

## CHAPTER EIGHT

### JUSTIFICATIONS

Recently, the case of a mother who had drowned her five children was found not guilty by reason of insanity. Andrea Yates, who said she drowned them because she believed she was saving them from Satan, and was haunted by visions that one of her sons would become a gay prostitute. She believed that she was possessed by the devil and that the media had planted bugs in her house to record her poor parenting. Unfortunately, she had a long history of mental problems, which had led to several hospitalizations and at least two suicide attempts. The question was not whether or not she had killed her children, but whether or not she was insane at the time of the killings. She had called 911 only minutes after killing the children and then confessed to the police.

Note that there is a difference also between being able to be mentally competent to stand trial vs. claiming a defense of not guilty by reason of insanity. Also, the issue of just when someone is “insane” for this defense only applies to the person’s “insanity” at the time of the offense, and not during a trial.

There are two types of *affirmative defenses*<sup>1</sup> that may result in acquittal despite the fact that the prosecution has established the elements of an offense beyond a reasonable doubt:

1. *Justifications*. These are otherwise criminal acts that society approves and encourages under the circumstances. An example is self-defense.
2. *Excuses*. These acts deserve condemnation, but the defendant is not held criminally liable due to a personal disability such as infancy or insanity. (Chapter 9)

Affirmative defenses are designed to eliminate, mitigate or excuse a defendant's criminal culpability or civil liability. Perhaps the best known of affirmative defenses is the insanity defense. If it succeeds, which is actually not that often, the offender is placed in a mental institution as opposed to prison, and cannot be re-imprisoned once they are released from the institution.

The affirmative defense of justification relieves an individual of criminal liability in those instances in which society considers that an otherwise criminal act. Excuses, in contrast, are acts that deserve condemnation that do not result in criminal liability due to a disability such as infancy or insanity. Facts that may not be relevant for justification or excuse may be considered at sentencing to mitigate a defendant’s sentence.

For example, in ***PC 189.5. Murder - Burden of Proving Mitigation, Justification, or Excuse:*** *Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.*

What about a police officer? If they have to use force to affect an arrest or stop a serious crime that saves a person’s life, is that “justifiable?” Yes, it is:

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<sup>1</sup> Affirmative defenses work to limit or excuse a defendant's criminal culpability or civil liability

## Justifications

### ***PC 196. Justifiable Homicide by Public Officer***

Homicide is **justifiable** when committed by public officers and those acting by their command in their aid and assistance, either -

1. In obedience to any judgment of a competent Court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

What about you as a citizen? Under certain circumstances, you may find yourself forced to use deadly force to save yourself or a family member? Is this “justifiable?” Of course it would be.

### **SELF-DEFENSE**

Self-defense justifies the use or threat of force when an individual reasonably believes that he or she confronts the imminent, immediate and unlawful infliction of death or serious bodily harm.

### **DEFENSE OF OTHERS**

The defense of others provides a privilege to intervene to defend another individual. Imagine yourself having to fight an intruder who entered your home in the middle of the night. Your family is at home, and you are literally in a fight for you life, as well as theirs. Assuming you overcame the offender’s efforts, he later claims that you used excessive force in either subduing him or chasing him from the house. Just how much “force” can you use and who decides what amount of force is “reasonable” under the circumstance?

### ***PC 197. Justifiable Homicide by Any Person***

Homicide is also justifiable when committed by any person in any of the following cases:

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, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein; or,
3. When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,
4. When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

### ***PC 198. Limitation of Self Defense and Defense of Property Rule***

A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of Section 197, to prevent which homicide may be awfully committed, is **not sufficient to justify it**. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

**DEFENSE OF THE HOME**

In these cases, deadly force is justified against an intruder who is reasonably believed to intend to commit a felony. Some statutes restrict this to “forcible felonies.” There is no duty to retreat under the “castle doctrine.”

***PC 198.5. Home Protection Bill of Rights***

*Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred. As used in this section, great bodily injury means a significant or substantial physical injury.*

Are you legally held liable if the use of force was either justifiable or excusable? No, you are not.

