk. The Court of Appeals agreed that, based on the testimony of the People's witnesses, the defendant could be found to have displayed indifference to murder. However, according to the Court of Appeals, the appellate division's reasoning "misconceives" the nature of the justification defense. Justification does not make criminal behavior lawful; rather, if the force used is justified, then the behavior cannot be criminal at all.

In addition to the rejection of the argument in *People v. Padgett* that the justification defense should only be available to defendants when their conduct is deemed intentional, the Court of Appeals in the current case found that the justification defense should also be applicable to a defendant charged with depraved indifference murder. "If the conduct is justified, it simply cannot be the basis of depraved indifference murder or any other crime. We reject the contention that the additional element of depravity—which, we have held, refers solely to the objective circumstances under which the reckless conduct is alleged to have occurred...in some way alters the rationale or operation of the defense."

The Court of Appeals found that, pursuant to Section 35.15(1)(a) and (b), the evidence was sufficient to support a jury finding that the defendant reasonably believed that his actions were necessary to protect his friend from deadly force and robbery. The defendant was therefore entitled to the jury instruction on the justification defense.

The Court of Appeals reversed the order of the Appellate Division, vacated the conviction, and ordered a new trial.

USE OF FORCE

Section 35.10 defines the use of force in general.

The use following subsections authorize certain persons to use of physical force under specified circumstances.

1. A parent or guardian may use physical force to discipline an incompetent person or person under the age of twenty-one who is entrusted in the parent or guardian's care.
2. A warden or other jail, prison, or correctional institution official may use physical force to maintain order and discipline.
3. A person responsible for maintaining the order of common carrier passengers, such as a flight attendant, bus driver, or cruise ship employee, may use physical force to maintain order. Such personnel may also use deadly physical force if necessary to prevent death or serious physical injury.
4. Any person who reasonably believes that another person is about to commit suicide or inflict serious physical injury upon himself may use physical force to prevent the death or injury.
5. A licensed doctor, or person acting under a doctor's direction, such as a nurse, may use physical force to administer treatment as long as: (1) the treatment is administered either with the consent of the patient or the consent of a parent or guardian if the patient is either under the age of eighteen or incompetent; or (2) the treatment is administered in an emergency and the doctor reasonably believes that no one who is competent to consent can be consulted.
6. A person may use physical force upon another person in self-defense or defense of a third person, or in defense of premises, or in order to prevent larceny of or criminal mischief to property, or in order to affect an arrest or prevent an escape from custody.

SELF-DEFENSE

New York justifies the use of physical force in defense of self and others. Depending upon the circumstances, which will be discussed in later cases, the amount of force used may be ordinary physical force or deadly physical force. The general rule is that the defense of self and others requires that the physical force used be proportional to the force used by the aggressor. One may use no more force than that which reasonably appears necessary for protection. To justify the use of deadly force, the law is limited to instances where the person using the force must be attacked with danger or apparent danger of death or great bodily harm.

In addition to the proportionality rule, self-defense and defense of others is otherwise limited in the Penal Law. First, the person using the force must not be the initial aggressor to the incident, unless the person withdraws and the threat persists. Second, the threatening physical force must be imminent.

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Third, the person must have a reasonable belief that the need for physical force is reasonable under the circumstances.

Deadly Physical Force

A person may use deadly physical force either in self-defense or defense of a third person when he or she reasonably believes that another person is imminently going to use deadly physical force and the force is reasonable under the circumstances.

The duty to retreat applies to situations where defensive deadly, but not ordinary, physical force is used. New York is one of the significant minorities referred to in the textbook that requires retreat before resorting to using deadly physical force.

The distinction between physical force and deadly physical force may not be very clear in some cases. In Penal Law Section 10.00(1), deadly physical force is defined as, "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious injury." While this definition is clear, when the defendant has fired one shot at the victim's feet or pushed the victim out of an open second floor window, and the victim dies, the level of force used could be disputed. When the level of force can be contested, the defense is entitled to present the issue to the jury as a question of fact for the jury to decide. The court should thus instruct the jury on both the use of physical force and deadly physical force and let the jury decide which definition is applicable.

Section 35.15 defines the use of physical force in defense of a person.

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:
 - (a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or
 - (b) The actor was the initial aggressor; except that in such case use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or
 - (c) The physical force involved is the product of a combat by agreement not specifically authorized by law.
2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:
 - (a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she

may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

- (i) in his or her dwelling and not the initial aggressor; or
- (ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or
- (b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or
- (c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.

