Chapter 5: Criminal Defenses, Part 1



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A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence…

—Fla. Stat. Ann. §776.013(4), cited in Section 5.3.3 "Defense of Habitation"

5.1 Criminal Defenses

Learning Objectives

1. Distinguish between a denial or failure of proof defense and an affirmative defense.
2. Distinguish between imperfect and perfect defenses.
3. Distinguish between factual and legal defenses.
4. Give examples of factual and legal defenses.
5. Distinguish between defenses based on justification and excuse.

A plethora of criminal defenses exist. Defenses may completely *exonerate* the criminal defendant, resulting in an acquittal, or *reduce the severity* of the offense. Chapter 3 "Constitutional Protections" discussed defenses based on the federal Constitution. This chapter reviews the categorization of nonconstitutional criminal defenses, along with the elements of various defenses sanctioning the use of force.

Categorization of Defenses

Defenses can be categorized as denial or failure of proof, affirmative, imperfect, or perfect. Defenses can also be categorized as factual, legal, based on justification, or excuse. Lastly, defenses can be created by a court (**common law**), or created by a state or federal legislature (**statutory**).

Definition of Denial or Failure of Proof and Affirmative Defenses

As stated in Chapter 2 "The Legal System in the United States", a criminal defendant will be acquitted if the prosecution cannot prove *every element* of the offense beyond a reasonable doubt. In certain cases, the defendant can either *deny* that a criminal element(s) exists or simply sit back and wait for the prosecution to fail in meeting its burden of proof. This legal strategy is sometimes referred to as either a **denial or failure of proof defense**.

An **affirmative defense** is not connected to the prosecution's burden of proof. When the defendant asserts an affirmative defense, the defendant raises a *new* issue that must be proven to a certain evidentiary standard. State statutes often specify whether a defense is affirmative. The Model Penal Code defines an affirmative defense as a defense that is deemed affirmative in the Code or a separate statute, or that "involves a matter of excuse or justification peculiarly within the knowledge of the defendant" (Model Penal Code § 1.12 (3) (c)). Procedurally, the defendant must assert any affirmative defense before or during the trial, or the defense cannot be used as grounds for an appeal.

Example of an Affirmative Defense

A fight breaks out at a party, and Juan is severely injured. Jasmine and Jerome are arrested and charged for battering Juan. Jerome claims that *he* did not touch Juan; *someone else* battered him. Jasmine claims that *she* did not batter Juan because she was legally defending herself against *Juan's* attack. Jerome's claim focuses on the elements of battery and asserts that these elements cannot be proven beyond a reasonable doubt. Technically, Jerome can do nothing and be acquitted if the prosecution fails to prove that he was the criminal actor. Jasmine's self-defense claim is an **affirmative** defense. Jasmine must do something to be acquitted: she must prove that Juan attacked *her* to a certain evidentiary standard.

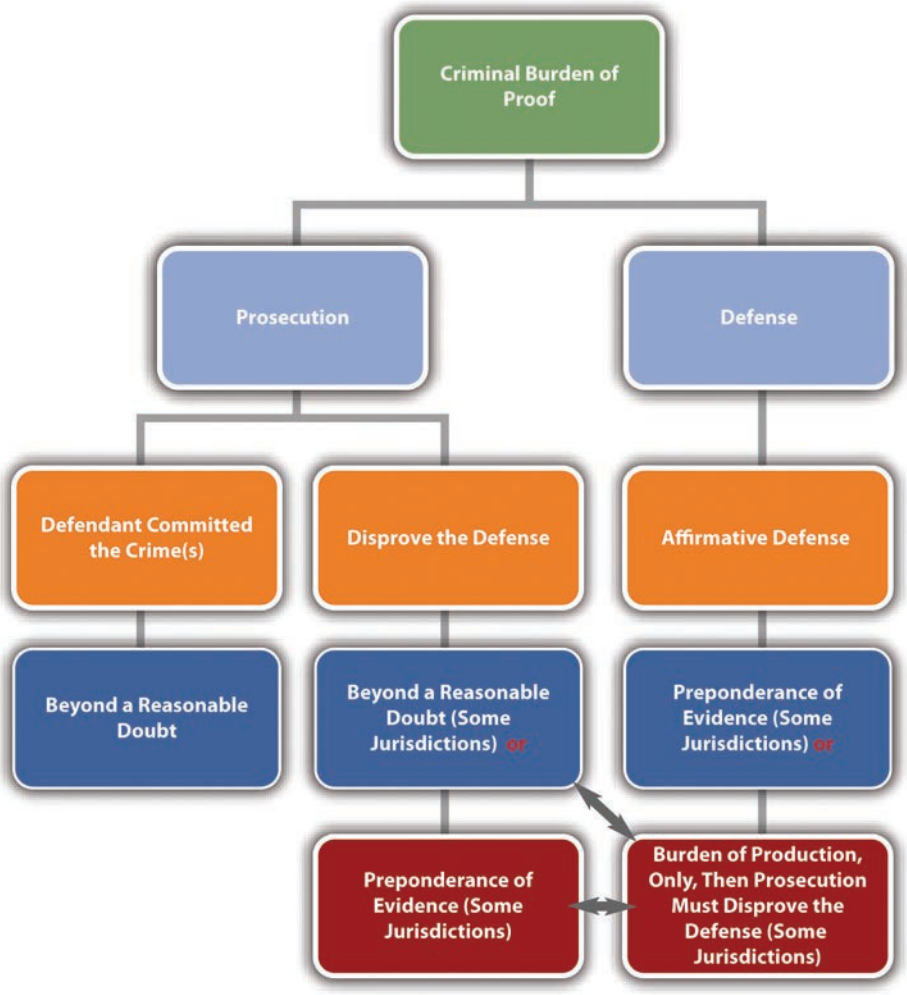
Figure 5.1 Denial and Affirmative Defenses

Denial/Failure of Proof	
Affirmative	

Burden of Proof for Affirmative Defenses

As stated in Chapter 2 "The Legal System in the United States", states vary as to their requirements for the defendant's burden of proof when asserting an affirmative defense (Findlaw.com, 2010). Different defenses also have different burdens of proof. Some states require the defendant to meet the burden of production, but require the prosecution to thereafter meet the burden of persuasion, *disproving* the defense to a preponderance of evidence, or in some states, beyond a reasonable doubt. Other states require the defendant to meet the burden of production and the burden of persuasion. In such states, the defendant's evidentiary standard is preponderance of evidence, *not* beyond a reasonable doubt. In the example given in Section 5 "Example of an Affirmative Defense", for Jasmine's self-defense claim, Jasmine must prove she was defending herself by meeting either the burden of production or the burden of production and persuasion to a preponderance of evidence, depending on the jurisdiction.

Figure 5.2 Diagram of the Criminal Burden of Proof



Definition of Imperfect and Perfect Defenses

As stated previously, a defense can reduce the severity of the offense, or completely exonerate the defendant from criminal responsibility. If a defense reduces the severity of the offense, it is called an **imperfect defense**. If a defense results in an acquittal, it is called a **perfect defense**. The difference between the two is significant. A defendant who is successful with an imperfect defense is still *guilty* of a crime; a defendant who is successful with a perfect defense is *innocent*.

Example of Imperfect and Perfect Defenses

LuLu flies into a rage and kills her sister Lola after she catches Lola sleeping with her fiancé. LuLu is thereafter charged with first-degree murder. LuLu decides to pursue two defenses. First, LuLu claims that the killing should be *manslaughter* rather than first-degree murder because she honestly but unreasonably believed Lola was going to attack *her*, so she thought she was acting in self-defense. Second, LuLu claims she was insane at the time the

killing occurred. The claim of manslaughter is an **imperfect** defense that will reduce LuLu's sentence, but will not acquit her of criminal homicide. The claim of insanity is a **perfect** defense that will result in an acquittal.

Definition of Factual and Legal Defenses

A defense must be based on specific *grounds*. If a defense is based on an issue of **fact**, it is a **factual defense**. If a defense is based on an issue of **law**, it is a **legal defense**.

Example of Factual and Legal Defenses

Armando is charged with the burglary of Roman's residence. Armando decides to pursue two defenses. First, Armando claims that he was with Phil on the date and time of the burglary. This is called an **alibi defense**. Second, Armando claims that it is too late to prosecute him for burglary because of the **expiration of the statute of limitations**. Armando's alibi defense is a **factual** defense; it is based on the *fact* that Armando could not have committed the burglary because he was somewhere else at the time it occurred. Armando's statute of limitations defense is a **legal** defense because it is based on a *statute* that limits the amount of time the government has to prosecute Armando for burglary.

Definition of Justification and Excuse

With the exception of alibi, most affirmative defenses are based on either **justification** or **excuse**. Typically, justification and excuse defenses admit that the defendant committed the criminal act with the requisite intent, but insist that the conduct should not be criminal.

A defense based on justification focuses on the *offense*. A justification defense claims that the defendant's conduct should be legal rather than criminal because it supports a principle valued by society. A defense based on excuse focuses on the *defendant*. An excuse defense claims that even though the defendant committed the criminal act with criminal intent, the defendant should not be responsible for his or her behavior.

Example of Justification and Excuse

Review the examples of affirmative, imperfect, and perfect defenses given in Section 5.1.1 "Categorization of Defenses". Jasmine's self-defense claim is based on **justification**. Society believes that individuals should be able to protect themselves from harm, so actions taken in self-defense are justified and noncriminal. Note that a self-defense claim focuses on the *offense* (battery) in light of the circumstances (to prevent imminent harm). LuLu's insanity claim is based on **excuse**. Although LuLu killed Lola with criminal intent, if LuLu is truly insane it is not be fair or just to punish her for her behavior. Note that an insanity claim focuses on the *defendant* (a legally insane individual) and whether he or she should be criminally responsible for his or her conduct.