***PC 199. Justifiable or Excusable Homicide; Full Acquittal Required***

*The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.*

**EXECUTION OF PUBLIC DUTIES:**

The enforcement of criminal law requires the police and other justice professionals to interfere with an individuals’ life, liberty and property under the umbrella of the 4<sup>th</sup> Amendment. These acts are justified by the need to maintain law and order. For example, in California, the death penalty is conducted by means of the “lethal injection.” Those person or persons charged with this duty would be excluded from liability for the death of the inmate, since they were following the law and protocol.

**Arrests – Use of Force**

What about making arrests? Are you legally justifiable in using force, when necessary, to make a citizen’s arrest?

***PC 835. How Arrest is Made - Restraint Limited to Necessity***

*An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.*

***PC 835a. Use of Reasonable Force to Effect Arrest***

*Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.*

**Civil Liability** 835 PC (b) *There shall be no civil liability on the part of, and no cause of action shall arise against, any public officer or employee acting pursuant to subdivision (a) and within the scope of his or her authority for false arrest or false imprisonment arising out of any arrest that is lawful or that the public officer or employee, at the time of the arrest, had reasonable cause to believe was lawful. No officer or employee shall be deemed an aggressor or lose his or her right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or overcome resistance.*

## Justifications

### ***PC 837. Arrest by Private Person***

A private person may arrest another:

1. *For a public offense committed or attempted in his presence.*
2. *When the person arrested has committed a felony, although not in his presence.*
3. *When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.*

What if you need help in making an arrest? Can you call on others to help you? And would they be subject to the same protections?

### ***PC 839. Summoning Assistance to Make Arrest***

*Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.*

If you did make an arrest, you'd have to let the person know that you are making the arrest and what for. Obviously, if you were in the process of trying to subdue them, you would have to wait until the situation was safe enough for you to do so. Frankly, unless you've come prepared to make an arrest, with your handcuffs, bullet-resistance vest, tear-gas, pepper spray, stun gun, taser, baton, expandable baton, (most of which are illegal for citizens to possess) you may want to leave the arresting to the police and instead, be a great witness!

### ***PC 841. Notice of Authority and Intent to Arrest***

*The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape. The person making the arrest must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested.*

But what if they jumped up and tried to escape after you had arrested them? Would you be justified in using force to overcome their resistance, such as fighting with you, or to prevent their escape? Of course you would be justified.

## **RESISTING AN UNLAWFUL ARREST**

Interestingly, California law requires that if you are being arrested by the police, you are to submit and not resist the arrest. 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.

### ***PC 834a. Duty to Refrain From Resisting Arrest***

*If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.*

However, in the unlikely event that the person does not submit, the law does allow those making the arrest to overcome that resistance.

**PC 843. Overcoming Resistance or Preventing Escape**

*When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.*

Would this include being able to break a door or window to make an arrest for a felony?

**PC 844. Breaking Doors or Windows to Make Arrest**

*To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.*

What if you were trapped inside by the offender? Could you “break” your way out justifiably?

**PC 845. Breaking Door or Window When Leaving Place of Arrest**

*Any person who has lawfully entered a house for the purpose of making an arrest, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.*

Can you take a weapon from someone once you’ve arrested them? Hopefully, if you even encountered this situation, you’d be in a position to protect yourself first.

**PC 846. Taking Weapon From Person Arrested**

*Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken.*

Even if you did make a legitimate arrest and were justified in the use of force involved, you still have one more duty to perform.

**PC 847. Duty of Private Person to Deliver Arrested Person to Magistrate or Peace Officer - Limitations on Liability of Peace Officer for False Arrest or Imprisonment**

*(a) A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person arrested before a magistrate, or deliver him or her to a peace officer.*

**NECESSITY**

Criminal acts are justified when undertaken to prevent a greater, imminent and immediate harm in those instances that an individual lacks legal alternatives. 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” since individuals are confronted with the unhappy choice between committing a crime or experiencing a harmful event. The harm to be prevented traditionally was required to result from the forces of nature. For example, a person who in the middle of a raging storm breaks into an unoccupied cabin to seek shelter. Since there is no “mens rea” to commit a theft or other crime, the culpability is nil.

