He started it:
the Justification defense

Penal Law 35

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I. General Overview

Justified conduct is conduct that under ordinary circumstances is criminal, but which under special circumstances is not wrongful. There is no basis for limiting the application of justification to any particular mens rea or any particular crime because it applies to both intentional and reckless acts. *See People v. McManus*, 67 N.Y.2d 541 (1986) and *People v. Magliato*, 68 N.Y.2d 24 (1986)(depraved indifference murder); *People v. Huntley*, 59 N.Y.2d 868 (1983)(vehicular manslaughter).

Because justification is an ordinary defense, it must be disproved beyond a reasonable doubt. CPL 25.00(1). When raised, the prosecutor's job becomes far more difficult. Typically, no conviction of an offense by verdict is valid unless (i) based upon trial evidence which is legally sufficient; and (ii) which establishes beyond a reasonable doubt every element of such offense and (iii) the defendant's commission thereof. CPL 70.20. justification is raised, however, a conviction by verdict is only valid if (i) based on legally sufficient trial evidence, establishing beyond a reasonable doubt (ii) every element of such offense, (iii) the defendant's commission thereof, and (iv) that the defendant was not justified in doing so.

A. Statutes
   1. Article 35 of the Penal Law addresses the Defense of Justification. Justification is a defense to most offenses. Justification is a powerful defense because, when raised at trial, the People have the burden of disproving beyond a reasonable doubt the defendant's acts were not justified. CPL 25.00(1).
   2. Penal Law 35.05 addresses lawfully sanctioned conduct that would otherwise be unlawful[1] and unlawful acts necessary to avoid

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While not addressed by these materials, this subsection permits unlawful acts when required or authorized by law, typically by a public servant in the reasonable exercise of his or her official duties, powers, or functions (ie., controlled drug buys). The unlawful acts must be performed in the performance of official responsibilities, *People v. Mattison*, 75 A.D.2d 959 (1st Dep't 1980), and must be authorized by law; it's not enough for a public servant to reasonably believe the acts are authorized. *People v.*

imminent public or private injury ("lesser of two evils")

3. Penal Law 35.10 addresses use of force generally, and 35.15 specifically addresses using force to defend a person.
4. Penal Law 35.20 addresses using force to defend a premises and to defend a person in the course of a burglary.
5. Penal Law 35.25 addresses the use of force to prevent larceny or criminal mischief.
6. Penal Law 35.27 prohibits using force to resist an arrest and 35.30 discusses the force a police or peace officer may use to make an arrest or prevent escape.

B. Jury Instructions

1. A defendant is entitled to a justification charge "'whenever there is evidence to support'" the defense. *People v. Petty*, 7 N.Y.3d 279, 284 (2006)(quoting *People v. McManus*, 67 N.Y.2d 541 (1986).
2. If under any reasonable view of the evidence the fact finder might have decided the defendant's actions are justified, the court's failure to charge the defense constitutes reversible error. *People v. Padgett*, 60 N.Y.2d 12 (1983).
   a. The evidence is viewed in light most favorable to the defendant. *Petty*, 7 N.Y.3d 279 (1986).
   b. The record as a whole is considered, not just the defense's case (*Id.*) and the jury can consider justification based on the People's evidence alone. *People v. Steele*, 26 N.Y.2d 526 (1970).
   c. The jury can consider justification **even when the defendant testifies he did not engage in the alleged conduct**. *See Padgett*, 60 N.Y.2d 142 (1983)(defendant testified he avoided an provoked attack by pushing the door frame hard, breaking the door's glass. The defendant was still entitled to justification instruction of intentionally breaking the glass door even though his testimony, if true, negated his intent).
   d. Any evidence supporting the charge requires, **even when the**

Idarola, 222 A.D.2d 454 (2d Dep't 1995).

defendant asserts another defense. *See Steele*, 26 N.Y.2d 526 (1970)(even though the defendant presented an alibi defense, justification instruction still warranted by the People's evidence and concession the victim was the initial aggressor); *People v. Butts*, 72 N.Y.2d 746 (1988)(defendant outright denied involvement in crime).

e. When the jury ask for the justification instruction during deliberations and the defendant joins the request. *People v. Mariano*, 101 A.D.3d 1367 (3d Dep't 2012).