Table 5.1 Categorization of Defenses

Defense Type	Characteristics
Common-law	Created by a court
Statutory	Created by a state or federal legislature
Denial or failure of proof	Creates doubt in one or more elements of the offense and prevents the prosecution from meeting its burden of proof
Affirmative	Raises an issue separate from the elements of the offense
Imperfect	Reduces the severity of the offense
Perfect	Results in an acquittal
Factual	Based on an issue of fact
Legal	Based on an issue of law
Alibi	Asserts that the defendant was somewhere else when the crime was committed
Expiration of the statute of limitations	Asserts that it is too late for the government to prosecute the defendant for the crime
Justification	Claims that the criminal conduct is justified under the circumstances
Excuse	Claims that the defendant should be excused for his or her conduct

Key Takeaways

- A denial or failure of proof defense focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof. An affirmative defense is a defense that raises an issue separate from the elements of the crime. Most affirmative defenses are based on justification or excuse and must be raised before or during the trial to preserve the issue for appeal.
- An imperfect defense reduces the severity of the offense; a perfect defense results in an acquittal.
- If the basis for a defense is an issue of fact, it is called a factual defense. If the basis for a defense is an issue of law, it is called a legal defense.
- 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 when the crime occurred. An example of a legal defense is a claim that the statute of limitations has expired, which asserts that it is too late for the government to prosecute the defendant for the crime.
- An affirmative defense is based on justification when it claims that criminal conduct is justified under the circumstances. An affirmative defense is based on excuse when it claims that the criminal defendant should be excused for his or her conduct.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Carol is on trial for battery, a general intent crime. Carol puts on a defense that proves her conduct was accidental, *not* intentional. Is this an affirmative defense? Why or why not?
2. Read *State v. Burkhart*, 565 S.E.2d 298 (2002). In *Burkhart*, the defendant was convicted of three counts of murder. The defendant claimed he acted in self-defense. The jury instruction given during the defendant's trial stated that the prosecution had the burden of disproving self-defense. However, the instruction did not state that the prosecution's burden of disproving self-defense was *beyond a reasonable doubt*. Did the Supreme Court of South Carolina uphold the defendant's conviction for the murders? The case is available at this link: http://scholar.google.com/scholar_case?case=10661488680244997 63&hl=en&as_sdt=2&as_vis=1&oi=scholarr.
3. Read *Hoagland v. State*, 240 P.3d 1043 (2010). In *Hoagland*, the defendant wanted to assert a **necessity** defense to the crime of driving while under the influence. The Nevada Legislature had never addressed or mentioned a necessity defense. Did the Supreme Court of Nevada allow the defendant to present the necessity defense? The case is available at this link: http://scholar.google.com/scholar_case?case=8002120339805439441&q= Hoagland+v.+State&hl=en&as_sdt=2,5&as_ylo=2009.

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5.2 Self-Defense

Learning Objectives

1. Define self-defense.
2. Define deadly force.
3. Ascertain the four elements required for self-defense.
4. Ascertain two exceptions to the unprovoked attack requirement.
5. Define the battered wife defense, and explain its justification under the imminence requirement.
6. Analyze when it is appropriate to use deadly force in self-defense.
7. Distinguish between the duty to retreat and stand-your-ground doctrines.
8. Define imperfect self-defense.

As stated previously, **self-defense** is a defense based on **justification**. Self-defense can be a defense to assault, battery, and criminal homicide because it always involves the use of force. In the majority of states, self-defense is a **statutory** defense (Mich. Comp. Laws, 2010). However, it can be modified or expanded by courts on a case-by-case basis.

Most states have special requirements when the defendant uses **deadly force** in self-defense. **Deadly force** is defined as any force that could potentially kill. An individual does not have to actually die for the force to be considered deadly. Examples of deadly force are the use of a knife, gun, vehicle, or even bare hands when there is a disparity in size between two individuals.

Self-defense can operate as a **perfect** or **imperfect** defense, depending on the circumstances. Defendants who commit criminal homicide justified by self-defense can be acquitted, or have a murder charge reduced from first to second or third degree, or have a charge reduced from murder to manslaughter. Criminal homicide is discussed in detail in Chapter 9 “Criminal Homicide”.

To successfully claim self-defense, the defendant must prove four elements. First, with exceptions, the defendant must prove that he or she was confronted with an **unprovoked** attack. Second, the defendant must prove that the threat of injury or death was **imminent**. Third, the defendant must prove that the **degree of force** used in self-defense was objectively reasonable under the circumstances. Fourth, the defendant must prove that he or she had an **objectively reasonable fear** that he or she was going to be injured or killed unless he or she used self-defense. The Model Penal Code defines self-defense in § 3.04(1) as “justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”

Provocation

In general, if the defendant initiates an attack against another, the defendant cannot claim self-defense (State v. Williams, 2010). This rule has two exceptions. The defendant can be the initial aggressor and still raise a self-defense claim if the attacked individual responds with *excessive* force under the circumstances, or if the defendant *withdraws* from the attack and the attacked individual persists.

Excessive Force Exception

In some jurisdictions, an individual cannot respond to the defendant's attack using excessive force under the circumstances (State v. Belgard, 2010). For example, an individual cannot use **deadly force** when the defendant initiates an attack using **nondeadly force**. If an individual does resort to deadly force with a nondeadly force attack, the defendant can use reasonable force in self-defense.

Example of the Excessive Force Exception

Patty and Paige get into an argument over a loan Patty made to Paige. Paige calls Patty a spoiled brat who always gets her way. Patty slaps Paige across the face. Paige grabs a carving knife from the kitchen counter and tries to stab Patty. Patty wrestles the knife away and stabs Paige in the chest, killing her. In this example, Patty provoked the attack by slapping Paige across the face. However, the slap is **nondeadly force**. In many jurisdictions, Paige cannot respond to nondeadly force with **deadly force**, like a knife. Paige used excessive force in her response to Patty's slap, so Patty can use deadly force to defend herself and may *not* be responsible for criminal homicide under these circumstances.

Withdrawal Exception

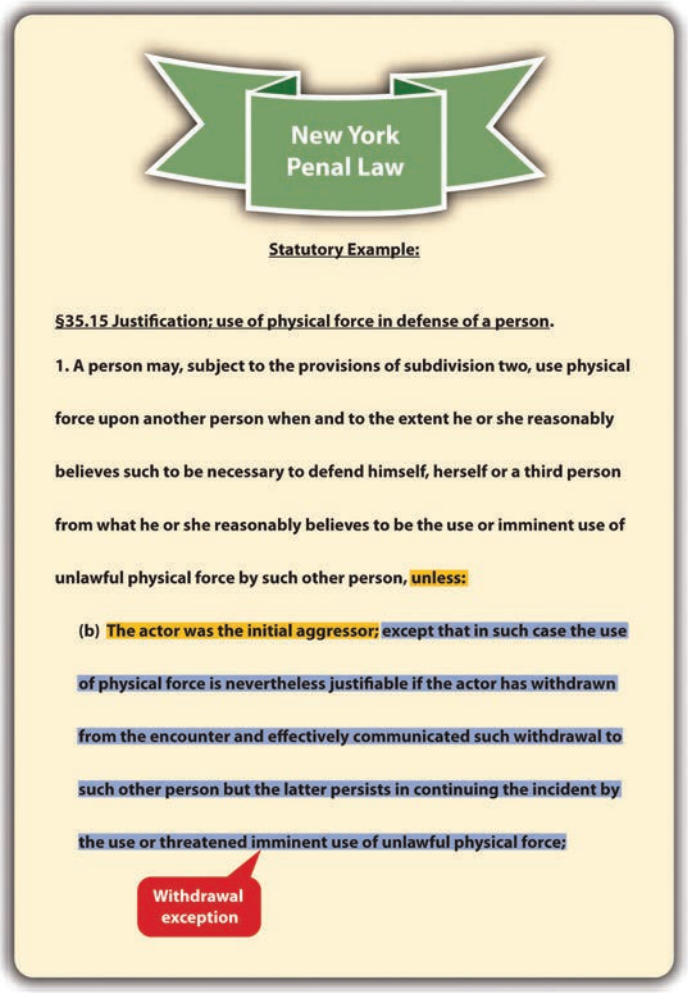
In some jurisdictions, the defendant can be the initial aggressor and still use force in self-defense if the defendant withdraws from the attack, and communicates this withdrawal to the attacked individual (N.Y. Penal Law, 2010). If the attacked individual persists in using force against the defendant after the defendant's withdrawal, rather than notifying law enforcement or retreating, the defendant is justified in using force under the circumstances.

Example of Withdrawal

Change the excessive force exception example in Section 5 "Example of the Excessive Force Exception". Imagine that after Patty slaps Paige across the face, Paige begins pounding Patty with her fists. Patty manages to escape and runs into the garage. She huddles against the garage wall. Paige chases Patty into the garage. Patty says, "Please, please don't hurt me. I'm sorry I slapped you." Paige kicks Patty in the back. Patty turns around and karate

chops Paige in the neck, rendering her unconscious. In many jurisdictions, Patty's karate chop is lawful under a theory of self-defense because she completely *withdrew* from the attack. Thus Patty is probably not criminally responsible for battery, based on the karate chop to the neck. However, Patty *could* be criminally responsible for battery based on the slap to Paige's face because this physical contact was unprovoked and not defensive under the circumstances.