**Excessive Force****Deadly force**

An individual acting in self-defense is entitled to use the force reasonably believed to be necessary to defend him or herself. **Deadly force** is force that a reasonable person under the circumstances would be

## Justifications

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 being transformed into an aggressor. This is the case where an individual entitled to non-deadly force resorts to deadly force. The Model Penal Code limits deadly force to the protection against death, serious bodily injury, kidnapping or rape. A good example of this in California law is:

### ***PC 195. Accidental and Excusable Homicide***

Homicide is excusable in the following cases:

1. *When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.*
2. *When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, **when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.***

For example, if you were in a fight with someone and knocked them down, you then picked up a concrete block and smashed it down on the person's head. This would certainly be taking an "undue advantage," and would be considered "excessive."

### **The Objective Test for Excessive Force under the Fourth Amendment**

The reasonableness of the use of force by the police must be judged using the reasonable person test; *would a jury or judge, faced with the same set of circumstances make the same decision?* Unfortunately, the police often have to make split-second decisions. Considerations must include severity of the crime, the threat to the officer or the public, and whether the suspect is actively resisting arrest or evading arrest by flight.

### **CONSENT**

Consent generally does not provide a defense to a criminal act other than in the case of incidental contact, sports and socially beneficial activities. In clarifying "consent," California Penal Code 261.6, states that:

#### ***PC 261.6. Consent Defined***

*In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.*

*Note also: A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289.*

Examples of *consent related issues* can include:

***PC 518. Extortion Defined.*** Extortion is an unusual crime, since it can only succeed with the consent of the victim, even though they are being taken advantage of by another.

*Extortion is the obtaining of property from another, **with his consent**, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.*

Obviously, even though the "victim" consents, they are only doing so under duress or fear of harm or exposure. This is why there is no culpability, since there is no *mens rea* on their part:

#### ***PC 519. Fear Induced by Threat***

*Fear, such as will constitute extortion, may be induced by a threat, either:*

1. *To do an unlawful injury to the person or property of the individual threatened or of a third person; or,*

2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or,
3. To expose, or to impute to him or them any deformity, disgrace or crime; or,
4. To expose any secret affecting him or them.

Other “consent” concerns could include:

Fighting, since if you and another choose to fight, the consent is inherent. If you were attacked and acting in self-defense, that is a different scenario, and you would be able to claim that as a legitimate defense. In this case, the “combatants” have decided for one reason or another, to fight it out. i.e., they have consented to the combat!

**PC 415. Fighting, Causing Loud Noise, or Using Offensive Words in Public Place**

*(1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.*

In this case, both parties may be equally liable for fighting in public. The law didn’t specify as to why they were fighting or who started it.

**PC 197. Justifiable Homicide by Any Person**

*When committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he was the assailant or **engaged in mutual combat, (This implies some form of consent or agreement to fight)** must really and in good faith have endeavored to decline any further struggle before the homicide was committed...*

In consent cases, the victim may be engaged in a mutual act, but for some reason, the offender overrides the other party’s consent to certain acts or behaviors. For example if one was on a date and engaged in minor petting, but the offender goes too far and commits what would today be referred to as a “date rape.” This may be prosecutable since the victim may have engaged in the initial activity by consent, but did not want to engage in sexual activity. For example, consent is clarified in PC 261.6:

**PC 261.6. Consent Defined**

*In prosecutions under (Specific sex offenses) Section 261, 262, 286, 288a, or 289, in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.*

*In PC 272. Contributing to Delinquency of Minor (D) "Express consent" is defined as: oral or written permission that is positive, direct, and unequivocal, requiring no inference or implication to supply its meaning.*

*In addition: **A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289. Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.***

For example, in the crime of rape, note the different variation of why and how the lack of consent is demonstrated:

**PC 261. Rape**

## Justifications

(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is **incapable, because of a mental disorder or developmental or physical disability, of giving legal consent**, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim **incapable of giving consent**.

(2) Where it is accomplished **against a person's will** by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is **prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance**, and this condition was known, or reasonably should have been known by the accused.

(4) Where a person is at the time **unconscious of the nature of the act**, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions:

(A) Was **unconscious or asleep**.