3. Form of Instruction
   a. General instruction is not enough; the instruction must be specifically applicable to the form of justification the evidence supports. *See People v. Acosta*, 233 A.D.2d 199 (1st Dep't 1996)(court erred in refusing to instruct on justification for the use of deadly force asserted in response to a reasonable belief the victim was attempting to commit a forcible rape).
   b. Instruction must encapsulate each theory of justification the evidence supports. *People v. Torre*, 42 N.Y.2d 1036, 1037 (1977)(reversible error for trial court to only instruct on defense of another when the defendant requested (and evidence supported) instruction for defense of another and self-defense).

C. Justification is a **complete defense**
   1. The jury cannot find a defendant guilty of a lesser included offense for which it found the defendant not guilty by reason of justification. *See People v. Velez*, 131 A.D.3d 129 (1st Dep't 2015).
   2. The court **is required** instruct the jury to "stop consideration" if they find the defendant not guilty by reason of justification, and to "only consider the lesser included offenses if they find the defendant not guilty of the greater offense for a reason other than justification." In other words, a finding of not guilty by reason of justification precludes further deliberations.
   3. If the court fails to provide the jury with the "stop consideration" instruction, object to the court's instruction to preserve the issue

because typical justification instruction generally conveys "stop consideration." *See People v. Hayes*, 72 A.D.3d 441 (1st Dep't 2010).

II. Initial Aggressor / Provoker

A. Justification defense unavailable if conduct of person against whom the defendant uses force was "provoked by the defendant with intent to cause physical injury to another person. PL 35.15(1)(a). *See People v. Rabbit*, 123 A.D.2d 722 (2d Dep't 1986) (defendant not justified in using deadly physical force because he provoked smaller man's defensive use of a knife)

B. Justification is also not available to the initial aggressor. PL 35.15(1)(b)
   1. The initial aggressor first uses or threatens to use physical force - insults, abusive language, or starting an argument is not for that reason alone the initial aggressor.
      a. An initial aggressor makes true threats and does not encompass mere insults. *People v. Gordon*, 223 A.D.2d 372, 373 (1st Dep't 1996).
      b. Nor does it encompass abusive language. *People v. Baez*, 118 A.D.2d 507 (1st Dep't 1986)
   2. And the initial aggressor who fails to retreat from the conflict and effectively communicate the retreat. *See* PL 35.15(1)(a); 35.15(2)(a)(i).

C. Determining the Initial Aggressor
   1. Who escalated the situation? Bringing a gun to a bat fight, a bat to a knife fight, a knife to a fist fight[2]
   2. Infer from Defendant's Conduct
      a. Stabbing unarmed victim in back who was sitting on a bed drinking beer. *People v. Tolbert*, 203 A.D.2d 901 (4th Dep't 1994)

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[2] *People v. Francis*, 15 A.D.3d 318 (1st Dep't 2005)

b. Stabbing a disarmed drunkard who poses no threat. *People v. Martinez*, 149 A.D.2d 438 (2nd Dep't 1989)
c. Returning with a shotgun in hand to the scene of a confrontation with an unarmed victim. Although some indication the victim threatened the defendant, there was no evidence victim was armed. *People v. Fousse*, 167 AD2d 416 (2nd Dep't 1990).
d. Shooting first, (*Calvin of Oakknoll*, 110 A.D.2d 1044 (4th Dep't 1985))[3], but not always. *See Ortiz*, 205 AD2d 325 (1st Dep't 1994).
e. Can be initial aggressor even when verbally provoked. *People v. Soriano*, 188 A.D.2d 420 (1st Dep't 1992) (Defendant met the victim's verbal provocation with pushing ... and a couple stabs)

3. Infer from the victim's conduct
   a. Prior threats by the victim against the defendant is admissible to prove that the victim was the initial aggressor, whether or not the threats are communicated to the defendant. *People v. Petty*,