Figure 5.3 New York Penal Law



Imminence

The defendant cannot use any degree of force in self-defense unless the defendant is faced with an **imminent** attack (State v. Taylor, 2010). Imminent means the attack is *immediate* and not something that will occur in the future. If the defendant is threatened with a future attack, the appropriate response is to inform law enforcement, so that they can incapacitate the threatening individual by arrest or prosecution. Another situation where imminence is lacking is when the attack occurred in the *past*. When the defendant uses force to remedy a previous attack, this is retaliatory, and a self-defense claim is not appropriate. The legal response is to inform law enforcement so that they can incapacitate the attacker by arrest or prosecution.

Some state courts have expanded the imminence requirement to include situations where a husband in a domestic violence situation uses force or violence regularly against the defendant, a battered wife, therefore creating a threat of imminent harm every day (Bechtel v. State, 2010). If a jurisdiction recognizes the **battered wife defense**, the defendant—the battered wife—can legally use force against her abusive husband in self-defense in situations where harm is not necessarily immediate.

Example of an Attack That Is Not Imminent

Vinny tells Fiona that if she does not pay him the $1,000 she owes him, he will put out a contract on her life. Fiona pulls out a loaded gun and shoots Vinny. Fiona cannot successfully argue self-defense in this case. Vinny's threat was a threat of future harm, *not* imminent harm. Thus Fiona had plenty of time to contact law enforcement to help protect her safety.

Example of an Attack That Is Retaliatory

Dwight and Abel get into a fist fight. Dwight knocks Abel unconscious. Dwight observes Abel for a few minutes, and then he picks up a large rock and crushes Abel's skull with it, killing him. Dwight cannot claim self-defense in this situation. Once Dwight realized that Abel was unconscious, he did not need to continue to defend himself against an imminent attack. Dwight's conduct appears *retaliatory* and is not **justified** under these circumstances.

Example of an Imminent Attack under the Battered Wife Defense

Spike severely beats and injures his wife Veronica every couple of days. Spike's beatings have become more violent, and Veronica starts to fear for her life. One night, Veronica shoots and kills Spike while he is sleeping. In states that have expanded self-defense to include the battered wife defense, Veronica may be successful on a theory of self-defense.

Mary Winkler Defense Video

Dr. Alan J. Lipman Catherine Crier on Winkler Spousal Abuse Murder Trial

Mary Winkler claimed the battered wife defense as an imperfect defense to the murder of her husband, a pastor (Gay, M., 2011).

" href="http://www.youtube.com/watch?v=KFSwTAINxnM" class="replaced-iframe" onclick="return replaceIframe(this)">(click to see video)

Proportionality

The defendant cannot claim self-defense unless the degree of force used is **objectively reasonable** under the circumstances. This requirement primarily focuses on the use of **deadly force** and when it is legally justified. In general, deadly force can by employed in self-defense when a reasonable person feels threatened with imminent **death**, **serious bodily injury**, and, in some jurisdictions, a **serious felony** (Or. Rev. Stat. 2010). Serious bodily injury and serious felony are technical terms that are defined in a statute or case, depending on the jurisdiction. The Model Penal Code states that deadly force is not justifiable "unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat" (Model Penal Code § 3.04(2)(b)).

Example of Appropriate Deadly Force

Nicholas, an intruder, pins Wanda to the floor of her garage and begins to forcibly remove her clothing. Wanda feels around the floor with her hand and finds a screwdriver. She plunges the screwdriver into Nicholas's neck, killing him. Wanda has used appropriate force and can claim self-defense in most jurisdictions. A reasonable person in Wanda's situation would feel deadly force is necessary to repel Nicholas's sexual assault. Nicholas's attack is a **serious felony** that could result in **serious bodily injury** or **death**. Thus the use of deadly force is legally **justified** under these circumstances.

Duty to Retreat

Early common law stated that the defendant had a duty to **retreat to the wall** before using deadly force against an attacker. The majority of states have rejected this doctrine and instead allow the defendant to **stand his or her ground** if the defendant is not the initial aggressor in the confrontation (State v. Sandoval, 2010). In jurisdictions that still follow the **retreat doctrine**, the defendant must retreat if there is an objectively reasonable belief that the attacker will cause death or serious bodily injury, and a retreat won't unreasonably increase the likelihood of death or serious bodily injury (Connecticut Criminal Jury Instructions, 2010). The Model Penal Code defines the duty to retreat by stating that the use of deadly force is not justifiable if "the actor knows that he can avoid the necessity of using such force with complete safety by retreating" (Model Penal Code § 3.04 (2) (b) (ii)). An established exception to the retreat doctrine in jurisdictions that follow it is the defense of the home, which is called the **castle doctrine**. The castle doctrine is discussed shortly.

Example of the Duty to Retreat

Sandy and Sue have an argument in the park. Sue pulls a knife out of a sheath that is strapped to her leg and begins to advance toward Sandy. Sandy also has a knife in her pocket. In a state that follows the **retreat doctrine**, Sandy must attempt to escape, if she can do so safely. In a state that follows the **stand-your-ground doctrine**, Sandy can

defend herself using her own knife and claim lawful self-defense. Note that Sandy was not the *initial aggressor* in this situation. If Sandy pulled a knife first, she could *not* use the knife and claim self-defense, whether the state follows the stand-your-ground doctrine or the duty to retreat doctrine.

Objectively Reasonable Fear of Injury or Death

The defendant cannot claim self-defense unless a reasonable person in the defendant's situation would believe that self-defense is necessary to avoid injury or death. If the defendant honestly but *unreasonably* believes self-defense is necessary under the circumstances, a claim of **imperfect self-defense** may reduce the severity of the offense (State v. Faulkner, 2010). However, the defendant is still guilty of a crime, albeit a less serious crime.

Example of Unjustified Conduct

Justin, who weighs over two hundred pounds and is six feet tall, accidentally bumps into Wanda, a slender ten-year-old child. Wanda spins around and shakes her fist at Justin. Justin responds by shoving Wanda so hard that she crashes into a telephone pole and is killed. Justin probably *cannot* claim self-defense under these circumstances. A reasonable person would not believe Wanda is about to seriously injure or kill Justin. Thus Justin's response is unnecessary and unjustified in this case.

Example of Imperfect Self-Defense

Change the unjustified conduct example given in Section 5 "Example of Unjustified Conduct". Imagine that a slender, female ten-year-old severely abused Justin when he was younger. Since the abusive incident, Justin has an unreasonable fear of female children and honestly believes that they can and will hurt him if provoked. If the trier of fact determines that Justin honestly but unreasonably believed that Wanda was about to inflict serious bodily injury or kill him, any charge of murder could be reduced to manslaughter on a theory of **imperfect self-defense**.

Key Takeaways

- Self-defense is a defense based on justification that allows a defendant to use physical force to protect himself or herself from injury or death.
- Deadly force is any force that can produce death. An individual does not have to die for the force to be deemed deadly.
- Four elements are required for self-defense: (1) an unprovoked attack, (2) which threatens imminent injury or death, and (3) an objectively reasonable degree of force, used in response to (4) an objectively reasonable fear of injury or death.
- Two exceptions to the unprovoked attack rule are an individual's use of excessive force in response to an initial attack and the defendant's withdrawal from the initial attack.

- The battered wife defense asserts that a woman who is a victim of spousal abuse may use force in self-defense under certain circumstances, even when the threat of harm is not immediate. The battered wife defense is justified with respect to the imminence requirement: because the abuse is so constant, the battered wife faces an imminent threat every day.
- Deadly force is appropriate in self-defense when the attacker threatens death, serious bodily injury, and, in some jurisdictions, a serious felony.
- The duty to retreat doctrine is a common-law rule requiring a defendant to retreat if it is safe to do so, instead of using deadly force in self-defense. The stand-your-ground doctrine is a rule allowing the defendant to use deadly force if appropriate in self-defense, rather than retreating.
- Imperfect self-defense is a defense available when the defendant has an honest but unreasonable belief that force is necessary to defend against injury or death. Imperfect self-defense reduces the severity of the offense, but does not result in acquittal.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Scott's wife Diane constantly physically abuses him. One night while Diane is sleeping, Scott places a pillow over her face and smothers her. Can Scott defend against a charge of criminal homicide by claiming **self-defense**? Why or why not?
2. Read *Rodriguez v. State*, 212 S.W.3d 819 (2006). In *Rodriguez*, the defendant was convicted of murder and attempted murder. The defendant appealed his convictions on the ground that the jury did not *unanimously* reject each element of self-defense. Did the Court of Appeals of Texas uphold the defendant's convictions? The case is available at this link: https://casetext.com/case/rodriguez-v-state-464.
3. Read *Shuler v. Babbitt*, 49 F.Supp.2d 1165 (1998). In *Shuler*, the defendant shot and killed a grizzly bear that charged him while he checked a sheep pasture to make sure his sheep were safe. The sheep had already been subjected to several bear attacks. The Fish and Wildlife Service thereafter fined the defendant under the Endangered Species Act. The defendant claimed **self-defense** against the bear. The Fish and Wildlife Service ruled that the defendant *provoked* the attack and could not claim self-defense. Did the US District Court for the District of Montana uphold the fine? The case is available at this link: http://www.gilalivestockgrowers.org/documents/ShulerVsBabbitt.pdf.

Law and Ethics: The Menendez Brothers

Were They Entitled to a Jury Instruction on Imperfect Self-Defense?

Read *Menendez v. Terhune*, 422 F.3d 1012 (2005). The case is available at this link: http://cases.justia.com/us-court-of-appeals/F3/422/1012/569492.