(B) Was **not aware, knowing, perceiving, or cognizant that the act occurred**.

(C) Was **not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact**.

(D) Was **not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose**.

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official.

(a) As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

(b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

(c) As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.

### **Statutory Rape**

In an interesting variation, in what used to be called "statutory rape," regardless that both parties are "consenting," the law merely says that they are incapable of that consent because of their age, and both are liable to punishment:

#### **PC 261.5. Unlawful Sexual Intercourse With Person Under 18 yrs.**



*(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.*

*Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.*

### ***Condom Defense?***

What if the victim, knowing they cannot resist a rape, asks the offender for a condom. Is that sufficient legally to show from the offender's defense, that the victim actually consented?

No, it is not, although it actually was a defense issue in one state, but California law closed the door on this defense with PC 261.7:

***PC 261.7 Sex Crime Victim; Request for Condom, Other Birth Control Device Not Sufficient to Constitute Consent.*** *In prosecutions under (Sex offenses) Section 261, 262, 286, 288a, or 289, in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.*

In sexual offenses, there may be times when the victim is "unconscious of the nature of the act" We've seen this recently in the infamous case of Andrew Luster, heir to the Max Factor fortune, who drugged his victims using "date rape drugs," and then videotaped them for his own purposes. He's now in prison as a result of his actions. The issue is the victim's inability to even know what is occurring to them, much less whether or not there is any question of consent.

In California law, this legal protection means since the victim is incapable of resisting this does not constitute consent. This is because the victim meets one of the following conditions:

- (1) Was unconscious or asleep.*
- (2) Was not aware, knowing, perceiving, or cognizant that the act occurred.*
- (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.*

### ***Use of Drugs or Alcohol***

One who would give someone else a drug to overcome their resistance and consent, could be liable for:

#### ***PC 222 Administering Controlled Substances or Anesthetic to Aid Felony***

*Every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anaesthetic, or intoxicating agent, with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony.*

Sentencing enhancements can also be incurred by the use of overcoming resistance by the use of drugs, etc.

*PC 666.7. Sentence Enhancements – (h) (11) Administering by injection, inhalation, ingestion, or any other means, any specified controlled substance against the victim's will by means of force, violence, or fear of immediate and unlawful bodily injury to the victim or another person for the purpose of committing a felony (Sec. 12022.75, Pen. C.).*

*Other specified sex offenses include:*

*PC 262 Spousal Rape*

*PC 286 Sodomy (By force, threat, or with minors)*

## Justifications

### *PC 288. Lewd Act on Child or Dependent Person*

*(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child,*

### *PC 288a. Oral Copulation (By force, threat, or with minors)*

*Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person*

### *PC 289. Sexual Penetration by Foreign Object*

*(a)(1) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person*

**Review Questions**

1. How does consent factor in extortion cases?
2. If you were dating someone and had broken up, and then the “ex” came over and committed sexual acts with you against your wishes, would he or she have a legitimate claim to your consent since you two had been intimate in the past?
3. Think of a time in your experiences where you may have “broken the law,” but it was due to necessity.
4. Has there ever been a time in your life where you had to act in “self-defense?”
5. Have you ever had to use “justifiable force?”

**Web Resources**

Andrea Yates Case

[http://www.courtstv.com/trials/yates/072606\\_verdict2\\_ctv.html](http://www.courtstv.com/trials/yates/072606_verdict2_ctv.html)

Court TV

[http://www.courtstv.com/home\\_primetime/index.html](http://www.courtstv.com/home_primetime/index.html)

Legal on line dictionaries – legal terms

<http://dictionary.law.com/>

<http://dictionary.lp.findlaw.com/>

<http://www.nolo.com/glossary.cfm>

‘Lectic Law definition of necessity defense

<http://www.lectlaw.com/def2/n044.htm>

**Case Study #1: Smith v. City of Hemet (2005) , 394 F.3d 689 (9th Cir. 2005)**

**Review Question:**

This case essentially changed the use of force standard on deadly force issues to include the admonition that any use of force that could include the possibility of “*serious injury*,” be included in police policies and procedures. What do you think? Should a Police K-9 be considered “deadly force?”