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In a cautionary tale from my home county (Chautauqua) and partially why I avoided hunting as a teenager at the expense of much ridicule, the defendant, Calvin of Oakknoll (possibly a distant relation) was not justified in killing Mr. Douglas O'Kelley. Calvin shot O'Kelley for hunting in the woodlands of the church that Calvin founded (the Religious Society of Families). Calvin and his betrothed were the church's only members. Because any self-respecting church in the Southern Tier has woodlands for church huntin' only, Calvin posted "private property" signs in the surrounding woods. On the day in question, Calvin saw O'Kelley exit the woods roughly 100 yards from the church (the church doubled as Calvin's residence). Calvin grabbed the church Winchester (typically used to kill bear and moose from 200 yards) and approached O'Kelley to discuss O'Kelley's sacrilegious hunt. An argument ensued that Calvin ended the only way he knew how - with a point blank shot to the chest of his foe. O'Kelley died instantly. Calvin was the initial aggressor - he had a bigger gun, fired the one and only shot, and witnesses testified O'Kelley pointed his shotgun at the ground during the entire argument. O'Kelley was also wearing a plaid hunting jacket with a hunting tag affixed, clearly in the woods to hunt and not to duel.

7 N.Y.3d 277 (2006)[4] (how does this square with *Miller* and *Robert S.*? According to COA, a threat "may indicate an intent to act upon them, thereby creating a probability that the deceased victim has in fact acted as the initial aggressor."

b. Prior violent acts by the victim the of which the defendant is aware.

c. The fact finder determines the initial aggressor.

(1) *People v. Isidore,* 201 A.D.2d 932 (4th Dep't 1994) - At a bench trial, an officer testified he witnessed defendant repeatedly striking unarmed victim about head and upper body with metal pipe. While the neither the defendant not victim testified, testimony about who started the fight conflicted. The court chose to believe the officer.

III. THE DUTY TO RETREAT

A. The defendant, when not the initial aggressor, has **no duty to retreat before** reasonably using **nondeadly** force.

B. Before using deadly force, however, the defendant has a duty to retreat even when not the initial aggressor.

1. PL 35.15(2)(a) - defensive use of deadly force not permissible when defendant "**knows that he can retreat with complete safety** to [himself] and others." *People v. Seit*, 86 N.Y.2d 629 (1995)(justification noted warrant because there was uncontroverted evidence the defendant and his family had the opportunity to retreat, but failed to do so, and waited for the deceased to return).

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How does this align with *Robert S.* and *Miller*? In *Petty*, COA reasoned, "such threats may indicate an intent to act upon them, thereby creating a probability that the deceased victim hasd in fact acted upon them as the initial aggressor." Can't prior bad acts of a defendant be introduced to establish the defendant's intent even when unbeknownst to a complainant?

2. What does it mean to be able to retreat to complete safety? **Look at the circumstances** surrounding the defendant's use of force. The *Matter of Y.K.*, 87 N.Y.2d 430, 434 (1996) is instructive: "at that point, when the kicking and punching started, the respondent was being held on the ground surrounded by 10 or 15 other members of the group and apparently without anyone in the area to help her. Manifestly, she was unable to retreat safely under those circumstances and her use of deadly force was justified."

C. The defendant has **no duty to retreat from his or her "own dwelling"** before using deadly force when not the initial aggressor. PL 35.15(2)(a)(i).
   1. There is **no duty even when the defendant and complainant live in the same dwelling.** People v. Jones, 3 N.Y.3d 491 (2004); *People v. Emmick*, 136 A.D.2d 892 (4th Dep't 1988)(error for trial court to instruct the jury on the defendant's duty to retreat where the victim, the defendant's brother, first attacked the defendant in the apartment they shared).
   2. There is no definition of "dwelling" for PL 35.15.
      a. COA - Legislature chose not to incorporate PL 140.0 (burglary / trespass) definition of "dwelling" when it enacted the duty to retreat statute. "[A]ny definition of the term must therefore account for a myriad of living arrangements, from rural farm properties to large apartment buildings." *People v. Hernandez*, 98 N.Y.2d 175 (2002). To determine if a location is the defendant's "own dwelling," examine the extent to which **defendant (and persons actually sharing living quarters with the defendant) exercises exclusive possession and control** over the are in question. "Own dwelling" "encompasses a house, an apartment or part of a structure where defendant lives and where others are ordinarily exclude - the antithesis of which is routine access to or use of an area by strangers." *Hernandez*, 98 N.Y.2d at 182-83.
      b. "Dwelling" does not include lobby and stairwell areas of a six-story apartment building. *Id.*
      c. Nor does "dwelling" extend to open porch. *People v. Bennett*, 212