Lyle and Eric Menendez were tried and convicted of murder and conspiracy to commit murder of their parents. There were two series of trials. The first trial, which had two separate juries, resulted in two hung juries. At the first trial, the brothers introduced evidence of sexual abuse by their father, and the court instructed the jury on **imperfect self-defense**. The imperfect self-defense jury instruction was based on the brothers' *honest but unreasonable fear* that their father would hurt or kill them (Menendez v. Terhune, 2010). The second trial took place in front of one jury and resulted in the convictions. During the second trial, some evidence of abuse was excluded, Lyle Menendez refused to testify, and there

was *no* jury instruction on **imperfect self-defense**. After sentencing, the brothers petitioned for a writ of habeas corpus based on several claims, including the exclusion of the abuse evidence and failure to instruct the jury on imperfect self-defense (Menendez v. Terhune, 2010). The US Court of Appeals for the Ninth Circuit affirmed the district court's denial of the petition on grounds that there was insufficient evidence to support the jury instruction on imperfect self-defense and no foundation to support the admissibility of the evidence of abuse. The court held that the evidence confirmed there was no *imminent* threat of serious bodily injury or death when the brothers killed their parents.

The facts of the case are lurid. Evidence included the sexual abuse of both boys by their father, surreptitiously taped psychotherapy sessions, spending sprees, fabricated mafia hit stories, and alleged will tampering by the brothers after the parents were killed.

1. Do you think the Menendez case should have been treated as a "battered child syndrome" case, easing the requirement of *imminence* and allowing for a jury instruction on **imperfect self-defense**?

Check your answer using the answer key at the end of the chapter.

Menendez Brothers Video

Lyle and Erik Menendez News Report

A news story on the conviction of the Menendez brothers is presented in this video:

" href="http://www.youtube.com/watch?v=SFWLYealwa8" class="replaced-iframe" onclick="return replaceIframe(this)">(click to see video)

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5.3 Other Use-of-Force Defenses

Learning Objectives

1. Ascertain the elements required for the defense of others.
2. Define real and personal property.
3. Explain the appropriate circumstances and degree of force a defendant can use when defending property.
4. Ascertain the elements required for the defense of ejection of trespasser.
5. Distinguish defense of property from defense of habitation.
6. Ascertain the three elements required for the use of deadly force in defense of habitation under modern castle laws.
7. Identify three common features of modern castle laws.
8. Ascertain the constitutional parameters of the use of force by law enforcement to arrest or apprehend criminal suspects.

Aside from self-defense, a defendant can legally use force to defend another *person*, real or personal *property*, and *habitation*. In addition, *law enforcement* can use force to arrest or capture individuals who reasonably appear to be committing crimes. In this section, the elements of several use-of-force defenses will be reviewed. Keep in mind that these defenses can be statutory, common-law, perfect, or imperfect, depending on the facts and the jurisdiction.

Defense of Others

According to early common law, a defendant could use force to defend another only when the defendant and the person defended had a *special relationship*, such as a family connection. Most jurisdictions now reject this common-law restriction on defense of others and allow a defendant to defend *anyone* to the same degree that he or she could use self-defense (People v. Kurr, 2010). Thus in a majority of jurisdictions, **defense of others** requires the same elements as self-defense: the individual defended must be facing an unprovoked, imminent attack, and the defendant must use a reasonable degree of force with a reasonable belief that force is necessary to repel the attack.

Occasionally, a defendant uses force to defend another who has no legal right to use force in self-defense. Under the common law, the defendant could not use force legally if the individual defended could not use force legally in self-defense. However, the majority of states now allow a defendant to use force to defend another person if it *reasonably appears* that use of force is justified under the circumstances (Commonwealth v. Miranda, 2010). The Model Penal Code allows the defense of another when “under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force” (Model Penal Code

§ 3.05(1) (b)). Thus if the defendant has a *subjective belief* that the individual defended could use force legally in self-defense, defense of others is appropriate under the Model Penal Code.

Example of Defense of Others

Alex and Shane, aspiring law enforcement officers, are performing a training maneuver in a rural area. Their instructor Devin is watching nearby. Alex pretends to attack Shane. Just as Devin is about to demonstrate a takedown, Timmy, who is jogging in the area, dashes over and begins beating Alex. Under the older common-law rule, Timmy could be successfully prosecuted for battery of Alex. Shane did not have the right to use self-defense during a practice maneuver, so neither did *Timmy*. In jurisdictions that allow defense of others if it reasonably appears that self-defense is warranted, Timmy could probably use the defense to battery because it *reasonably appeared* that Alex was about to unlawfully attack Shane. In jurisdictions that follow the Model Penal Code, Timmy can most likely use defense of others as a defense to battery because it is clear *Timmy* honestly believed Shane had the right to use self-defense in this situation.

Defense of Property

All jurisdictions allow individuals to use force in **defense of property** under certain specified circumstances. Property can be real or personal. **Real property** is land and anything permanently attached to it. This includes a home. However, defense of the home is discussed in Section 5.3.3 “Defense of Habitation”. **Personal property** is any movable object.

In the majority of states, the defendant can use force only to defend real or personal property if the defendant has an objectively reasonable belief that an *imminent* threat of damage, destruction, or theft will occur (California Criminal Jury Instructions, 2010). The Model Penal Code provides “the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary: (a) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property” (Model Penal Code §3.06(1) (a)). Thus if the defendant has a *subjective belief* that force is immediately necessary to protect real or personal property, force is appropriate under the Model Penal Code.

The amount of force that a defendant may legally use to protect real or personal property is *reasonable* force, under the circumstances (K.S.A., 2010). The defendant can also chase someone who steals personal property and take the item back (Conn. Gen. Stat., 2010). The Model Penal Code provides “the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary…to retake tangible movable property” (Model Penal Code §3.06(1) (b)). In general, the Model Penal Code and most states do not authorize the use of **deadly force** to protect property (other than the home) under any circumstances (Fla. Stat. Ann., 2010).

Example of Defense of Property

Kelsey sees Keith, her stepbrother, approaching her brand new car with a key in his hand. It appears that Keith is

about to scrape the paint on the door of the car with this key. Kelsey tackles Keith to prevent him from vandalizing the car. Kelsey has probably used *reasonable* force under the circumstances and can claim defense of property as a defense to battery. If Keith testifies that he was simply going to hand Kelsey the key, which she left in the house, the attack could still be justified if the trier of fact determines that it was *objectively reasonable* for Kelsey to believe Keith was about to damage her property. In jurisdictions that follow the Model Penal Code, Kelsey can probably use defense of property as a defense to battery because it is clear *Kelsey* believed that force was immediately necessary to protect her personal property in this situation. Of course, if Kelsey pulls out a gun and shoots Keith, she could not claim defense of property because deadly force is never justifiable to protect real or personal property from harm.

Ejection of Trespasser

A simple trespasser is an individual who is present on real property without consent of the owner. Property owners have the legal right to *eject* trespassers under certain specified circumstances.

Most states authorize the ejection of a trespasser if the trespasser is first asked to leave and fails to comply within a reasonable time (N.J. Stat., 2010). The degree of force that can be used to eject the trespasser is *reasonable force*, under the circumstances (Iowa Code, 2010). Deadly force is never reasonable to eject a trespasser unless the trespasser threatens imminent deadly force against the defendant or another individual (State v. Curley, 2010). Deadly force under these circumstances is justified by **self-defense** or **defense of others**, *not* ejection of trespasser.

Example of Ejection of Trespasser

Sam sees Burt sitting on his lawn. Sam goes up to Burt and asks him to “move along.” Burt looks up, but does not stand. Sam goes into the house and calls law enforcement, but they inform Sam that there is a local emergency, and they cannot come and eject Burt for at least five hours. Sam goes back outside and sees that Burt is now sprawled out across the lawn. Sam grabs Burt, lifts him to his feet, and pushes him off the lawn and onto the sidewalk. Sam can probably use **ejection of trespasser** as a defense to battery of Burt. Sam asked Burt the trespasser to leave, and Burt ignored him. Sam’s attempt to rely on law enforcement was likewise unsuccessful. Sam’s use of nondeadly force appears objectively reasonable. Thus Sam’s ejection of a trespasser is most likely appropriate under these circumstances.