Note: In California law, “**injury**,” is any physical injury which requires professional medical treatment. Source: *PC 243.Battery; Punishment (f) (5)*.

By contrast "**serious bodily injury**" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement. See *PC 243 Battery-punishments.(f) (4)*. "Serious bodily harm" includes serious physical injury as well as a serious traumatic condition. *PC 76.Threaten Life of Government Official*

**Great bodily injury** (GBI) generally means a significant or more substantial physical injury than occurs in serious bodily injury.. In *PC 12022.7*, it is defined as when in the commission of a felony or attempted felony the victim becomes comatose due to brain injury or to suffer paralysis of a permanent nature. "Paralysis" means a major or complete loss of motor function resulting from injury to the nervous system or to a muscular mechanism. *PC 417.6. Drawing or Exhibiting Weapon - Intentional Infliction of Great Bodily Injury*

*PC 12022.7. Infliction of Great Bodily Injury During the Commission or Attempted Commission of a Felony; Causing Brain Injury or Permanent Paralysis; Victim is 70 Years Old or Older; Domestic Violence Situations;*

**Facts**

On the night of August 26, 1999, Smith’s wife placed an emergency phone call to the Hemet Police Department (“Department”) reporting that her husband “was hitting her and/or was physical with her.” Mrs. Smith informed emergency personnel that her husband did not have a gun, there were no weapons in the house, and he was clad in his pajamas. Officer Daniel Reinbolt was the first officer to arrive at the house in order to investigate the incident. He observed Smith standing on his front porch and “noticed Smith’s hands in his pockets.” The officer announced himself and instructed Smith to remove his hands from his pockets. Smith refused, responding with expletives and directing Officer Reinbolt to come to him. Officer Reinbolt informed Smith that he would approach, but only after Smith removed his hands from his pockets and showed that he had no weapons. Smith again refused to remove his hands from his pockets and instead entered his home. After Officer Reinbolt advised dispatch of what had transpired, Smith reemerged onto the porch with his hands still in his pockets. Officer Reinbolt again instructed Smith to show his hands. Smith complied with his instruction, but then refused to follow an order to “put his hands on his head and walk towards [the officer’s] voice[.]” Instead, Smith again asked Officer Reinbolt to approach and enter the home with him.

Officer Nate Miller arrived in response to Officer Reinbolt’s radioed request for assistance. Observing Smith’s refusal to cooperate with Officer Reinbolt, Officer Miller contacted dispatch to request additional assistance, including a canine unit. Officer David Quinn, a canine handler with the Department, arrived shortly thereafter with “Quando,” a police canine. Officer Aaron Medina also responded to one of the assistance calls. Officer Quinn instructed Smith to turn around and place his hands on his head. Smith again refused to obey the order, despite being informed that Quando could be sent to subdue him and might bite. Without further warning, Officer Quinn sprayed Smith in the face with pepper spray. Smith responded with expletives and attempted to reenter his residence, but the door had been locked by Mrs.

Smith. Several more officers then moved onto the porch, grabbed Smith from behind, slammed him against the door, and threw him down on the porch; Officer Quinn ordered the canine to attack him. Quando bit Smith on his right shoulder and neck area. At some point, either before or after the order to attack, the dog sank his teeth into Smith's arm and clung to it.

With at least four officers surrounding him and Quando's teeth sunk into his shoulder and neck, Smith agreed to comply with the officers' orders and submit to arrest. Although Smith submitted, he admits that he was "curled up" in a fetal position in an attempt to shield him-self from the dog and that one of his hands was "tucked in somewhere," still out of the officers' view. As one of the officers attempted to secure both arms, Quando was instructed by Officer Quinn to bite Smith a second time; this time the dog bit Smith on his left side and shoulder blade.

Upon Officer Quinn's order, Quando ultimately retreated, and the officers dragged Smith off the porch, face down. Once off the porch, Smith continued to shield one of his arms from the dog's attack. Officer Quinn then ordered Quando to bite Smith a third time. This time, the dog bit into Smith's buttock. While all this was transpiring, Smith was pepper-sprayed at least four times, at least two of which sprayings occurred after the police dog had seized him and broken his skin, and at least one after the officers had pinned him to the ground.

