

## 5.6: End-of-Chapter Material

### 5.6.1 Summary

Defenses can be denial or failure of proof, affirmative, imperfect, perfect, factual, legal, common law (created by case law), or statutory (created by a state or federal legislature). A denial or failure of proof defense creates doubt in one or more of the elements of the offense and prevents the prosecution from meeting its burden of proof. An affirmative defense raises an issue separate from the elements of the offense and must be asserted before or during the trial or it cannot serve as the basis for an appeal. Defendants have either the burden of production or the burden of production and persuasion to a preponderance of evidence for an affirmative defense. An imperfect defense reduces the severity of the offense, or sentence. A perfect defense results in an acquittal. A factual defense is grounded in the facts of the case, while a legal defense depends on a statute or common-law principle. An example of a factual defense is an alibi defense, which asserts that the defendant could not have committed the crime because he or she was somewhere else at the time the crime occurred. An example of a legal defense is expiration of the statute of limitations, which means it is too late to prosecute the defendant for the offense.

Defenses can also be based on justification or excuse. A defense based on justification focuses on the offense and deems the conduct worthy of protection from criminal responsibility. A defense based on excuse focuses on the defendant and excuses his or her conduct under the circumstances.

Self-defense justifies the defendant's conduct in using physical force as protective. Self-defense is legal only when the defendant is faced with an unprovoked, imminent attack, and it is objectively reasonable that the degree of force used in response is necessary to avoid the attack. The defendant can be the initial aggressor and still use self-defense if the attacked individual uses too much force in response to the defendant's attack or if the defendant withdraws from the attack and is still pursued by the attacked individual. The attack does not necessarily have to be imminent if the defendant is a battered wife. Deadly force is any force that can kill under the circumstances. Deadly force can be used in self-defense only if the defendant is faced with imminent death, serious bodily injury, or the commission of a serious felony. Some jurisdictions require the defendant to retreat before resorting to deadly force, while others allow the defendant to stand his or her ground.

In most states, an individual can defend another to the same extent as self-defense. If a defendant is honestly but unreasonably mistaken about the fact that he or she needs to respond in self-defense or defense of others, imperfect self-defense or defense of others may be appropriate, depending on the jurisdiction. A defendant can also defend property using nondeadly force from an imminent threat of damage, loss, or theft. Real property is land and anything permanently attached to it, while personal property is any movable object. In many jurisdictions, a trespasser may be ejected from real property using nondeadly force after the trespasser has been requested to leave.

Defense of habitation is distinct from defense of real property in most states. Modern laws called castle laws expand the use of force to defend habitation. Castle laws eliminate the duty to retreat when in the home and provide civil and criminal immunity from prosecution for the use of deadly force. Deadly force can be used against a trespasser who enters occupied premises without consent of the owner when there is an objectively reasonable belief that the occupants will be seriously injured or killed.

Law enforcement can also use force to arrest or apprehend a criminal. If the force is deadly, it is considered a seizure under the Fourth Amendment and is scrutinized under an objectively reasonable standard.

The defense of choice of evils (called the necessity defense in some jurisdictions) permits the defendant to commit a crime if the harm caused is less severe than harm that will occur if the crime is not committed. In general, criminal homicide cannot be defended by choice of evils. Duress, a closely related defense, can sanction the use of force when the defendant is imminently threatened with serious bodily injury or death. Like choice of evils, the degree of force used pursuant to duress should be nondeadly.

The victim can also consent to the defendant's conduct, creating a consent defense, as long as the consent is given knowingly and voluntarily, the conduct is sexual or occurs during a sporting event, and the conduct does not involve serious bodily injury or death.

### 5.6.2 YOU BE THE DEFENSE ATTORNEY

You are a well-known private defense attorney with a perfect record. Read the prompt, review the case, and then decide whether you would **accept** or **reject** it if you want to maintain your level of success. Check your answers using the answer key at the end of the chapter.