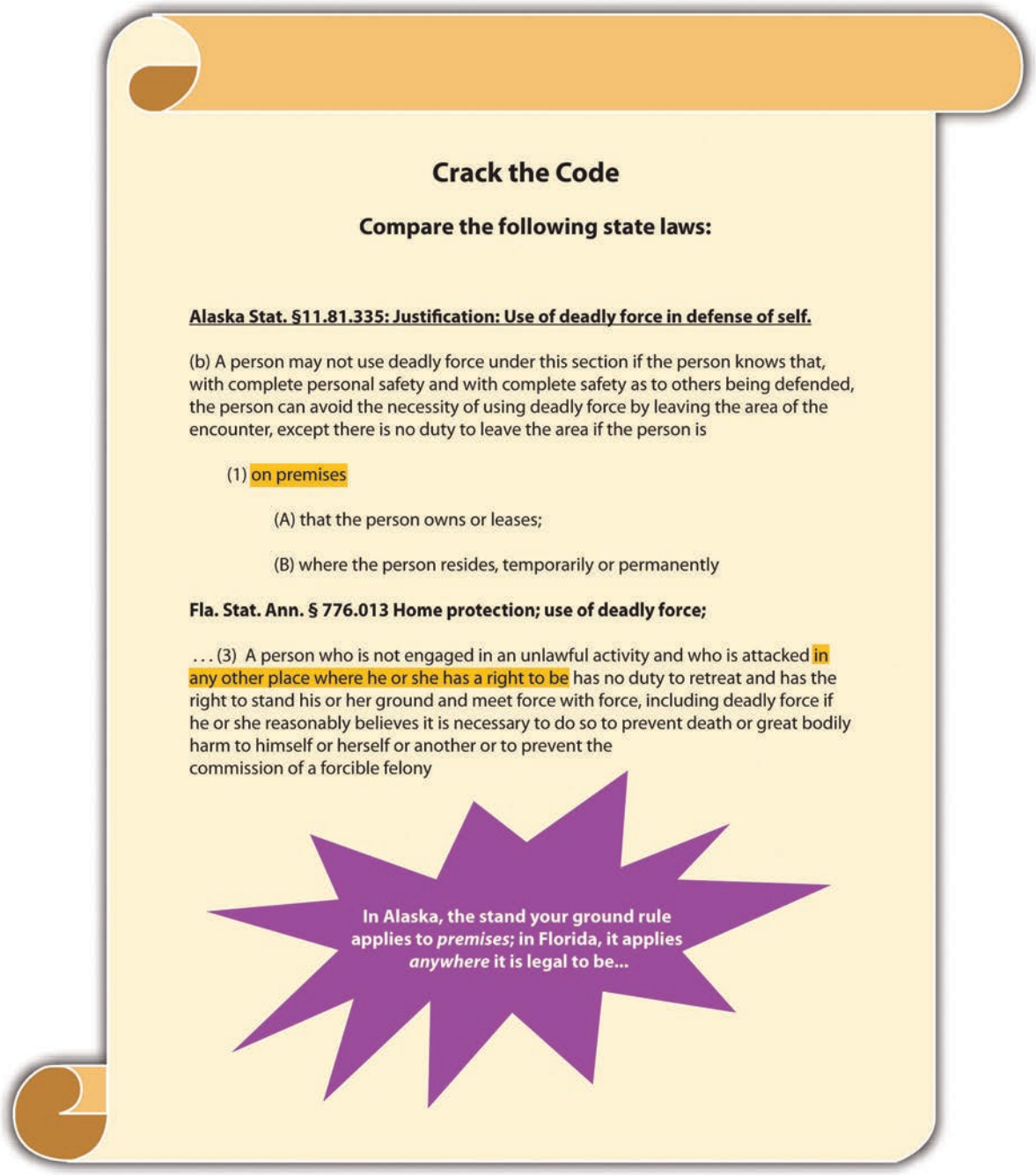
Defense of Habitation

Defense of habitation is a defense that applies specifically to the defendant’s *residence*. At early common law, a person’s home was as sacred as his or her person, and deadly force could be employed to protect it. The majority of states have since enacted modern **castle laws** that embody this common-law doctrine. Other than the use of deadly force, defense of habitation generally follows the same rules as defense of property, self-defense, and defense of others. Thus this defense of habitation discussion focuses primarily on the use of deadly force.

The first state to expand the defense of habitation to include the use of deadly force was Colorado, with its "make my day" self-defense statute (Colo. Rev. Stat. Ann., 2010). In 2005, Florida began a wave of castle law modifications that resulted in most states revising their defense of habitation laws (Fla. Stat. Ann., 2010). Generally, three elements must be present before the use of deadly force is appropriate to defend habitation under modern castle laws. First, the intruder must actually *enter* or be in the process of entering the residence owned by the defendant (Fla. Stat. Ann., 2010). This excludes intruders who are outside or in the **curtilage**, which is the protected area around the home. Second, the residence must be *occupied* when the entry occurs. This excludes devices like **spring-guns** that protect unoccupied dwellings with deadly force (People v. Ceballos, 2010). Third, the defendant must have an *objectively reasonable* belief that the intruder intends to commit a crime of *violence* against the occupant(s) after entry (Or. Rev. Stat., 2010). The Model Penal Code provides "[t]he use of deadly force is not justifiable…unless the actor believes that…the person against whom the force is used is attempting to dispossess him of his dwelling…or…attempting to commit…arson, burglary, robbery or other felonious theft…and either…has employed or threatened deadly force…or…the use of force other than deadly force would expose the actor or another in his presence to substantial danger of serious bodily harm" (Model Penal Code § 3.06 (3)(d)).

The majority of states' castle laws abolish any **duty to retreat** when inside the home (Alaska Stat., 2010). Florida's castle law creates a presumption that the defendant has a reasonable fear of imminent peril of death or great bodily injury when the intruder makes an unlawful or forceful entry (Fla Stat. Ann., 2010). This compels the prosecution to *disprove* the defendant's reasonable belief of death or great bodily injury beyond a reasonable doubt, which is extremely difficult. Additional features of many castle laws are **civil immunity** and **criminal immunity** from prosecution (720 ILCS, 2010). **Immunity from prosecution** means that a defendant who complies with the castle law requirements cannot be sued for damages or prosecuted for a crime based on injury or death to the intruder.

Figure 5.4 Crack the Code



Example of Defense of Habitation under a Castle Law

Nate, a homeowner with three children, hears the front door open in the middle of the night. Nate removes a handgun from the nightstand and creeps silently down the stairs. He sees Bob tiptoeing toward his daughter's bedroom. Nate shoots and kills Bob. Unfortunately, Bob is Nate's daughter's boyfriend, who was trying to enter her bedroom for a late-night get-together. Nate could probably assert the defense of **protection of habitation** under modern castle laws in most jurisdictions. Bob made **entry** into an **occupied residence**. It is difficult to identify individuals in the dark and to ascertain their motives for entering a residence without the owner's consent.

Thus it was *objectively reasonable* for Nate to feel threatened by Bob's presence and to use deadly force to protect his domicile and its residents. If Nate is successful with his defense, he will also be **immune** from a *civil suit* for damages if the castle law in his jurisdiction provides this immunity.

Change the example with Nate and Bob so that Bob enters the residence during the day, and Nate identifies him as his daughter's boyfriend. Under these circumstances, the prosecution could rebut any presumption that Nate's actions were objectively reasonable. A reasonable person would ask Bob why he was entering the residence before shooting and killing him. The trier of fact might determine that Nate's intent was not to protect himself and his family, but to *kill* Bob, which would be malice aforethought. If Nate's actions are not justifiable by the defense of habitation, he could be charged with and convicted of first-degree murder in this situation.

Use of Force in Arrest and Apprehension of Criminal Suspects

Occasionally, law enforcement must use *force* to effectuate an arrest or apprehend a criminal suspect. The *appropriate* use of force during an arrest or apprehension can operate as a defense to assault, battery, false imprisonment, kidnapping, and criminal homicide. At early common law, law enforcement could use reasonable, nondeadly force to arrest an individual for a misdemeanor and reasonable, even deadly force, to arrest an individual for *any* felony. Modern law enforcement's ability to use deadly force is governed by the US Constitution.

The US Supreme Court clarified the constitutional standard for law enforcement's use of deadly force in *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, the Court invalidated a Tennessee statute that allowed law enforcement to exercise *any* degree of force to apprehend and arrest a fleeing felon. The law enforcement officer in *Garner* admitted that he shot and killed a suspect, reasonably believing he was *unarmed*. The Court held that the Fourth Amendment governed law enforcement's use of deadly force in this situation because the use of deadly force is a **seizure**. Thus law enforcement's use of deadly force must be scrutinized pursuant to the standard of constitutional *reasonableness*. According to the Court, the only constitutionally reasonable circumstances under which law enforcement can use deadly force to arrest or apprehend a fleeing felon is when law enforcement has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Currently, most jurisdictions have statutes protecting law enforcement's reasonable use of force when effectuating an arrest or apprehending a fleeing suspect. Under *Garner*, these statutes must restrict the lawful use of deadly force to potentially deadly situations. If a law enforcement officer exceeds the use of force permitted under the circumstances, the law enforcement officer could be prosecuted for a *crime* or sued for *civil damages* (or both).

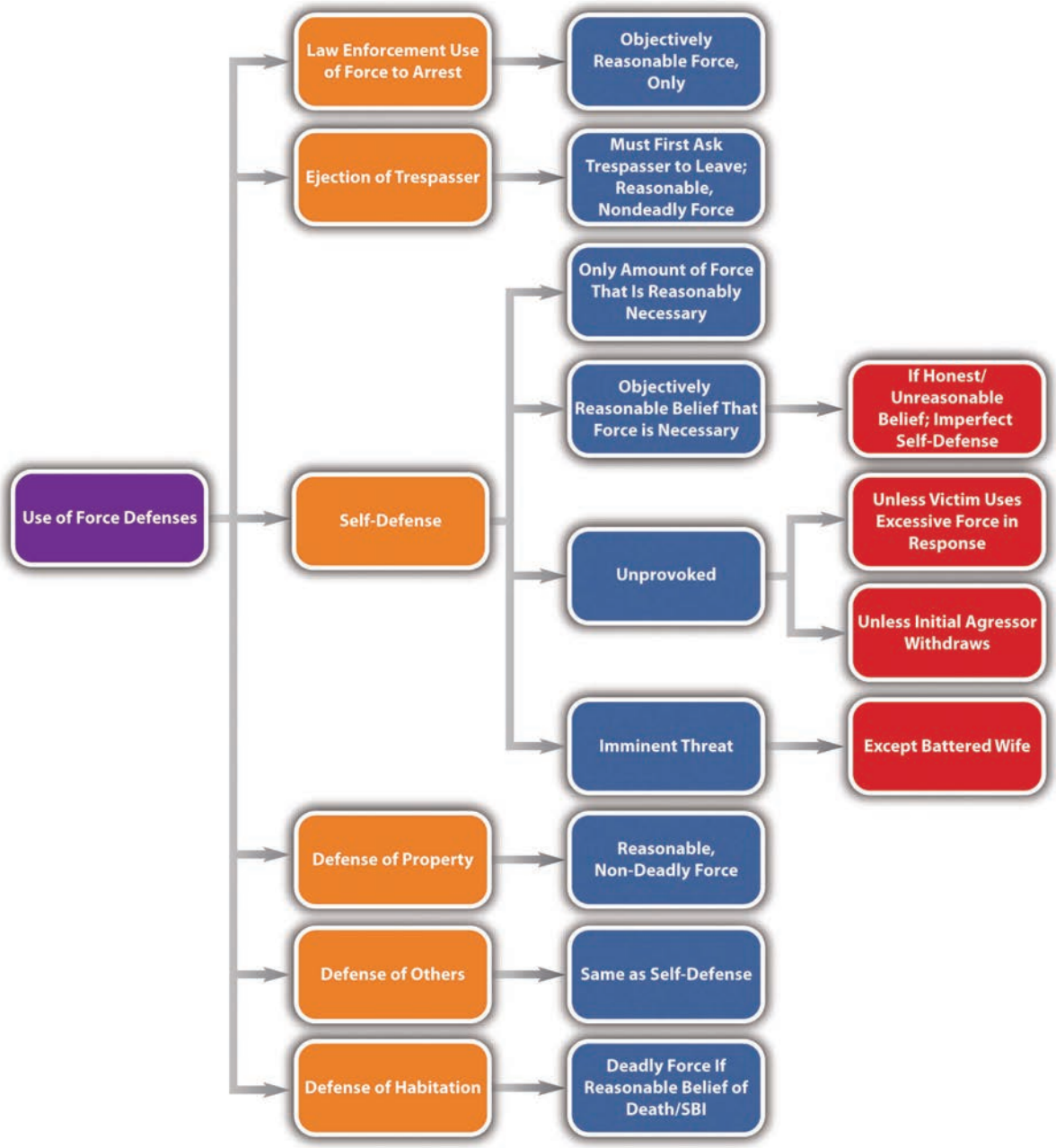
Example of Reasonable Force by Law Enforcement to Arrest

