

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.

5.3.1 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*, 654 N.W.2d 651 (2002), accessed November 14, 2010, http://scholar.google.com/scholar_case?case=14992698629411781257&hl=en&as_sdt=2&as_vis=1&oi=scholar. 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*, No. 08-P-2094 (2010), accessed November 14, 2010, <http://www.sociallaw.com/slip.htm?cid=19939&sid=119>. 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.

5.3.2 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.

5.3.3 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 No. 3476,

accessed November 15, 2010, <http://www.justia.com/criminal/docs/calcrim/3400/3476.html>. 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. § 21-3213, accessed November 15, 2010, kansasstatutes.lesterama.org/Chapter_21/Article_32/21-3213.html. The defendant can also chase someone who steals personal property and take the item back. Conn. Gen. Stat. § 53a-21, accessed November 15, 2010, www.cga.ct.gov/2009/pub/chap951.htm#Sec53a-21.htm. 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. § 776.031, accessed November 16, 2010, http://law.justia.com/florida/codes/2007/TitleXLVI/chapter776/776_031.html.

5.3.4 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.

5.3.5 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. § 2C:3-6, accessed November 15, 2010, law.onecle.com/new-jersey/2c-the-new-jersey-code-of-criminal-justice/3-6.html. The degree of force that can be used to eject the trespasser is *reasonable force*, under the circumstances. Iowa Code § 704.4, accessed November 15, 2010, coolice.legis.state.ia.us/cool-ice/default.asp?category=billinfo&service=iowacode&ga=83&input=704#704.4. 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*, Docket # 0000011.WA (Wash. App. 2010), accessed November 15, 2010, http://scholar.google.com/scholar_case?case=11648057948374905030&q=State+v.+Curley&hl=en&as_sdt=2,5&as_ylo=2009. Deadly force under these circumstances is justified by **self-defense** or **defense of others**, *not* ejection of trespasser.

5.3.6 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.

5.3.7 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. § 18-1-704.5, accessed November 16, 2010, www.co.jefferson.co.us/jeffco/sheriff_uploads/revised_statutes.htm. In 2005, Florida began a wave of castle law modifications that resulted in most states revising their defense of habitation laws. Fla. Stat. Ann. § 776.013, accessed November 16, 2010, law.onecle.com/florida/crimes/776.013.html. 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. § 776.013, accessed November 16, 2010, law.onecle.com/florida/crimes/776.013.html. 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*, 526 P.2d 241 (1974), accessed November 16, 2010, wings.buffalo.edu/law/bclc/web/calceballos.htm. 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. § 161.225, accessed November 16, 2010, www.leg.state.or.us/ors/161.html. 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. § 11.81.335(b), accessed November 16, 2010, <http://touchngo.com/ig/cntr/akstats/Statutes/Title11/Chapter81/Section335.htm>. 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. § 776.013, accessed November 16, 2010, law.onecle.com/florida/crimes/776.013.html. 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 § 5/7-2 (b), accessed November 16, 2010, www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=072000050HArt.+7&ActID=1876&ChapAct=720. **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.

Crack the Code

Compare the following state laws:

Alaska Stat. §11.81.335: Justification: Use of deadly force in defense of self.

(b) A person may not use deadly force under this section if the person knows that, with complete personal safety and with complete safety as to others being defended, the person can avoid the necessity of using deadly force by leaving the area of the encounter, except there is no duty to leave the area if the person is

(1) on premises

(A) that the person owns or leases;

(B) where the person resides, temporarily or permanently

Fla. Stat. Ann. § 776.013 Home protection; use of deadly force;

... (3) A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony

In Alaska, the stand your ground rule applies to *premises*; in Florida, it applies *anywhere it is legal to be...*

Figure 5.4 Crack the Code

5.3.8 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.

5.3.9 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).

5.3.10 Example of Reasonable Force by Law Enforcement to Arrest

Review the example in Chapter 1, [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.