A.D.2d 1028 (4th Dept 1995); *see People v. Aiken*, 4 N.Y.3d 324 (2005) (defendant not in his "dwelling" when standing in open doorway, because an open doorway does not provide the same "reasonable expectation of seclusion and refuge from the outside world as closed door does")

d. May extend to locked hallway of apartment limited to residents and guests. People v. McCurdy, 86 A.D.2d 493 (2d Dep't 1982)

e. No reasonable view of evidence trailer defendant's dwelling when he moved out 6 weeks prior, not paying rent, removed all belongings, entered written lease agreement elsewhere, did not retain keys, was not allowed inside by ex-girlfriend. *People v. Shaut*, 261 AD2d 960 (4th Dept 1999)

3. Whether an incident happened in a "dwelling" is for **the jury to decide** and the court must instruct the jury "the defendant would not be required to retreat if the defendant was in his dwelling and not the initial aggressor." *People v. Berk*, 88 N.Y.2d 257, 267 (1996); *People v. Colville*, 79 A.D.3d 189 (2d Dep't 2010)

D. A guest has a duty to retreat from a "dwelling" not his own - the question becomes under what circumstances does a person invited to stay in the dwelling of another become a resident of the dwelling? *See People v. Van Allen*, 216 A.D.2d 39 (1st Dep't 2005) *cf. Minnesota v. Olson*, 495 U.S. 91 (1990)(defendant, who was an overnight guest in an upstairs duplex, had a reasonable expectation of privacy in the premises which was protected by the Fourth Amendment); see also *Hernandez*, 98 N.Y.2d at 182-83 (To determine if a location is the defendant's "own dwelling," examine the extent to which defendant (and persons actually sharing living quarters with the defendant) exercises exclusive possession and control over the are in question).

IV. Deadly vs. Non-deadly Force

Justification is measured from the force used, not the injury inflicted. Where the level of force speaks for itself, the Court may decide the issue as a matter of law. In close calls, it's up to the jury. For example, the court did not err when finding as a matter of law the defendant used deadly force by causing his knife to come into contact with the victim's (named Fritz) abdomen, *(People v. Taylor*, 118 A.D.3d 1044 (3d Dep't 2014)), or when the defendant stabbed the complainant four times with a large machete. *People v. Beckford*, 49 A.D.3d 547 (2d Dep't 2008). That level of force speaks for itself. But in closer cases, the level of force the defendant used is for the jury to decide. For example, it isn't abundantly clear the level of force (deadly or non-deadly) a defendant uses for tossing a beer cup over his shoulder in attempt to slow his pursuers[5], (*People v. Powell*, 101 A.D.3d 1369 (3d Dep't 2012)) or who strikes a complainant in the head with a partially full bottle of wine (*People v. Jones*, 148 A.D.2d 547 (2d Dep't 1989). Close calls are for the jury, not the judge. A judge who determines the level of force as a matter of law in a close case abuses his discretion.

A. Non-deadly Force

1. A person "may 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 ..." PL 35.15(1)

B. Deadly Force

1. "[A] person may not use deadly physical force upon another person pursuant subdivision one unless [h]e reasonably believes that such other person is using or about to use deadly physical force," (PL 35.15(2)(a)); or "[h]e reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery;" (PL 35.15(2)(b)), or "[h]e reasonably

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[5]At least according to his testimony.

believes that such other person is committing or attempting to commit a burglary and the circumstances are such that the use of deadly force is authorized by" PL 35.20(3). PL 35.15(2)(c).

a. In determining whether the force used was deadly physical force "[t]he risk of serious injury or death and capacity to presently inflict the same are central to the definition, no the consequences of the defendants conduct or what he intended. *People v. Magliato*, 68 n.Y.2d 24, 29 (1986)

2. "Deadly physical force" - force which under the circumstances used is readily capable of causing death or "serious physical injury." PL 10.00(11). This definition "adopted primarily for the statutory defense of justification ..., hinges on the nature of the risk created - ie., its imminence or immediacy, as well as its gravity." *People v. Magliato*, 68 N.Y.2d 24, 29 (1986)
3. "Deadly weapon" - any loaded weapon from which a shot, readily capable of producing death or other "serious physical injury" may be discharged, or a switchblade knife, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, plastic knuckles or metal knuckles. PL 10.00(12)
4. "Dangerous Instrument" - any instrument, article, substance, including a "vehicle" as that term is used in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious physical injury. PL 10.00(13)
   a. "Vehicle" means "motor vehicle" "trailer" or "semi-trailer" as defined in the VTL, any snowmobile as defined in parks and rec law, any aircraft, or any vessel equipped by propulsion by mechanical means or sail. PL 10.00(14)
5. "Serious physical injury" - physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. PL 10.00(10)
   a. Substantial risk of death
      (1) Loss of consciousness from choking. *People v. Suyoung Yun*, 140 A.D.3d (1st Dep't 2016)