Review the example in Chapter 1 "Introduction to Criminal Law", Section 1.2.1 "Example of Criminal Law Issues". In that example, Linda puts a bra in her purse without paying for it at an expensive department store. When she attempts to leave the store, an alarm is activated. Linda begins sprinting down the street. Colin, a police officer, just happens to be driving by with the window of his patrol car open. He hears the store alarm, sees Linda running, and begins shooting at Linda from the car. Linda is shot in the leg and collapses. In this example, no

facts exist to indicate that Linda poses a potentially **deadly** threat to Colin or others. The fact that Linda is running down the street and an alarm is going off does not demonstrate that Linda has committed a crime necessitating deadly force to arrest. Thus Colin can use only **nondeadly** force to arrest Linda, such as his hands, or possibly a stun gun or Taser to subdue her. If Linda is *unarmed* and Colin uses a firearm to subdue her, the utilization of deadly force is excessive under these circumstances and Colin has no defense to assault with a deadly weapon or to attempted murder.

Change this example and imagine that Colin pulls over and attempts to arrest Linda. Linda removes a gun from her purse. Under most modern statutes, Colin does not have a duty to retreat and can use deadly force to arrest or apprehend Linda. Under *Garner*, it is reasonable to believe that Linda poses a danger of death or serious bodily injury to Colin or others. Thus Colin can constitutionally use **deadly force** to protect himself and the public from harm in this situation. Note that Linda's theft is probably a *misdemeanor*, not a *felony*. However, it is Linda's exhibition of deadly force to resist arrest that triggers Colin's deadly force response. Under these circumstances, Colin's use of deadly force is justified and can operate as a legal defense in a criminal prosecution or civil suit for damages.

Figure 5.5 Diagram of Use-of-Force Defenses



Key Takeaways

- Defense of others has the same elements as self-defense: the individual defended must be facing an unprovoked, imminent attack, and the defendant must use a reasonable degree of force with a reasonable belief that force is necessary to repel the attack.
- Real property is land and anything permanently attached to it. Personal property is any movable object.
- The defendant can use nondeadly force to defend real or personal property if the defendant has an objectively reasonable belief that an imminent threat of damage, destruction, or theft will occur.
- Property owners can use reasonable nondeadly force to eject a trespasser after first asking the trespasser to

leave.

- Only nondeadly force may be used to defend property; deadly force may be used to defend habitation.
- The defendant can use deadly force to defend habitation under modern castle laws if an intruder enters occupied premises, and the defendant has an objectively reasonable belief that the intruder will seriously injure or kill the occupants.
- Modern castle laws abolish the duty to retreat when inside the home, occasionally include a presumption that the defendant has an objectively reasonable belief the intruder is going to seriously injure or kill the occupants, and provide civil and criminal immunity from prosecution.
- Use of deadly force by law enforcement is considered a seizure under the Fourth Amendment, so law enforcement cannot use deadly force to apprehend or arrest a criminal suspect unless there is probable cause to believe the suspect will inflict serious physical injury or death upon the officer or others.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Melanie watches as Betty verbally abuses Colleen. Betty is a known bully who verbally abused Melanie in the past. Betty calls Colleen an expletive and gives her a firm shove. Melanie walks up behind Betty, removes a knife from her pocket, and plunges the knife into Betty's back. Betty suffers internal injuries and later dies. Can Melanie use defense of others as a defense to criminal homicide? Why or why not?
2. Read *Commonwealth v. Alexander*, 531 S.E.2d 567 (2000). In *Alexander*, the defendant was convicted of brandishing a weapon when he pointed an *unloaded* rifle at an individual who was repossessing his vehicle in an aggressive and belligerent manner. Did the Supreme Court of Virginia uphold the defendant's conviction? The case is available at this link: http://caselaw.findlaw.com/va-supreme-court/1454888.html.
3. Read *Dutton v. Hayes-Pupko*, No. 03-06-00438 (2008). In *Dutton*, a law enforcement officer asked the victim for her name and date of birth after she allegedly sprayed her neighbors with a hose. The victim refused to respond, and the law enforcement officer handcuffed her and forced her into his vehicle, injuring her wrist. The victim sued for use of *excessive* force in arrest. Did the Texas Court of Appeals hold that the victim had the right to sue the officer for use of excessive force in arrest? The case is available at this link: http://scholar.google.com/scholar_case?case=17543977294597089197&q= Dutton+v.+Hayes-Pupko&hl=en&as_sdt=2,5&as_vis=1.

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5.4 Defenses Based on Choice

Learning Objectives

1. Ascertain the three elements required for the choice of evils defense.
2. Distinguish between the choice of evils defense and the duress defense.
3. Identify one crime that is not justifiable by the choice of evils defense or the duress defense.

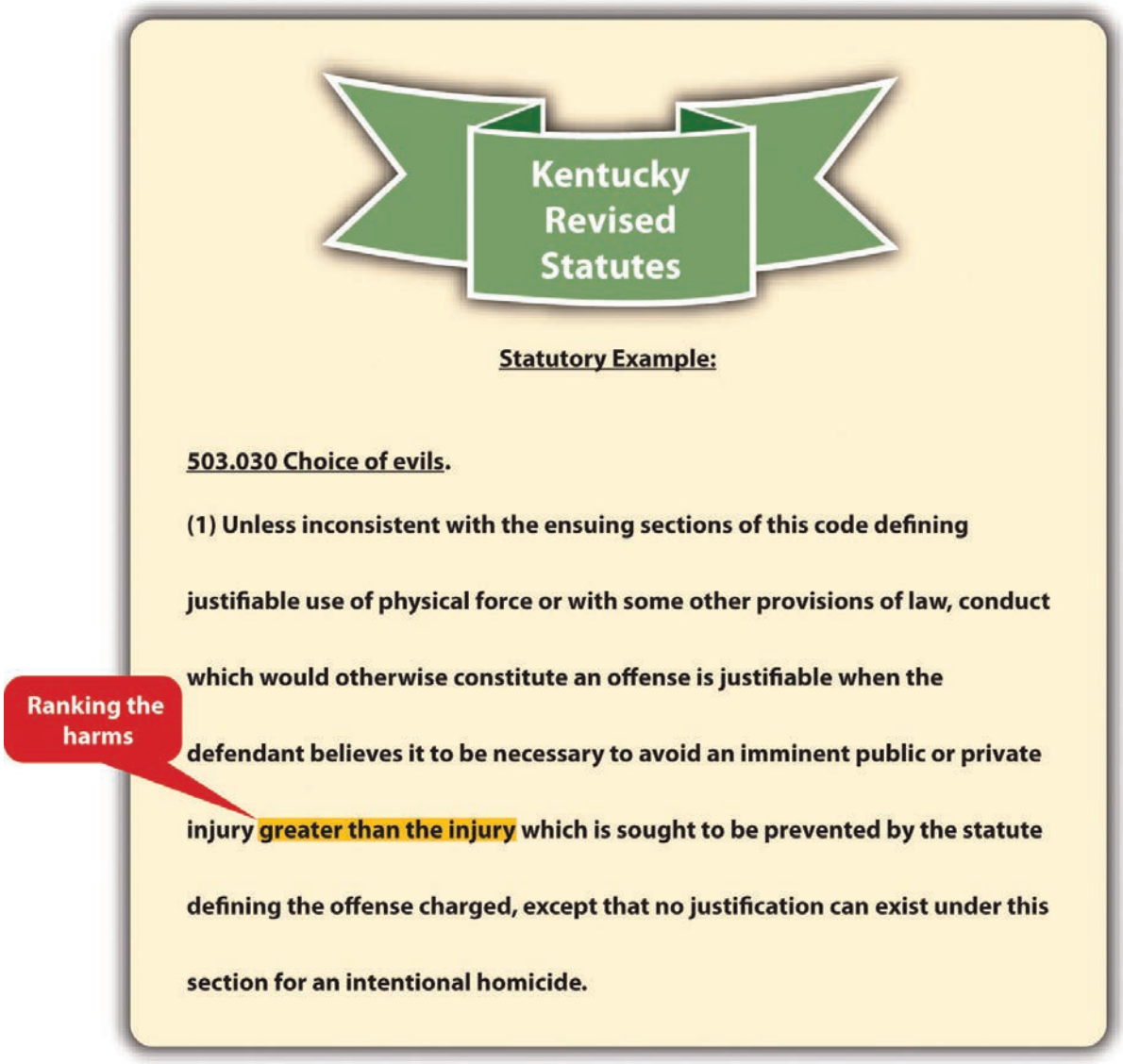
Occasionally, the law protects a defendant from criminal responsibility when the defendant has *no choice* but to commit the crime. In this section, we review the choice of evils and duress defenses.

