Lee Burgess: Welcome back to the Law School Toolbox podcast. Today we have another episode in our "Listen and Learn" series. This one is on criminal law, specifically self-defense and the defense of others. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hi, this is Lee from the Law School Toolbox. Welcome back to the "Listen and Learn" series! Today we are diving into criminal law, specifically self-defense and defense of others. These justification defenses are absolutely crucial to understand for the bar exam and your law school exams, as they appear frequently in criminal law questions. They're also fascinating, because they deal with intense human situations where split second decisions can have life altering consequences.

Lee Burgess: So let's start with the basics. Both self-defense and defense of others are justification defenses. A justification defense essentially says, "Yes, I did the act, but I was justified in doing so, so I should not be found guilty of a crime." Unlike other defenses, which might argue there was no wrongdoing, or perhaps acknowledge wrongdoing but argue the defendant shouldn't be held responsible, justification defenses assert that the action was the right thing to do under the circumstances. Self-defense is probably the most common justification defense you'll encounter on an exam.

Lee Burgess: So, what exactly is self-defense? Well, first, it's important to know that self-defense is a complete defense to a crime. That means if you claim self-defense and are successful, you should be fully acquitted, not just found guilty of a lesser offense. It's a powerful defense. But of course there are specific elements that must be met in a self-defense claim, and those elements differ depending on whether the defendant used deadly or non-deadly force while committing the crime.

Lee Burgess: Let's start with non-deadly force. For non-deadly force, the use of force is justified when, (1) the defendant reasonably believes; (2) that he is in imminent danger of being harmed; and (3) the amount of force used is proportional to the physical harm threatened. So reasonable belief, imminent danger, and

proportional force. That last part is really important – the force used must be reasonably related to the threatened harm which the defendant seeks to avoid. You can't stab someone for threatening to shove you in line at the grocery store, for example.

Lee Burgess: Now for deadly force, the stakes are obviously higher. The use of deadly force is justified when, (1) the defendant kills another based on a reasonable belief; (2) that he was in imminent danger of being killed or suffering great bodily injury; and (3) the use of deadly force was necessary to defend against the danger. You might be thinking those rules sound really similar. They do, but there are important differences you must keep straight. For deadly force, the threat must be one of death or great bodily injury, not just any harm. And the use of deadly force must be necessary, not just proportionate. There can't be other reasonable options available to avoid the harm.

Lee Burgess: Now, this is where it gets a bit more complex. In a minority of jurisdictions, there's what's called a duty to retreat before deadly force may be used. In these jurisdictions, to justify deadly force in self-defense, the defendant must show either, a) there was no opportunity to retreat; or b) retreat could not have been accomplished safely. However, even in duty to retreat jurisdictions, there is no duty to retreat if the defendant was attacked in their own home. This is sometimes called the Castle Doctrine. Your home is your castle and you don't have to flee from it, even if you could do so safely. Homes are sort of sacred in the U.S., and your rights in and around them are often substantially higher than in other places.

Lee Burgess: Okay, we've covered typical self-defense situations. But what if you started the fight? Does self-defense go out the window if you started it? The answer is "no". You can still argue self-defense, but the rules are understandably different for you. If you're the aggressor – the person who initiated the altercation – you can only use force in self-defense if, a) you withdraw from the altercation and communicate such intent; or b) the other person suddenly escalates the fight with deadly force and withdrawal is not possible. So if you pick a fist fight with someone, but then walk away saying, "I'm done, I don't want to fight anymore", and they pull a knife – you may be justified in using force to defend yourself, even though you started the initial confrontation.

Lee Burgess: We're about to get into a hypothetical to seal in some of these rules, but before we do, let's talk about imperfect self-defense. Rather than being a complete defense, imperfect self-defense is a mitigating defense to murder that can reduce a murder charge to voluntary manslaughter. Imperfect self-defense is applicable when the defendant kills another based on a good faith belief that,

(1) the defendant was in imminent danger of being killed or suffering great bodily injury; and (2) the use of deadly force was necessary to defend against the danger; but (3) at least one of those beliefs was unreasonable. For example, if someone genuinely believed their life was in danger, but that belief was objectively unreasonable under the circumstances, they might have an imperfect self-defense claim. I want to note that not all courts allow imperfect self-defense to be applied in situations where the defendant was defending another person.

Lee Burgess: Okay, that was a lot of law. It's hard to really learn these rules unless we see them play out in context. So let's look at a hypo before we cover the rules for defense of others. This hypo was adapted from the February 2008 California bar exam, so it's a great example of a question you should be preparing to answer. Here's the hypo:

Lee Burgess: "Dan's neighborhood was overrun by two gangs, the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

Lee Burgess: After threatening Dan for several weeks, Vic backed into an alley, showed him a knife, and said, 'Think carefully about your decision. Your deadline is coming fast.' Dan was terrified. He began carrying a gun for protection.

Lee Burgess: A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic. Dan was arrested and charged with murder. Can he successfully raise a claim of self-defense? Discuss."

Lee Burgess: What do you think? Did Dan act in self-defense? Remember, start with the law. What is the rule that we are applying here? Since Dan shot and killed Vic, we need to look at the rules for the use of deadly force. In case you need a refresher, the use of deadly force is justified when, (1) the defendant kills another based on a reasonable belief; (2) that he was in imminent danger of being killed or suffering great bodily injury; and (3) the use of deadly force was necessary to defend against the danger. What do you think? Did Dan have a reasonable belief that he was in imminent danger of being killed or suffering a great bodily injury?