(2) Does not include:
(a) Lump in leg from shooting that required medication and physical therapy, as well as use of cane, crutches and inability to play sports. *People v. Ham*, 67 A.D.3d (3d Dep't 2007)
(b) A punch in the jaw from a 13 year old. *Matter of Andre D.*, 182 AD2d (4th Dep't 1992)

b. Serious protracted disfigurement
(1) Reasonable observer would find the person's altered appearance distressing or objectionable; injury must be viewed in context, consider location on body and victim overall physical appearance. *People v. Manigault*, 145 A.D.3d (4th Dep't 2016)

c. Protracted impairment of health

d. Protected impairment of physical condition
(1) Two fractures to jaw requiring surgery and placement of titanium plate in chin; jaw wired shut for 4 weeks, numbness in chin until trial. *People v. Ford*, 114 A.D.3d 1273 (4th Dep't 2014)
(2) Disabling injury that required retirement from police department. *People v. Santana*, 40 A.D.3d 230 (1st Dep't 2007)
(3) Permanent contracture of joints caused by restraints placed on wrists and ankles. *People v. Marshall*, 105 A.D.2d 849 (2nd Dep't 1984)

V. DEFENDANT'S "REASONABLE BELIEF" INCLUDES BOTH A SUBJECTIVE AND OBJECTIVE ELEMENT

A. Subjective
1. The defendant actually believed the level of force he used was necessary to avert the imminent use of unlawful force .
a. For deadly force - the defendant actually believed deadly force was necessary to avert the imminent use of deadly force or the commission of one of the enumerated felonies. *People v. Goetz*,

68 N.Y.2d 96 (1986).[6]

B. Objective
   1. The defendant's belief the force he used was that of a reasonable person in the defendant's circumstances. *Matter of Y.K.*, 87 N.Y.2d 430, 433 (1996).[7]

   2. Reasonableness of the defendant's belief based on:
      a. Any relevant knowledge the defendant had, at the time, of the person against whom he acted. *People v. Aiken*, 4 N.Y.3d 324 (2005)(justification instruction warranted where the defendant

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"I wanted to kill those guys, I wanted to maim those guys. I wanted to make them suffer in every way I could. If I had more bullets I would have shot them again and again. My problem was I ran out of bullets. I was going to gouge one of the guys out with my keys afterwards. You can't understand this. I know you can't understand this. That's fine." - Bernhard Goetz's confession

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New York has a long history of requiring self-defense claims be reasonable. Chief Judge Watchler spells out that history in *Goetz*. In 1829, the criminal statute required lethal force only be justified when a defendant had "reasonable ground" to apprehend imminent danger. Then, in 1849 in *Shorter v. People*, 2 NY 193, lethal force could only be justified by a reasonable belief (even if such belief was wrong). A new Penal Law was adopted in 1881which incorporated **"reasonable ground"** language from the 1829. The 1909 Penal Law also adopted verbatim the **"reasonable ground"** language from the 1881 statute. Two cases followed interpreting the **"reasonable ground"** - *Lumsden* , which held a reasonable belief cannot based on mere fear or fancy or remote hearsay or a delusion, and *Tomlin*-which set forth the following governing test: did the situation justify the defendant as a reasonable man in believing that he was about to be murderously attacked?" Then, in 1937, the Law Revision Commission report summarized self-defense law as requiring "reasonable belief in the imminence of the danger" determined by how a man of ordinary courage in the circumstances surrounding the defendant at the time of killing. Finally, the modern Penal Law, enacted in 1965 (PL 35.15), **changed "reasonable ground" to "reasonable belief"** and this where the confusion in *Goetz* started.

and the victim, his neighbor, had a long history of animosity and the victim stabbed the defendant some years before and threatened the defendant repeatedly thereafter).