Choice of Evils Defense

The **choice of evils defense** (called the necessity defense in some jurisdictions) protects a defendant from criminal responsibility when the defendant commits a crime to avoid a greater, imminent harm. Under the Model Penal Code, "[c]onduct which the actor believes to be necessary to avoid harm or evil…is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged" (Model Penal Code § 3.02(1)(a)). The choice of evils defense can be statutory or common-law, perfect or imperfect, depending on the jurisdiction.

The choice of evils defense generally requires three elements. First, there must be more than one harm that will occur under the circumstances. Usually, the harms are the product of nature, or are circumstances beyond the defendant's control (State v. Holmes, 2010). Second, the harms must be ranked, with one of the harms ranked more severe than the other. The ranking is generally up to the legislature or common law. In many jurisdictions, the loss of life is never justifiable under this defense and cannot be ranked lower than any other harm (Ky. Rev. Stat. Ann., 2010). Third, the defendant must have an *objectively reasonable* belief that the greater harm is *imminent* and can only be avoided by committing the crime that results in the lesser harm (Tenn. Code Ann., 2010).

Figure 5.6 Kentucky Revised Statutes



The choice of evils defense is rarely used and is generally only a defense to the loss or destruction of property. When the defense is perfect, it results in an acquittal. When the defense is imperfect, it results in a reduction in sentence or the defendant's conviction of a lesser offense.

Example of the Choice of Evils Defense

Tamara gets lost while hiking in a remote, mountainous area. After wandering around for hours with the temperature dropping, Tamara finds a locked cabin. Tamara breaks a window and climbs inside. Once inside, Tamara prepares some canned chili, drinks tap water, and uses the telephone to call law enforcement. Tamara could probably plead and prove choice of evils as a defense to burglary and theft in many jurisdictions. Tamara was confronted with two harms: harm to her personal safety and well-being and harm to the real and personal property of another. The harm to Tamara's health and safety is ranked *more severe* than the minimal harm to property. It is *objectively reasonable* to break into and enter a cabin and use some of the supplies inside to prevent

imminent injury or death. Thus although Tamara committed burglary and theft in many jurisdictions, she did so with the reasonable belief that she was saving her own life. A trier of fact could find that the harm avoided by Tamara's actions was greater than the harm caused by the burglary and theft, and Tamara could be acquitted, or have her sentence or crime reduced, depending on the jurisdiction.

Change the facts in the preceding example, and imagine that Tamara steals money and jewelry in addition to the chili and tap water. Tamara could not successfully prove the defense of choice of evils to this additional theft. No harm was avoided by Tamara's theft of the money and jewelry. Thus choice of evils cannot justify this crime.

Change the facts in the preceding example, and imagine that Tamara kills the cabin's owner because he refuses to allow her to enter. Tamara could not successfully prove the defense of choice of evils under these circumstances. Tamara's life is *no more important* than the cabin owner's. Thus Tamara cannot *rank* the harms, and choice of evils cannot justify criminal homicide in this case.

The Duress Defense

In some jurisdictions, the choice of evils defense is called the **duress** defense if the choice of evils is deliberately brought on by another *individual*, rather than by nature, an act of God, or circumstances outside the defendant's control. The Model Penal Code defines the duress defense as "an affirmative defense that the actor engaged in the conduct…because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another" (Model Penal Code § 2.09(1)).

Three elements are required for the duress defense. First, the defendant or another person must face a threat of *imminent* serious bodily injury or death (Conn. Gen. Stat., 2010). Second, the defendant must have an *objectively reasonable* belief that the only way to avoid the serious bodily injury or death is to commit the crime at issue (Haw. Rev. Stat., 2010). Third, in most jurisdictions, the crime committed cannot be criminal homicide (RCW 9A.16.060, 2010). Like choice of evils, the duress defense is rarely used and can be statutory or common law, perfect or imperfect, depending on the jurisdiction.

Example of the Duress Defense

Keisha, a bank teller, hands Brian, a bank robber, money out of her drawer after he points a loaded gun at her head. Technically, Keisha embezzled the money from the bank, but she did so based on the *objectively reasonable* fear that Brian would kill her if she failed to comply with his demands. Keisha can successfully claim **duress** as a defense to any charge of theft. If Brian had pointed the gun at another client in line at the bank instead of Keisha, Keisha could still prevail using the duress defense because duress also applies when the threat of death or serious bodily injury is to *another* person.

Change the example with Keisha and Brian, and imagine that Brian's threat is made in a phone call, rather than in person. Brian threatens to kill Keisha if she doesn't place thousands of dollars in an envelope and mail it to him at a specified address. If Keisha complies, Keisha cannot prove duress as a defense to theft. Brian's threat by phone call is not a threat of *imminent* death. In addition, it is not objectively reasonable to be frightened by a voice on the telephone. Keisha could hang up the phone and contact law enforcement, instead of timidly complying with Brian's demands.

Change the preceding example with Keisha and Brian, and imagine that Brian orders Keisha to kill his ex-wife

Pat, who works at the station next to Keisha. Brian thereafter hands Keisha a switchblade. Keisha cannot kill Pat and claim duress as a defense to murder in most states. Keisha's life is no more *valuable* than Pat's. Therefore, Keisha cannot legally choose to commit the crime of murder and justify the crime with the duress defense.

Key Takeaways

- Three elements are required for the choice of evils defense: the defendant must be faced with two or more evils, the evils must be ranked, and it must be objectively reasonable for the defendant to choose to commit the crime to avoid the imminent evil that is ranked higher.
- Choice of evils is often based on nature or an act of God; duress is generally brought on by another individual.
- Choice of evils and duress are generally not defenses to criminal homicide.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A fire sweeps through a residential neighborhood. Clark and Manny light their neighbor's house on fire to create a firebreak. This prevents several houses from burning, including Clark's and Manny's. Do Clark and Manny have a defense to arson in this case? Why or why not?
2. Read *People v. Lovercamp*, 43 Cal. App. 3d 823 (1974). In *Lovercamp*, the defendants escaped from prison and were immediately captured. The defendants claimed they were forced to escape because a group of prisoners threatened them with sexual assault. The trial court did not allow the defendants to introduce evidence supporting the defense of **necessity**, and the defendants were convicted of escape. Did the Court of Appeals of California uphold their conviction for escape? The case is available at this link: http://scholar.google.com/scholar_case?case=6496346791408865822&hl=en&as_sdt=2&as_vis=1&oi=scholarr.
3. Read *State v. Daoud*, 141 N.H. 142 (1996). In *Daoud*, the defendant was convicted of driving while under the influence. The defendant appealed because the trial court did not allow her to present evidence in support of the **duress** defense. Did the Supreme Court of New Hampshire uphold the defendant's conviction? The case is available at this link: http://scholar.google.com/scholar_case?case=18389754229002463686&hl=en&as_sdt=2&as_vis=1&oi=scholarr.

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5.5 Consent

Learning Objectives

1. Ascertain the two elements required for the consent defense.
2. Identify three situations where consent can operate as a legal defense.

Consent by the victim can also form the basis of a justification defense to criminal conduct. **Consent** is most commonly used as a defense to sex crimes such as rape, and lack of consent is a criminal **element** of most sexual offenses that must be proven beyond a reasonable doubt. Thus consent to sexual acts is discussed in Chapter 10 "Sex Offenses and Crimes Involving Force, Fear, and Physical Restraint". In this section, consent to *nonsexual* conduct is explored. Consent is a defense that can be statutory or common law, perfect or imperfect, depending on the jurisdiction.

Elements of the Consent Defense

Consent can be a valid defense to a crime only if the victim *chooses* to render it. Thus it must be proffered knowingly and voluntarily, or it is ineffective. Under the Model Penal Code, consent is ineffective if "it is given by a person who is legally incompetent to authorize the conduct…it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable to make a reasonable judgment…it is induced by force, duress or deception" (Model Penal Code § 2.11(3)). In general, consent is not **knowing** if it is given by an individual who is too young, mentally incompetent (Colo> Rev. Stat. Ann., 2010), or intoxicated. In general, consent is not **voluntary** if it is induced by force, threat of force, or trickery (Del. Code Ann. tit. 11, 2010).