Reasonableness

As the textbook demonstrates, *People v. Goetz* establishes an objective as well as subjective standard in determining the reasonableness of an actor's use of force.⁹ Section 35.15(2)(a) justifies the use of deadly force when the person "reasonably believes" that another person is using or about to use such force against him. When this defense is raised by the defendant, the jury must then engage in a two-step analysis. First, it must determine whether the defendant actually believed that his life was in imminent danger. Second, the jury must ascertain whether the defendant's perceptions concerning the need to use deadly force were reasonable. As such, an analysis of the reasonableness of an act is not purely an objective one. As the following case shows, the subjective portion of the reasonableness test rests upon the circumstances facing the actor.

PEOPLE V. WESLEY
Court of Appeals of New York
76 N.Y.2d 555 (1990)

Opinion By: Hancock, J.

In this case, the defendant contends that the trial court erred in its instruction on the defense of justification to the jury by applying an improper standard for determining the reasonableness of defendant's belief of the necessity to use deadly physical force. The instruction did not direct the jury to place themselves, or a reasonable person, in defendant's place.

The defendant, a 19-year old college student, was on the porch of a house with Diane Jackson, Jeleen McMillan, and Arlene Woods. Woods, who had a knife in her possession, got into an argument with Jackson. The argument continued as Jackson and Woods walked away from each other. Suddenly, Woods doubled back after Jackson and threatened to stab her. Defendant managed to get the knife away from Woods and place it in a paper bag.

At about that time, three male teen-agers arrived on the scene. Two of these youths, Eric Stone and Keith Robinson, began calling defendant and Woods epithets. Despite defendant's pleas to be left

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alone, Stone, Robinson and others continued shouting epithets at defendant as he walked down the street. Stone and Robinson also verbally threatened defendant.

Stone left the scene for a few minutes and returned carrying a stick. After more argument, Stone struck defendant with the stick, and defendant stabbed him in the chest. Stone fell to the ground and dropped the stick. Robinson then picked up the stick and began chasing defendant out of the area where the stabbing had taken place. When Robinson returned, he had been stabbed in the hand. Stone later died as a result of the stab wound.

Defendant was convicted after a jury trial of second degree manslaughter, second degree assault, and fourth degree criminal possession of a weapon. He appealed the conviction and the Appellate Division affirmed the conviction.

During the jury trial, the judge instructed the jury with the following charge on reasonableness. “You have heard the conflicting stories told by the witnesses as to what actually happened, and you must consider these stories under the rules of law as I have explained them to you. Having decided in your own minds what truly occurred, you must then decide whether there was a legal justification for the Defendant’s alleged acts. In order to find justification for the Defendant’s acts, you must find that he believed his conduct necessary to defend himself from what he reasonably believed to be an unprovoked physical assault against himself even if he was mistaken in his conclusion that the victim was about to assault him.”

The defense argued that this instruction did not direct the jury to place themselves, or a reasonable person, in the defendant’s place, since the *Goetz* decision states that the reasonable person standard still contains a subjective element.

In determining reasonableness, the critical focus, according to the Court of Appeals, must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident, and what a reasonable person in those circumstances and having defendant’s background and experiences would conclude. The jury was never told, in words or substance, that in deciding the question of reasonableness they must consider the circumstances that defendant found himself in. Consideration of the factors required by *Goetz*, include defendant’s background and characteristics and the circumstances confronting him at the time of the incident. Given the heightening tensions and the threats and epithets, such factors might have been significant in the jury’s assessment of the reasonableness of defendant’s belief that he was in peril. In view of the conflicting testimony of the witnesses, it cannot be said that the proof of guilt was so forceful and compelling that, had a proper and complete justification instruction been given, the result would not have been different.

The Court of Appeals ruled that the order of the Appellate Division should be reversed and a new trial ordered.

The Duty to Retreat

In New York, the defendant may not resort to deadly force if he or she can safely retreat. Penal Law Section 35.15(2)(a)(i) provides the sole exception to the duty to retreat: the home exception, or castle doctrine. A person is under no obligation to retreat first if she is in her dwelling and is not the initial aggressor. The home exception¹⁰ also applies when both the victim and defendant share the same dwelling.

Under common and statutory law, the justification defense includes deadly force reasonably used in self-defense. English common law justified deadly force in cases involving attacks in the dwelling of the defender. According to common law, the defender, even if the initial aggressor to the attack, had no

duty to retreat when inside the home. The contemporary conception of the castle doctrine in New York grew from the medieval times that land owner's should not have to abandon their fortifications to the enemy merely to save the life of that enemy.¹¹ The home exception thus reflects the principles of defense of one's home and defense of one's person and family in that home.