1. The defendant and his wife argued. She raised a knife above her head and stated, “Don’t make me use this.” The defendant took the knife away and thereafter stabbed the victim forty-three times in the head and chest with it. The defendant wants to make an *imperfect self-defense* argument. Will you accept or reject the case? Read *State v. Perez*, 840 P.2d 1118 (1992). The case is available at this link: [http://scholar.google.com/scholar\\_case?case=7422940810428798296&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=7422940810428798296&hl=en&as_sdt=2&as_vis=1&oi=scholar).
2. The defendants crossed a police tape and trespassed on a medical clinic’s private property while protesting abortion. The defendants want to make arguments in support of *necessity*, *defense of others*, and *duress*. The basis of the defendants’ claims is that they are protecting the lives of unborn children. Will you accept or reject the case? Read *Allison v. Birmingham*, 580 So.2d 1377 (1991). The case is available at this link: [http://scholar.google.com/scholar\\_case?case=8254507993974001416&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=8254507993974001416&hl=en&as_sdt=2&as_vis=1&oi=scholar).
3. The defendant, a police officer, shot the victim twice after being summoned to the victim’s home by his wife. The victim was intoxicated and armed with two small steak knives. The defendant shot the victim subsequent to a somewhat lengthy encounter during which the victim lunged at him with the knives. The victim claimed he was putting the knives down or about to put the knives down. The victim is suing the defendant for damages based on use of *excessive force* in arrest or apprehension. Will you accept or reject the case? Read *Roy v. Inhabitants of Lewiston*, 42 F.3d 691 (1994). The case is available at this link: [http://scholar.google.com/scholar\\_case?case=8822695050372354696&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=8822695050372354696&hl=en&as_sdt=2&as_vis=1&oi=scholar).
4. The defendant, the Oakland Cannabis Buyers’ Cooperative, distributes marijuana to qualified patients under California’s Compassionate Use Act, which allows the possession and use of marijuana for medical purposes. The US government wants to stop this distribution under the federal Controlled Substances Act, which prohibits possession and use of marijuana under any circumstances. The defendant wants to continue distribution under a claim of *medical necessity*. Will you accept or reject the case? Read *U.S. v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483 (2001). The case is available at this link: <http://www.law.cornell.edu/supct/pdf/00-151P.ZO>.

### 5.6.3 Cases of Interest

- *Acers v. United States*, 164 U.S. 388 (1896), discusses deadly force and self-defense: <http://supreme.justia.com/us/164/388>.
- *Graham v. Connor*, 490 U.S. 386 (1989), discusses force used in arrest: <http://supreme.justia.com/us/490/386>.
- *State v. Rogers*, 912 S.W.2d 670 (1995), discusses duress: [http://scholar.google.com/scholar\\_case?case=4913796561906479282&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=4913796561906479282&hl=en&as_sdt=2&as_vis=1&oi=scholar).

### 5.6.4 Articles of Interest

- Affirmative defenses: [www.fd.org/pdf\\_lib/Beneman\\_Affirmative\\_Defenses\\_materials.pdf](http://www.fd.org/pdf_lib/Beneman_Affirmative_Defenses_materials.pdf)
- Self-defense and martial arts: <http://www.ittendojo.org/articles/general-4.htm>
- Castle laws: [www.harvardjol.com/wp-content/uploads/2010/07/523-554.pdf](http://www.harvardjol.com/wp-content/uploads/2010/07/523-554.pdf)
- Necessity and duress defenses: [wings.buffalo.edu/law/bclc/bcl/articles/6/2/westen.pdf](http://wings.buffalo.edu/law/bclc/bcl/articles/6/2/westen.pdf)

### 5.6.5 Websites of Interest

- Castle laws by state: [http://www.readytodefend.com/index.php?main\\_page=page&id=5&chapter=12](http://www.readytodefend.com/index.php?main_page=page&id=5&chapter=12)
- Criminal defense attorneys for all fifty states: [www.hg.org/law-firms/USA-Criminal-Defense.html](http://www.hg.org/law-firms/USA-Criminal-Defense.html)

### 5.6.6 Statistics of Interest

- Violence used during household burglaries in the United States: [bjs.ojp.usdoj.gov/content/pub/press/vdhhbpr.cfm](http://bjs.ojp.usdoj.gov/content/pub/press/vdhhbpr.cfm)
- US law enforcement officers killed and assaulted: [www.fbi.gov/about-us/cjis/ucr/leoka/2009/leoka-2009](http://www.fbi.gov/about-us/cjis/ucr/leoka/2009/leoka-2009)

### 5.6.7 Answers to Exercises

From [Section 5.1](#)

1. Carol’s defense creates *doubt* in the *intent* element for battery. Thus Carol’s defense is a denial or failure of proof defense, *not* an affirmative defense.
2. The Supreme Court of South Carolina reversed the defendant’s conviction because the jury instruction should have explained that the prosecution has the burden of disproving self-defense *beyond a reasonable doubt*.
3. The Supreme Court of Nevada held that necessity was a valid *common-law* defense to driving while under the influence. However, the court upheld the defendant’s conviction because he did not meet the requirements for necessity under the circumstances.

### 5.6.8 Answers to Exercises

From Section 5.2

1. Colin cannot claim *traditional* self-defense because there is no objectively reasonable fear of imminent injury or death while Diane is sleeping. Colin also cannot technically assert the battered wife defense because he is a husband. Courts *can* expand statutory defenses or create new common-law defenses. However, courts may be reluctant to expand the battered wife defense to spouses of either gender, based on the physical differences between men and women and the lack of empirical evidence documenting battered husband syndrome.
2. The Court of Appeals of Texas affirmed the defendant's convictions, holding that the jury does *not* have to be unanimous as to each required element of self-defense.
3. The US District Court for the District of Montana reversed the fine and held that the defendant did not provoke the attack and was entitled to shoot the bear in self-defense.