Lee Burgess: I think he probably does. Dan will argue that his neighborhood was run by gangs and is inherently very dangerous. Vic himself was a gang member and had threatened Dan when Dan refused Vic's attempt to recruit him into the gang. Ultimately, Vic backed Dan into an alley, pulled a knife on him, and again

threatened him, this time saying his deadline was coming fast. All of that taken together, especially Vic's talking about Dan's impending deadline and walking with his hand under his jacket gives Dan a reasonable belief Vic was intending to kill Dan, and soon.

Lee Burgess: So, what about the third factor? Was Dan's use of deadly force necessary to defend against that danger? Dan will argue that when he saw Vic on the street with his hand under his jacket and after everything that had happened, he was terrified and believed Vic might be about to stab him with that same knife. To him, it seemed like a series of events culminating in an imminent threat.

Lee Burgess: Now, there is a weakness to Dan's defense, and that is that he carried around a gun for a week, essentially preparing to shoot Vic. The prosecution may argue that Dan is not entitled to self-defense because he was under no clear threat when he shot Vic.

Lee Burgess: I think Dan wins the day here, but you should contend with the weakness of this case in your answer, and you may come to a different conclusion, and that's okay. Just make sure to show your work.

Lee Burgess: Now, there is one more thing we need to address in this hypo to have a complete answer, and that is imperfect self-defense. Remember, imperfect self-defense reduces a murder charge to voluntary manslaughter. Imperfect self-defense applies when the defendant kills another based on a good faith belief that, (1) the defendant was in imminent danger of being killed or suffering great bodily injury; and (2) the use of deadly force was necessary to defend against the danger; but (3) at least one of those beliefs was unreasonable. So, this defense is a good one for Dan if his fear is found not to be reasonable, but that his belief that he was in imminent danger and needed to act was in good faith. Given the timing of his actions, his carrying of a gun, and the lack of a true, clear threat from Vic in that moment, this may not be Dan's strongest argument.

Lee Burgess: I hope that hypo helped you grasp self-defense more fully. We still need to discuss defense of others, so let's move on. First, note that the same general rules for self-defense apply to the defense of others. Most jurisdictions use one of two rules to evaluate defense of others claims, so we'll go over those rules now. First is the "step into the shoes" rule. Under this approach, the defendant steps into the shoes of the person being attacked, and may use force if the person being attacked could have themselves acted in self-defense. Basically, it's self-defense, but another person is involved. The second approach is the "reasonable appearance" rule. Here, the defendant can use force if he

reasonably but mistakenly believed the person being attacked had the right to act in self-defense. This rule is more lenient because it focuses on what the defendant reasonably believed, not what was actually happening. It allows for mistake.

Lee Burgess: Now let's analyze another hypothetical to see how these rules play out in practice. This hypo was from the February 2006 California bar exam:

Lee Burgess: "Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Believing that Oscar was arresting Friend unlawfully, Deft struck Oscar in an effort to aid Friend. Both Friend and Deft fled. The next day, as a result of Oscar's precise description of Deft, Paula, another police officer, found Deft on the street and arrested him for assault and battery. Oscar identified Deft as his assailant. Deft was then charged with assault and battery of a police officer. Thereafter, he was arraigned. How should a judge rule on Deft's motion for an instruction to the jury that his assault was justified on the basis of defense of another? Discuss."

Lee Burgess: Well, what do you think? This scenario is pretty interesting when we analyze it through these two different rules for defense of others. Let me break it down. Under the "step into the shoes" rule, Deft's position is pretty shaky. He can only claim defense of others if Friend himself had the right to resist arrest. That is, when Deft steps into Friend's shoes, he inherits these same limitations that Friend has. Since Oscar was a uniformed police officer making an arrest, Friend generally wouldn't have had the right to resist, unless the arrest was unlawful. Even if Friend believed the arrest was unlawful, he still doesn't have the right to physically resist a uniformed officer, unless it is clear that there is no legal basis whatsoever for the arrest.

Lee Burgess: The facts do not show the circumstances of why or how Oscar was making the arrest. It would seem that Deft might have a defense if, for example, Oscar were conducting the arrest in an extremely physically abusive manner and was clearly unwarranted in doing so. However, there are no facts to indicate that Oscar was acting improperly, and a court will deny Deft's motion to instruct the jury that Deft's assault was justified on the basis of defense of another.

Lee Burgess: Now, looking at the "reasonable appearance" rule, Deft's case is slightly better, but still problematic. This rule asks whether Deft reasonably believed Friend had the right to defend himself. The key word here is "reasonably". Given that Oscar was in uniform, which Deft clearly saw, it would be hard to argue that Deft's belief was reasonable. Courts generally don't consider it reasonable for

bystanders to intervene in arrests being conducted by identifiable police officers. In a courtroom, the judge would almost certainly deny Deft's motion for a jury instruction on defense of others. The visual evidence of Oscar's uniform creates a strong presumption that both Friend and Deft should have complied with the arrest procedure and challenged its legality later through proper legal channels, not through physical resistance.

Lee Burgess: In Deft's situation, absent additional extenuating facts, it's hard to argue that Deft was justified in striking Oscar in an effort to aid Friend, even if Deft believed reasonably or unreasonably that Oscar was arresting Friend unlawfully.

Lee Burgess: Alright, that's all we have time for today. Thank you for parsing through some criminal procedure with me, and I hope you feel more confident in your ability to analyze these justification defenses. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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