Eventually, the officers secured the handcuffs on both of Smith's arms. Officer Reinbolt then washed Smith's eyes out with water from a nearby hose, but did not cleanse the wounds he received as a result of the dog bites. Paramedics arrived shortly thereafter and attended to Smith's injuries.

**Issue** (*Edited for content*)

The court took this case en banc to clarify the law regarding whether, under *Heck v. Humphrey*, 512 U.S. 477 (1994), a § 1983 action for excessive force is necessarily barred by a plaintiff's conviction under California Penal Code § 148(a)(1) for willfully resisting, delaying, or obstructing a peace officer in the performance of his duties. We also take this occasion to bring our circuit into line with the others with respect to the definition of "deadly force."

Smith responds that the defendants unlawfully used excessive force against him *after* he had committed the acts on which his conviction was based, and thus that a verdict in his favor would not imply that his conviction was invalid. At the very least, Smith contends, the record does not reflect which acts underlay his plea and therefore his § 1983 action is not *necessarily* inconsistent with his conviction. Accordingly, he urges, *Heck v. Humphrey* is not a bar. We agree.

Under *Heck*, Smith would be allowed to bring a § 1983 action, however, if the use of excessive force occurred *subsequent to* the conduct on which his conviction was based. Specifically, Smith would be entitled to proceed below if his conviction were based on unlawful behavior that took place while he stood alone and untouched on his porch - that is, if his unlawful conduct occurred while the officers were attempting to investigate his wife's complaint. In such case, a judgment in Smith's favor would not necessarily conflict with his conviction because his acts of resistance, delay, or obstruction would have occurred while the officers were engaged in the lawful performance of their investigative duties, not while they were engaged in effecting an arrest by the use of excessive force.

Smith alleges that the defendants unnecessarily and unreasonably used not only excessive force against him, but also deadly force. He asserts that the latter type of force was used when Officer Quinn ordered the police canine to attack him. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Supreme Court held that a police officer may not use deadly force "unless it is necessary to prevent 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."

## Justifications

The issue presented by Smith is initially whether the use of Quando to subdue him amounted to an unreasonable use of deadly force; however, as no party to this case asserts that the use of deadly force would have been appropriate here, the issue is actually only whether the use of Quando constituted deadly force. As we are reviewing an order of summary judgment, all that we must decide is whether the use of Quando to subdue Smith *could* have amounted to deadly force under the facts of this case.

### **Decision**

For the foregoing reasons, we reverse the district court's grant of summary judgment. On the record before us, we can-not conclude that Smith's § 1983 action is barred by *Heck*; his successful prosecution of this action will not necessarily impugn his earlier conviction. Further, considering the evidence in the light most favorable to Smith, a reasonable jury could find that the defendants used excessive force. Finally, we overrule *Vera Cruz* and adopt the universally accepted definition of the term deadly force; we do not, however, decide whether the officers used such force here, but leave that question for initial consideration following remand. The grant of defendants' motion for summary judgment is reversed and remanded.

**Case Study #2: People v. White, (1981) 117 Cal. App. 3d 270**

**Discussion question:** This is the now infamous “*Twinkie Defense*” case in which Dan White killed the Mayor of San Francisco George Moscone and the first openly gay Supervisor, Harvey Milk. After reading the case, what do you think about the defense issue of diminished *capacity*? *Could high intake of sugar, such as in “Twinkies” or soft drinks affect your ability to form the “mens rea”* required in a crime?

**Facts**

On November 10, 1978, defendant resigned from his position as a supervisor for the City and County of San Francisco. Several days later, he asked to be reinstated. Mayor George Moscone was responsible for filling the vacancies on the board. Initially, he assured defendant he would be reappointed. Later, the mayor wrote defendant, informing him that he had made no commitment of any kind to reappoint him. Supervisor Harvey Milk opposed defendant's reappointment.