b. The physical attributes of all involved.
c. The defendant's prior experiences which could provide a reasonable basis for his belief that another person's intentions were to use unlawful force against him.
d. The victim's reputation as a quarrelsome, vindictive or violent person, provided the defendant was aware of this reputation when he used force against the victim. People v. Miller, 39 N.Y.2d 543, 548-49 (1976).
e. **Specific acts of violence by the victim** the defendant knew at the time he used force against the victim.
   (1) In the *Matter of Robert S.,* 52 N.Y.2d 1046, 1048 (1981)(denying defendant and dissent's [Fuchsberg] invitation to admit evidence of prior acts of victim of which the defendant unaware); *Miller*, 39 N.Y.2d at 551 (1976);
   (2) People v. Rodawald, 177 N.Y. 408 (1904) (defendant's knowledge of specific acts of violence by the deceased against a third person inadmissible to support justification because character never establishes proof of individual acts and each specific act would create a new issue)
   (3) The **specific acts of violence by:**
      (a) the victim - must be "reasonably related to the crime for which the defendant stands charged." *Miller*, 39 N.Y.2d at 551.
         i) COA - knowledge of specific acts of violence may have more of an impact on the defendant's state of mind than the defendant's vague awareness of the victim's general reputation for violence. *Miller*, 39 N.Y.2d at 551-52.
         i) The specific acts must also bear on a defendant's state of mind and reasonableness of belief that the use of force was necessary. *See People v. Thompson*, 224 A.D.2d 950 (4th Dep't 1996)(not erroneous to

preclude defendant's testimony the victim attacked him before because there was no objective evidence of the defendant's need to use deadly physical force)[8]

ii) **Incorrectly precluding specific acts of violence by the victim is reversible error.** *People v. Dingley*, 42 N.Y.2d 888 (1977)

(a) the defendant

i) Prior violent acts by the defendant usually impermissible propensity evidence. *People v. Bradley*, 120 N.Y.3d 128 (2012)

ii) May be offered to rebut a claim of justification when the prior violent acts have a natural tendency to disprove the defendant's specific claim. *Id* at 134.

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[8] While it's still the law that the defendant must be aware of specific acts of violence by the victim to be admitted in support of a justification defense, COA recently opened the door to the admission of the victim's specific acts of violence of which the defendant is not aware. While it rejected the defendant's attempt to introduce prior bad acts by the victim unknown to the defendant, in *People v. Watson*, 20 N.Y.3d 1018, 1020 (2013), the defendant testified at his murder trial he panicked and shot Livingston Powell when Powell reached for his waist. The defendant, seeking to prove Powell was the initial aggressor, requested issuance of a subpoena from the district attorney of Powell's "criminal record, and specific acts of violence" known **"but also those unknown"** to the defendant. The trial court denied the subpoena in light of *Robert S* and *Miller* because acts unknown by a defendant are not relevant to his state of mind. The defendant appealed and asked COA to jettison *Robert S.* and *Miller* and issue a new rule: a defendant claiming justification should be able to use a complainant's prior violent acts (even those unbeknownst to the defendant) to establish the complainant was the initial aggressor by acting in accord for a propensity for violence. COA reasoned that issue wasn't before the court - there was no question that the defendant was the initial aggressor because Powell was unarmed. COA expressed no opinion on *Miller* and *Robert S.* Thus, when there is a reasonable view of the evidence (in the light most favorable to the defendant) the complainant is the initial aggressor, *Watson* may be used to argue for the admissibility of a complainant's prior violent acts which the defendant is not aware.

(b) Reversible error for court to admit defendant's prior violent acts from some unspecified, necessarily remote time that do not in any way tend to disprove a defendant's self-defense claim. *Id.*

Note, the degree of force is only justified to the extent the defendant reasonably believes to be necessary to repel the threat. *Matter of Y.K.*, 87 N.Y.2d 430, 433 (1996). Even when the person who is ultimately injured is an innocent bystander. *People v. Richardson*, 294 A.D.2d 379 (2d Dep't 2002)(trial court properly charged justification because jury could have found defendant justified in chasing and shooting at a robber, but hitting and killing an innocent bystander, if it found the defendant reasonably believed deadly force was necessary to defend himself against the robbery).