The Court of Appeals, however, has noted that this privileged status of the home is at odds with the state's interest in protecting life. Ultimately, the balance to be struck is between protecting life by requiring retreat and protecting the home by not requiring retreat. Prior to 1940, the law tended to support the protection of life by imposing a general duty to retreat in the face of deadly force. After 1940, the Court of Appeals departed from the retreat rule and held that a defendant facing felonious attack on the street was justified in standing his ground and destroying the attacker. When the Legislature revised the Penal Law in 1965, however, it codified the common law of the state prior to 1940. The Legislature statutorily limited the use of lethal force to instances where the defender could not avoid the necessity of using deadly force by retreating. In its revision of the Penal Law, the Legislature also incorporated the castle doctrine by directing that the duty to retreat does not apply when the defender is in his dwelling and is not the initial aggressor. The balance between the interests of protecting the home and protecting life was thus struck.¹²

Furthermore, a key issue for the courts has been how to define dwelling. Although "dwelling" is defined in Article 140 of the Penal Law, the statute, which refers to burglary offenses, provides a much broader definitional scope than the Court of Appeals has chosen to apply to justification defenses. In Article 140, "dwelling" is defined as "a building which is usually occupied by a person lodging therein at night."

In *People v. Hernandez*, the Court of Appeals rejected this definition for a much more narrow one. In this case, the Court held that the term dwelling "refers to a person's residence and any definition of the term must therefore account for a myriad of [sic] living arrangements, from rural farm properties to large apartment buildings." The determination of a dwelling depends on the extent to which a person, and those sharing living quarters with a person, exercise "*exclusive* (emphasis added) possession and control over the area in question." The Court explicitly stated that a house and an apartment or part of a structure apply. The key is that it is a location where the person lives and where others are ordinarily excluded.¹³ In *People v. Hernandez*, the defendant argued that he had no duty to retreat from the stairwell and lobby of an apartment building in which he lived. The Court of Appeals flatly rejected this argument since these areas are routinely accessed and used by strangers.

In *People v. Aiken*, the Court of Appeals went a step further in defining the areas subject to the castle doctrine. According to the Court, "[d]epending on the facts, the castle doctrine has been applied to areas immediately surrounding the home, such as a porch or yard...[or] garden." However, in this case, the Court found that a person does not have the same reasonable expectation to refuge from the outside world in a "hybrid private-public" space. Thus, the Court affirmed the manslaughter conviction based on the principle that when the defendant was threatened by the victim, the defendant had a duty to retreat from the doorway between his apartment and the common hall of a multi-unit apartment building.¹⁴

CONSENT

Consent is another justification which claims that the victim consented to the actions causing the injury. Consent is not codified as a general defense in the New York Penal Law. Thus, the justification of consent is not explicitly defined in Article 35. It is, however, defined in Article 130 of the Penal Law and refers to sex-related offenses.

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Unlike the justification defenses defined in this chapter, the defense of consent is an affirmative defense with the exception of injury inflicted during an athletic event or a medical procedure, as indicated in the textbook. The burden of proof, of production as well as persuasion, regarding consent rests on the defendant, rather than the State. The defendant has the burden to prove consent beyond a preponderance of the evidence.

Section 130.05(2) states that lack of consent results from:

- (a) Forcible compulsion; or
- (b) Incapacity to consent; or
- (c) Where the offense charged is sexual abuse or forcible touching...in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct; or
- (d) Where the offense charged is rape in the third degree...or criminal sexual act in the third degree...in addition to forcible compulsion...which, at the time of the act of intercourse, oral sexual conduct or anal sexual conduct, the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances.

Section 130.05 (3) defines those people deemed incapable of consent. People unable to give consent are: (a) less than seventeen years old; or (b) mentally disabled; or (c) mentally incapacitated; or (d) physically helpless; or (e) committed to the care and custody of the state department of correctional services or a hospital.

In New York, consent is not a defense to assault, but the *People v. Jovanovic* case showed that consent could be a defense to assault in the context of sadomasochism. As the textbook states, ordinary physical contact associated with sports is an exception to the consent defense. However, defendants charged with violence against their sexual partners have recently asserted consent akin to sports-like hockey and boxing. Most courts have rejected such defenses, but the Supreme Court of New York was the first appellate decision in the United States to hold that consent is a defense to bodily injury.¹⁵

PEOPLE V. JOVANOVIC
Court of Appeals of New York
700 N.Y.S.2d 156 (1999)

Opinion By: Saxe, J.

This case concerns whether the complainant consented to the sexual acts performed on her. Defendant argued that email messages from the complainant, redacted pursuant to the Rape Shield Law, should have been admitted into evidence to highlight defendant's "state of mind regarding his own reasonable beliefs as to complainant's intentions."

The facts of this case are complex, but basically, complainant, a Barnard College student, and defendant, a Columbia University doctoral student, engaged in an on-line relationship through a chat room. Early on, their emails took on an intimate tone and turned toward issues such as preferences for

snuff films. They set up a date in which ended at the defendant's apartment. At the apartment, defendant gave complainant some tea which had a "chemical taste." Defendant then showed a movie in which animated characters engaged in sexual or violent behavior. Defendant later ordered complainant to remove her top and pants. She complied. He then instructed her to lie down, which she did. He then tied her limbs to a futon frame, lit a candle, and poured the wax on her stomach. He later removed her panties and bra and dripped wax on her vaginal area and breasts. Defendant placed ice cubes on the areas he poured wax.