The mayor scheduled a press conference on Monday, November 27, at 11:30 a.m., to announce the new supervisor. On Sunday, November 26, sometime between 10 and 11 p.m., a reporter telephoned defendant and informed him that he was not going to be reinstated. At approximately 10 a.m. on the following morning, defendant telephoned his aide and asked for a ride to city hall. The aide picked up defendant at his home and delivered him to the front entrance to city hall on Polk Street. Instead of entering the building at the regular entrance, where he would be required to pass through a metal detector, defendant went to the McAllister Street side of city hall and entered the building through a basement window. Defendant went up to the mayor's office on the second floor and asked the appointment secretary if he could see the mayor. Defendant was admitted to the mayor's office at 10:40 a.m. After a few minutes, the appointment secretary heard defendant's raised voice in the mayor's office and a series of dull thuds. The mayor's deputy then saw defendant running down the corridor, outside of the mayor's office. The deputy entered the mayor's private sitting room and found the mayor's body. An autopsy revealed that the mayor had been shot four times: twice in the body and twice in the head. The wounds to the head were delivered after the mayor was lying on the floor, incapacitated by the body wounds, and were fired from a distance of one foot from the head. The slugs were from semijacketed .38 caliber bullets.

Shortly before 11 a.m., defendant ran down a corridor from the east side of city hall where the mayor's office is located and used his key to enter a door leading to the supervisors' offices on the west side of the building. Defendant entered Supervisor Harvey Milk's office and, in a normal tone of voice, asked to speak with Supervisor Milk. Defendant and Milk went across the hall to defendant's office. Approximately 15 seconds later, shots were heard in defendant's office. Defendant left his office and rushed down the corridor. Supervisor Milk's body was found in defendant's office. An autopsy revealed that Supervisor Milk had been shot five times: three times in the body and twice in the back of the head. The head wounds were delivered while Supervisor Milk was on the floor, incapacitated by the body wounds. The slugs were from semi-jacketed .38 caliber bullets.

Sometime after 11 a.m., defendant ran into his aide's office and yelled to her to give him her car key. After receiving the key, he ran out. Later, defendant called his wife and asked her to meet him at a cathedral. After meeting, they walked together to a police station where defendant surrendered himself to the police. The police removed a .38 caliber Smith and Wesson Chief Special revolver from a holster on defendant's right hip. The shots that killed Mayor Moscone and Supervisor Milk were fired from defendant's gun.

Shortly after his arrest, having been advised of his Miranda rights, defendant gave a statement to the police. He stated that he had been under pressure financially, politically, and at home. He had resigned from the board of supervisors to relieve some of the pressure. However, because of family support, he changed his mind and asked to be reappointed. Initially, he was assured by the mayor that he would be

## Justifications

reappointed. Later, he discovered that Supervisor Milk was working against his reappointment and that he was being used as a political "scapegoat."

Defendant stated that, since he never heard from the mayor personally, he went to city hall on November 27 to ask the mayor about the reappointment. Before leaving home, he armed himself with a revolver. When he met the mayor and was told that he would not be reappointed, he got "fuzzy" and there was "a roaring in his ears." He thought about the effect his not being reappointed would have on his family and about how the mayor was going to lie to everybody about him not being a good supervisor, so he "just shot him." "[Out] of instinct" he then reloaded his gun with extra shells from his pocket before leaving the mayor's office. Defendant stated that he then left the mayor's office and saw Supervisor Milk's aide in the corridor. He thought how Supervisor Milk had worked against him and decided he would "go talk to him." When they met, Supervisor Milk "smirked" at him. He "got all flushed" and shot Milk.

At the trial, defendant presented a *diminished capacity defense*.

It was the opinion of Dr. Jerry Jones, a psychiatrist, that defendant was suffering from severe depression; that he had the capacity to premeditate, to intend to kill, and to know that he should not act in a base and antisocial manner; however, he lacked the capacity to deliberate.

As a result of his examination, Dr. Martin Blinder, a psychiatrist, concluded that defendant was suffering from depression and intense pressure and that the pressure that he was suffering circumvented the mental processes necessary for premeditation, malice and intent.