If a defendant is justified in using physical force, the **People have the burden** to prove beyond a reasonable doubt the **force used was more than necessary and it was the excessive force that caused the injury or death.** For example, an intruder broke into a darkened apartment and the trial evidence established the apartment owner shot the intruder several times, first, while the intruder was standing, and then multiple times while the intruder was on the floor.[9] The People argue the owner used excessive force which caused the death of the intruder. The owner argues he was justified. The jury convicted the owner of manslaughter. The Second Department reversed because the **prosecution did not establish beyond a reasonable doubt that the excessive force (if any) caused the death.** *People v. Patterson,* 176 AD2d 901 (2nd Dep't 991).

Also note, the right to use physical force only lasts as long as the defendant reasonably believes the threat continues. Thus, if the complainant is disarmed, injured, or withdraws from the encounter, any use of force by the defendant against the complainant will not be justified. *See People v. Diguglielmo*, 75 A.D.3d 206, 215-16 (2d Dep't 2010) (complainant withdrew from encounter, did not threaten deadly physical force when shot); *People v. Bennett*, 279

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9 *See* Rule #2 "The Double Tap" from ZOMBIELAND (Columbia Pictures 2009) ("you think it's dead ... one more time makes it 100% sure).

A.D.2d 585 (2d Dep't 2001)(defendant disarmed wife of knife she was holding before killing her).

VI. Defending Property and Premises

A. Premises - "[a]ny 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."
    - May use any degree of force he or she reasonably believes to be necessary for such purpose and **but may only use deadly physical force if**
        - he or she reasonably believes such to be necessary to prevent or terminate the **commission or attempted commission of an arson (PL 35.20(1))**; or
        - he or she, in possession or control of any premises or licensed or privileged to be thereon or therein reasonably believes to prevent or terminate the commission or attempted commission of **arson**, or in the course of a **burglary or attempted burglary** (PL 35.20(2); or
        - he or she, in possession or control of a dwelling or an occupied building who reasonably believes that another person is committing or attempting to commit a **burglary for of such dwelling or building** (PL 35.20(3))[10]

Practice note: A defendant is entitled to a justification charge even when reasonably mistaken of an intruder's identity, including when the intruder is a police officer who, while responding to a domestic dispute call, forcibly entered the defendant's dwelling without announcing his presence. *People v. Zayas, 88 A.D.3d 918 (2d Dep't 2011); See People v. Deis*, 97 N.Y.2d 717 (2002). The

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PL 35.20(3) was intended to protect individuals who suddenly find themselves the victim of an intrusion upon their premises. *People v. Cox*, 92 N.Y.2d 1002 (1998).

defendant's must use force to defend his premises on his actual premises. Common areas of a multiple dwelling open to the general public or outside of the premises. *See People v. Duran*, 234 A.D.2d 560 (2d Dep't 1996)(lobby); *People v. McMoore*, 214 A.D.2d 893 (3d Dep't 1995)(hallway); *People v. Zupan*, 184 A.D.2d 888 (3d Dep't 1992)(stairway); *People v. Gaines*, 229 A.D.2d 448 (3d Dep't 1996)(front yard). Justified force against a trespasser or burglar ceases once they leave the premises. See People v. Ali, 89 A.D.3d 1412, 1413 (4th Dep't 2011).

Can a defendant use PL 35.20(3) to justifiably kill a foe that he invited into his dwelling knowing the foe intends to commit a crime once inside? In *People v. Godfrey*, 80 N.Y.2d 860 (1992), COA said no. Godfrey and the victim decided to "take it inside"Godfrey's dwelling to settle their dispute. Once their ensuing violent struggle in the dwelling subsided, Godfrey ordered the victim out of house. The victim refused and lunged for Godfrey's gun. Godfrey fatally shot him. The court properly did not instruct the jury that Godfrey justifiably acted in defense of a burglary because "nothing in [the] legislative history [of PL 35.20(3) or otherwise" suggested the Legislature meant to protect "one who ... invites another person into his home, fully aware that such person intends to commit a crime once inside."

Again, any reasonable view of the evidence that the defendant was justified in using deadly physical force requires an instruction. Thus, it is possible, for a defendant justifiably used deadly physical force to terminate a burglary and/or to defend against the imminent use of deadly physical force. People v. Hurley, 899 N.Y.S.2d 62 (App. Term 2009). The court's failure to provide both instructions in such a case is reversible error.