### 5.6.9 Answers to Exercises

From Section 5.3

1. Melanie *cannot* use defense of others as a defense to criminal homicide. Melanie can defend Colleen only to the same extent she could defend *herself*. Nothing in the fact pattern indicates that Colleen could defend herself using **deadly force**. Thus Melanie could be successfully prosecuted for criminal homicide in this situation.
2. The Supreme Court of Virginia held that the defendant could not threaten **deadly force** to defend *personal property* and affirmed the conviction.
3. The Court of Appeals of Texas held that the victim had the right to sue for excessive force used to arrest. The evidence did not indicate that the victim posed an *immediate danger* to the law enforcement officer's safety, or that she was attempting to resist arrest or flee. Moreover, the offense—failure to identify herself or give her date of birth—was minor. Thus the law enforcement officer was not immune from a lawsuit for damages under the circumstances.

### 5.6.10 Answers to Exercises

From Section 5.4

1. Clark and Manny can use **choice of evils** as a defense to arson in many jurisdictions. Clark and Manny were confronted with two harms: the loss of several homes or the loss of their neighbor's home. Clark and Manny ranked the loss of one home lower than the loss of several homes, which is *objectively reasonable*. Thus Clark and Manny could be acquitted or have a reduction in sentence or severity of the offense, depending on the jurisdiction.
2. The Court of Appeals of California held that the defendants should have been allowed to present evidence in support of the **necessity** defense and were entitled to a retrial.
3. The Supreme Court of New Hampshire upheld the defendant's conviction. The court recognized that a common-law defense of **duress** exists in some jurisdictions, but held that the facts in the defendant's case did not indicate that she was under duress. The court stated the defendant had lawful alternatives to driving while under the influence, such as calling a taxi or a friend for a ride or walking.

### 5.6.11 Answers to Exercises

From Section 5.5

1. In most jurisdictions, Allen cannot be criminally prosecuted because Brett **consented** to being tackled by *choosing* to participate in football, a contact sport.
2. The Court of Appeals of California held that the defendant had no constitutional right to be cryogenically frozen and affirmed the lower court's dismissal of his lawsuit seeking an injunction and immunity from criminal prosecution. The court reasoned that the defendant's right to refuse medical treatment is different from involving another individual in his death. It thereafter held that the defendant was legally free to commit suicide, but he could not authorize another to kill him.
3. The Court of Appeals of Georgia upheld the defendant's conviction for battery. The court stated, "It is the act and intent and results of the defendant's act which constitute the crimes as charged; the attitude of the victim is not called into issue by these elements." *Ramey v. State*, 417 S.E.2d 699, 701 (1992), accessed November 23, 2010, [http://scholar.google.com/scholar\\_case?case=10809733884390698075&hl=en&as\\_sdt=2002&as\\_vis=1](http://scholar.google.com/scholar_case?case=10809733884390698075&hl=en&as_sdt=2002&as_vis=1).

### 5.6.12 Answer to Law and Ethics Question

1. The US Court of Appeals for the Ninth Circuit gave great discretion to the state trial court, creating a presumption that the trial court did a proper analysis of the law and evidence when rejecting the **imperfect self-defense** jury instruction. The court thereafter agreed with the trial court's findings that the evidence excluded did *not* support a theory of *imminent* threat, required under California case law for a theory of imperfect self-defense. *Menendez v. Terhune*, 422 F.3d 1012, 1029 (2005), accessed November 19, 2010, <http://cases.justia.com/us-court-of-appeals/F3/422/1012/569492>. The battered wife syndrome or defense was not discussed in detail, although the Menendez brothers' theory of abuse is similar. This case is a good demonstration of how state case law varies, especially with regard to modern theories of self-defense based on psychological trauma. In a different state, there may have been a *different result* grounded in state law regarding these innovative defense theories.

### 5.6.13 Answers to You Be the Defense Attorney

1. In this case, the trial court rejected the imperfect self-defense argument and refused to instruct the jury on involuntary manslaughter. The Supreme Court of Kansas affirmed. The court held that after the defendant took the knife away, the victim was unarmed and no *imminent* threat of harm remained. Thus you would lose on the imperfect self-defense argument and should **reject** the case.
2. The Court of Criminal Appeals of Alabama affirmed the trial court's rejection of the defense arguments based on the fact that *abortion is legal*. The court reviewed the common law, statutes, and case precedent and concluded that these defenses are not appropriate to protest legal acts. Thus you would lose on the justification defense arguments and should **reject** the case.
3. The United States Court of Appeals for the First Circuit affirmed the lower court's dismissal of the lawsuit for damages. The court held that the defendant's use of force was objectively reasonable under the circumstances and gave *broad latitude* to officers who are forced to make split-second decisions under dangerous conditions. Thus you would win on the appropriate use of force in arrest argument and should **accept** the case.
4. The US Supreme Court held that there is no medical necessity exception to the Controlled Substances Act. The Court based its holding on the language of the federal statute, which reflects a determination that marijuana has no medical benefits worthy of an exception. Thus you would lose on the medical necessity argument and should **reject** the case.

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