About an hour later, defendant removed complainant's ties, placed her on the bed, hog-tied her so her hands and feet were tied behind her back, and penetrated her rectum with either a baton or his penis. Complainant woke up the following day, was able to untie her legs, fought the defendant off, and ran out of his apartment. The defendant and complainant resumed their email communications the following day.

Following a jury trial, defendant was convicted of kidnapping, sexual abuse, and assault. He was sentenced fifteen years to life.

The Rape Shield Law was designed to protect a woman's prior sexual conduct to that the victim not be judged as unchaste. The Supreme Court ruled that the messages "were inadmissible on the ground that they were covered by the protection of the Rape Shield Law...in that they constituted evidence of the complainant's prior sexual conduct." But the preclusion of the complainant's emails insulated her from being fully cross-examined. The complainant's statements concerning prior sexual conduct conveyed to the defendant "another message, namely, her interest in exploring the subject of [sodomasochistic] activities with him."

"Because the jury could have inferred from the redacted e-mail messages that the complainant had shown an interest in participating in sodomasochism with [defendant], this evidence is clearly central to the question of whether she consented to the charged kidnapping and sexual abuse. The People emphasize that it is not whether she initially consented that is relevant, but whether she withdrew her consent and whether defendant continued to act despite the withdrawal of consent. However, the strength of evidence as to the extent to which the complainant initially indicated to [defendant] an interest in participating in sodomasochism with him *is* relevant to a determination of whether that consent was withdrawn."

The Supreme Court, Appellate Division, First Department concluded that the email statements ruled inadmissible by the trial court were not covered by the Rape Shield Law. Thus, the conviction was reversed and the case remanded for a new trial.

REVIEW QUESTIONS

1. The justification defense of the New York Penal Law was finalized in:
 - A. 1965
 - B. 1967
 - C. 1968
 - D. 1956

Justifications

2. In New York, justification is a(n) _____ defense.
- A. ordinary
 - B. preponderance
 - C. persuasion
 - D. affirmative
3. Which of the following may **not** use justifiable force as defined by section 35.10?
- A. a parent disciplining a child
 - B. a doctor administering a needle to a patient
 - C. a teacher disciplining a child who failed to complete a homework assignment
 - D. a corrections officer subduing an aggressive inmate
4. Who in the following circumstances is legally justified in using deadly force?
- A. a citizen on the street who is being threatened by another to be stabbed, stands his ground, and shoots and kills his assailant
 - B. a police officer who shoots and kills a person running from the scene of an armed robbery, fits the description of witnesses, and is carrying a gun in his hand
 - C. a parent whose child has refused to wash the dishes
 - D. a tenant who is being verbally threatened by another tenant in the stairwell of an apartment building
5. What level of *mens rea* must the defendant present in order to assert a justification defense?
- A. recklessly
 - B. purposely
 - C. negligently
 - D. no level of *mens rea* need be presented

REFERENCES

- ¹ Leibovitz, W. (1968-1969). Justifiable use of force under Article 35 of the Penal Law of New York. *Buffalo Law Review*, 18, 285-301.
- ² Schwartz, H. (1968-1969). Drafting a new penal law for New York. *Buffalo Law Review*, 18, 251-267.
- ³ Bartlett, R. (1968-1969). Criminal law revision through a legislative commission: The New York experience. *Buffalo Law Review*, 18, 213-232.
- ⁴ *People v. Pena*, 169 Misc. 2d 75 (1996).
- ⁵ *People v. Pena*, 169 Misc. 2d 75 (1996).
- ⁶ *People v. Gray, et al.*, 150 Misc. 2d 852 (1991).
- ⁷ *People v. Gray, et al.*, 150 Misc. 2d 852 (1991).

⁸ *People v. Padgett*, 60 N.Y.2d 142 (1983).

⁹ *People v. Goetz*, 68 NY2d 96 (1986).

¹⁰ See *People v. Jones*, 3 N.Y.3d 491 (2004).

¹¹ Thompson, S. (1880). Homicide in self-defense, *American Law Review*, (14), 548-.

¹² *People v. Jones*, 3 N.Y.3d 491 (2004).

¹³ *People v. Hernandez*, 98 N.Y.2d 175 (2002).

¹⁴ *People v. Aiken*, 4 N.Y.3d 324.

¹⁵ Hanna, C. (2001). Sex is not a sport: Consent and violence in criminal law. *Boston College Law Review*, 42(2), 239-290. http://www.bc.edu/bc_org/avp/law/lwsch/journals/bclawr/42_2/01_FMS.htm

ANSWERS

1. C, 2. A, 3. C, 4. B, 5. D