Dr. George Solmon, a psychiatrist, found that defendant was suffering from recurrent bouts of unipolar depression (i.e., subject to recurrent bouts of depression to a major degree). He concluded that defendant lacked the mental capacity to meaningfully premeditate and deliberate; that he was in a disassociated state of mind and blocked out all awareness of his duty not to kill.

Dr. Donald Lunde, a psychiatrist, concluded that defendant was suffering from severe depression and that on November 27 he did not premeditate or deliberate, nor was he capable of mature, meaningful reflection.

Dr. Richard Delman, a psychologist, performed three psychological tests on defendant and, on the basis of such testing, concluded that defendant's ability to deliberate and premeditate was impaired; that on the day of the shooting he lacked the capacity to weigh considerations and rationally decide on a course of action; also, that defendant lacked the capacity to harbor malice and to appreciate his duty not to do wrong.

In response to such evidence, the district attorney offered testimony of Dr. Roland Levy, a psychiatrist, who, at the time of his examination of defendant on the evening of the shooting, found him to be moderately depressed but lacking any sign of clinical depression. He concluded that defendant had the capacity to deliberate and premeditate. Dr. Levy had reviewed the opinions of the defense psychiatrists and had found nothing to cause him to revise his opinion.

The balance of evidence offered by the defense consisted of testimony by friends, acquaintances and relatives. In substance, that evidence tended to show defendant as a man who enjoyed an honorable reputation in the community, but a person given to moods of frustration and deep depression. Defendant did not testify.

The jury found defendant guilty of two counts of voluntary manslaughter, a lesser included offense of the crime of murder. The jury also found, as true, charges that, in the commission of the two offenses,



defendant was armed with and used a firearm.

The trial judge sentenced defendant to a total term of seven and two-thirds years in state prison. On count one (the killing of Mayor George Moscone), defendant was given the upper term of four years, n2 pursuant to sections 193 and 1170, subdivision (b); also, a two-year firearm use enhancement, pursuant to sections 12022.5 and 1170.1, subdivision (c). On count two (the killing of Supervisor Harvey Milk), defendant was given a consecutive sentence of one year, pursuant to section 1170.1, subdivision (a), and an eight-month firearm use enhancement, pursuant to section 12022.5.

### **Issue**

In this appeal, defendant contends that the trial court improperly relied upon a single fact, namely, his use of a firearm, as the sole basis for imposing the upper term of imprisonment on count one and imposing firearm use enhancements on both counts one and two. He points out that, under such circumstances, the dual use of a single fact is prohibited. He argues, also, that the reasons given by the trial judge for his sentencing choice are insufficient to justify the imposition of the upper, or aggravated, term of imprisonment under the prescribed sentencing rules. (Cal. Rules of Court, rule 421.) Finally, he claims that the trial judge failed to consider certain mitigating circumstances when selecting the upper term for count one.

In his response, the Attorney General asserts that defendant has no right to complain of this alleged error on appeal because he failed to bring it to the trial court's attention at the sentencing hearing. He argues that defendant's silence in the trial court deprived the court and the prosecutor of the opportunity to cure the alleged sentencing defect and to specify reasons other than the use of a firearm for the imposition of the upper term on count one. He has cited no authority in support of his contention that such a sentencing error may be waived.

### **Decision**

The judgment is affirmed.

**Answers to Review Questions**

Chapter 8

1. How does consent factor in Extortion cases?

*A. Extortion is the obtaining of property from another, **with his consent**, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right. Obviously, even though the “victim” consents, they are only doing so under duress or fear of harm or exposure. This is why there is no culpability, since there is no mens rea on their part.*

2. If you were dating someone and had broken up, and then the “ex” came over and committed sexual acts with you against your wishes, would he or she have a legitimate claim to your consent since you two had been intimate in the past?

*A. No, they would not, and would be liable for rape charges. **A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289.** Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.*

3. Think of a time in your experiences where you may have “broken the law,” but it was due to necessity.

*A. Subjective response; rushing to the hospital, stopping on the freeway to help an accident victim, defending yourself or your family?*

4. Has there ever been a time in your life where you had to act in “self-defense?”

*A. Subjective response: defending yourself, others or your family?*

5. Have you ever had to use “justifiable force?”

*A. Subjective response*