Finally, a trespasser can fight back when a person defending property uses excessive force. *See People v. McGee*, 173 A.D.2d 861 (2d Dep't 1991)

B. Property - PL 35.25

1. A person may use physical force, other than deadly physical force, upon another person when and to the extent he or she reasonably believes to be the commission of or attempted commission by such other person of larceny or criminal mischief with respect to property other than premises. *See* PL 155.25 (larceny); PL 145.00 (criminal mischief)
2. When a reasonable view of the evidence supports the defendant's

use of deadly physical force, there is no need to charge the jury on PL 35.25 because it only applies to non-deadly force.

3. Once the larceny or criminal mischief is complete, a person is no longer justified in using physical force against that person. *See People v. Verdon*, 172 A.D.2d 863, 864 (2d Dep't 1991)

VII. NECESSITY - THE "WHAT ELSE WAS I SUPPOSED TO DO?" DEFENSE

A. Justified illegal acts necessary to avoid imminent public or private injury. PL 35.05(2)

B. Elements:
   1. Conduct necessary as an emergency measure to avoid private or public injury which is about to occur
      a. Conduct must be "reasonably calculated to have an actual effect in preventing harm" *People v. Craig*, 78 N.Y.2d 616, 623 (1991)
      b. Not tentative or only advisable or preferable or without a reasonable, legal alternative course of action. Id.
      c. Harm must be impending - a present, immediate threat - a danger that is actual and at hand, not one that speculative or remote. *Id.* at 624.
         (1) Jury question whether threat of harm that the defendant perceived had ceased to exist and if so whether defendant had sufficient time to react prior to engaging in illegal conduct. *People v. Maher*, 978, 982 (1992)[11]
   2. By reason of a situation occasioned and developed through no fault

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While slightly intoxicated, the defendant got into a minor traffic accident with another car. The other driver became belligerent while the two exchanged insurance information. The defendant sped away when it appeared thge other driver was retrieving a weapon from his car. The defendant's foot hit the floor and he flew from the scene, but didn't fly far before he flattened the unfortunate Frank Flotteron at 4 AM in a fatal faux pas. See also People v. Torres, 125 A.D.3d 1481 (4th Dep't 2015)(defendant initially driving while intoxicated necesary to avoid physical injury but not for the several miles thereafter).

of the actor[12]

3. The injury is of such gravity that according to ordinary standards of intelligence; or according to ordinary standards of morality
   a. No subjective element of Necessity (unlike the justified use of physical force). *Craig*, 78 NY2d 616 (1991)
4. 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.
   a. The harm the defendant's conduct prevents must outweigh the harm he causes. *See People v. Perry*, 19 NY3d 70 (2012) (Frightening a man with gun is not a justified emergency measure for ending a tussle or fistfight. Defendant grabbed a gun during a fight and "went off by accident" killing the other dueler)

Practice Note: The defense **only applies to the crime defendant commits to prevent another harm** - there must be two evils. For example, in *People v. Rodriguez*, 16 NY3d 341 (2011), a jury convicted the defendant for manslaughter and assault after defendant tried to prevent a moving truck from striking pedestrians. The trial court properly refused to instruct the jury on emergency justification as a defense to the resulting manslaughter and assault. The defendant testified he jumped into the passenger seat of a truck that was already moving. When he jumped into the truck, he slid behind the steering wheel and pumped the brakes in a failing attempt to prevent the truck from striking pedestrians. COA reasoned even if defendant's testimony was true there was no "'evil' on his part." The trial court failed, however, in failing to instruct the jury on driving while intoxicated. The emergency charge applied to the driving (the harm) but not reckless manslaughter and assault.

Necessary and justifiable conduct may not rest upon consideration s pertaining only to the morality and advisability of the statute, either in general application or with respect to its application to a particular class of cases

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People v. Lemmo, 85 AD3d 1204 (2d Dep't 2011)(where "defendant [led] an unmarked police car and a marked police car on a high speed chase, during which he proceeded to drive on a sidewalk, drive up a one-way street the wrong way and cause damage to the property, and injure a police detective," there was no reasonable view of the evidence that the situation was occasioned through no fault of defendant)

arising thereunder. Whenever evidence relating the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter whether the claimed facts and circumstances would, if established, constitute a defense. Thus, it's the court's decision (not jury) to decide as matter of law that the claimed facts and circumstances - if established - would constitute the defense.