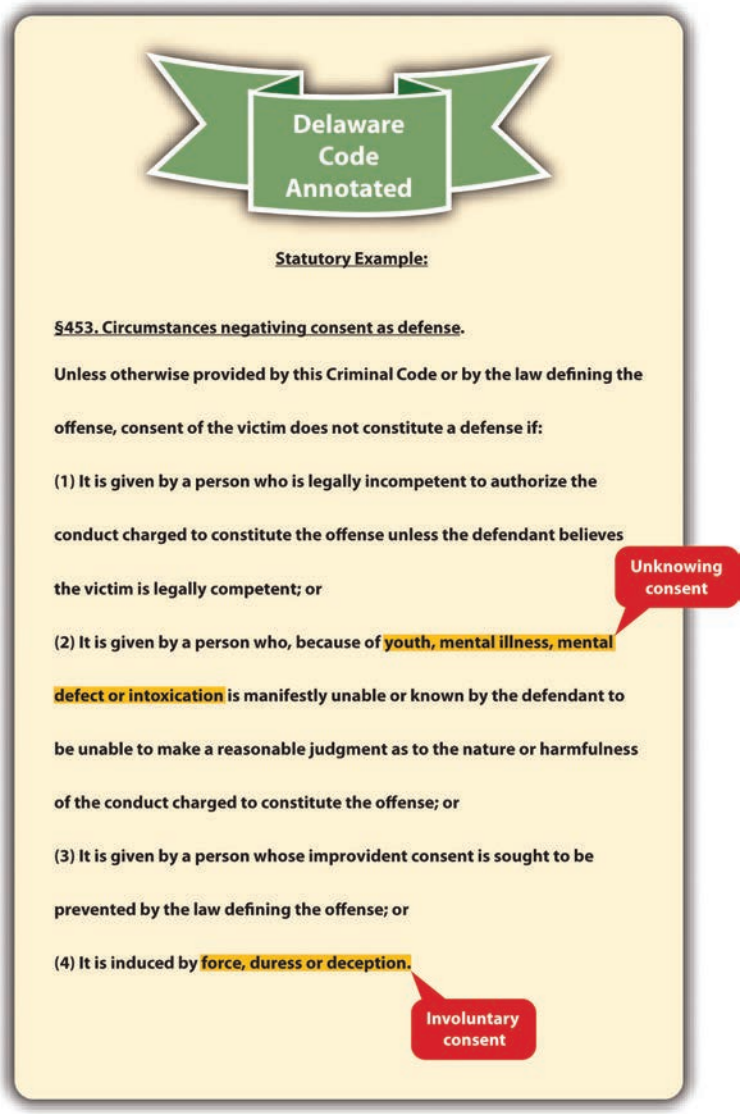
Example of Unknowing Consent

Gina drinks six glasses of wine at a party and offers to be the "donkey" in a game of pin the tail on the donkey. Other party members watch as Gina staggers her way to the front of the room and poses in front of the pin the tail on the donkey poster. Geoff walks up to Gina and stabs her several times in the buttocks with a pin. Geoff probably cannot claim consent as a defense to battery in this case. Gina consented to battery while she was intoxicated, and clearly she was unable to make a reasonable judgment. Thus her consent was not given **knowingly** and was ineffective in this situation.

Example of Involuntary Consent

Change the example with Gina and Geoff. Imagine that Gina just arrived at the party and has not consumed any alcohol. Geoff tells Gina he will poke out her eye with a pin if she does not volunteer to be the donkey in the pin the tail on the donkey game. He exemplifies his threat by making stabbing gestures at Gina's eye with the pin. Frightened, Gina goes to the front of the room and poses in front of the donkey poster until Geoff stabs her in the buttocks with the pin. Geoff probably cannot claim **consent** as a defense to battery in this case. Gina consented in response to Geoff's threat of physical harm. Thus her consent was not given **voluntarily** and was ineffective in this situation.

Figure 5.7 Delaware Code Annotated



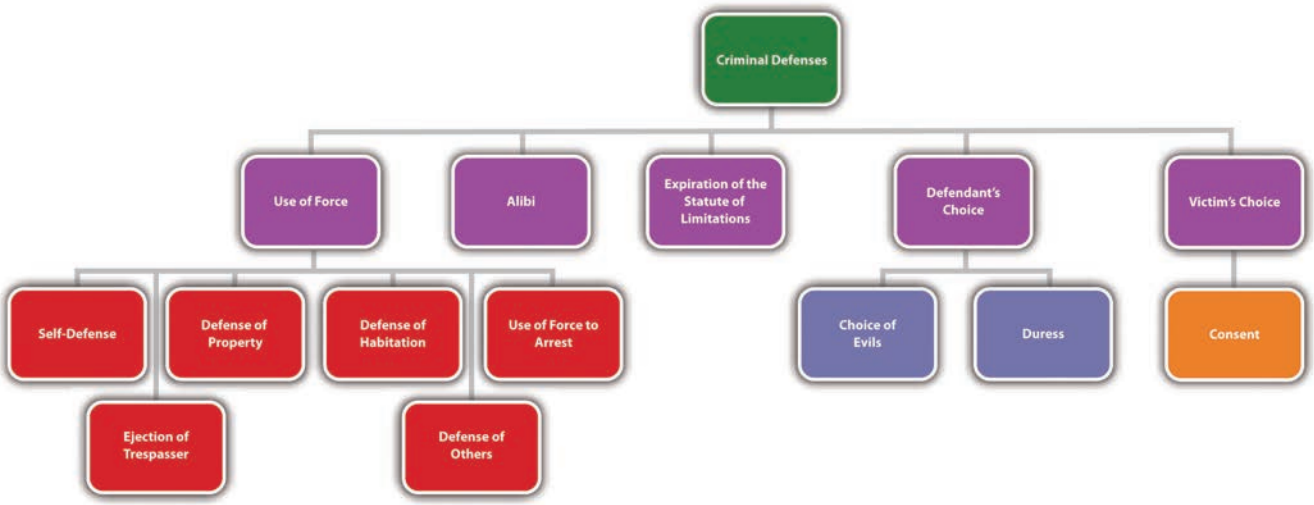
Situations Where Consent Can Operate as a Defense

Consent is a defense to only a few crimes. In most jurisdictions, consent can operate only as a defense to *sexual* conduct, injury that occurs during a *sporting* event, and crimes that do not result in *serious bodily injury* or *death* (Me. Rev. Stat. Ann., 2010). As the Model Penal Code states, "[w]hen conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if: (a) the bodily harm consented to or threatened by the conduct consented to is not serious; or (b) the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport" (Model Penal Code § 2.11(2)).

Example of Legal Consent

Review the examples with Gina and Geoff. Change the examples, and imagine that Gina did not consume any alcohol and was not threatened by Geoff. If Gina offers to be the donkey in the pin the tail on the donkey game and Geoff stabs her in the buttocks with the pin, Geoff may be able to use consent as a defense to battery. Gina's consent appears to be **knowing** and **voluntary**. Gina probably does not suffer **serious bodily injury** from the pin stab in the buttocks. Thus the elements of legal consent exist, and this situation is appropriate for the consent defense.

Figure 5.8 Diagram of Defenses, Part 1



Key Takeaways

- Two elements are required for the consent defense: the defendant must consent knowingly (cannot be too young, mentally incompetent, or intoxicated) and voluntarily (cannot be forced, threatened, or tricked).
- Three situations where consent can operate as a defense are sexual offenses, situations that do not result in serious bodily injury or death, and sporting events.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Allen tackles Brett during a high school football game, and Brett is severely injured. Can Allen be criminally prosecuted for battery? Why or why not?
2. Read *Donaldson v. Lungren*, 2 Cal. App. 4th 1614 (1992). In *Donaldson*, the defendant sought court permission to be cryogenically frozen because he had a brain tumor and wanted to be frozen until there was a cure. The defendant also sought to protect the individual who was going to help with the process and filed a lawsuit seeking an injunction and immunity from criminal prosecution for **assisted suicide**. The defendant claimed he had a constitutional right to **consent** to this procedure. Did the Court of Appeals of California uphold the defendant's right to be frozen—that is, to commit suicide? The case is available at this link: http://www.rickross.com/reference/alcor/alcor7.html.
3. Read *Ramey v. State*, 417 S.E.2d 699 (1992). In *Ramey*, the defendant, a police officer, was convicted of battery for beating the defendant with a flashlight and burning his nipples. The defendant claimed that the victim, who appeared to have mental problems, consented to this treatment. The trial court refused to instruct the jury on the consent defense. Did the Court of Appeals of Georgia uphold the defendant's conviction? The case is available at this link: http://scholar.google.com/scholar_case?case=10809733884390698075&hl=en&as_sdt=2002&as_vis=1.

References

Colo. Rev. Stat. Ann. § 18-1-505, accessed November 23, 2010, http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=.

Del. Code Ann. tit. 11 § 453, accessed November 23, 2010, http://delcode.delaware.gov/title11/c004/index.shtml#451.

Me. Rev. Stat. Ann. 17-A § 109, accessed November 23, 2010, http://www.mainelegislature.org/legis/statutes/17-A/title17-Asec109.html.

5.6 End-of-Chapter Material

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.

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=scholarr.
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=scholarr.
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=scholarr.
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.

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=scholarr.

Articles of Interest

- Affirmative defenses: https://www.law.cornell.edu/wex/affirmative_defense
- Self-defense and martial arts: http://www.ittendojo.org/articles/general-4.htm
- Castle laws: http://harvardjol.wpengine.com/wp-content/uploads/2013/10/Levin-Note1.pdf
- Necessity and duress defenses: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=503462

Websites of Interest

- Castle laws by state: http://criminal.findlaw.com/criminal-law-basics/states-that-have-stand-your-ground-laws.html
- Criminal defense attorneys for all fifty states: http://www.hg.org/law-firms/USA-Criminal-Defense .html

Statistics of Interest

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

Answers to Exercises

From Section 5.1 “Criminal Defenses”

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.

Answers to Exercises

From Section 5.2 "Self-Defense"

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.

Answers to Exercises

From Section 5.3 "Other Use-of-Force Defenses"

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.

Answers to Exercises

From Section 5.4 "Defenses Based on Choice"

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.

Answers to Exercises

From Section 5.5 "Consent"

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, 2010).

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, 2010). 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.

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.

References

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.

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.