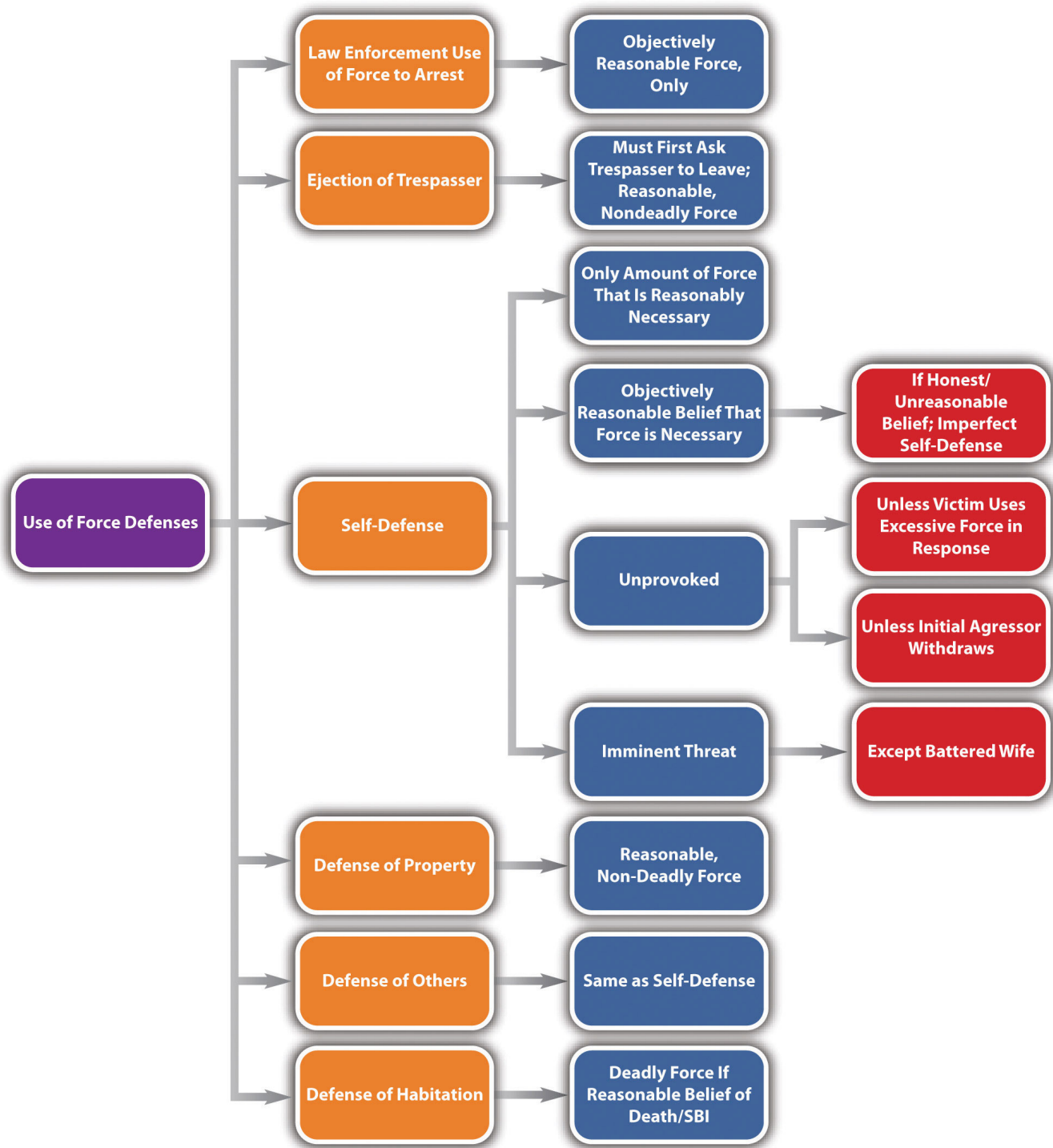


Figure 5.5 Diagram of Use-of-Force Defenses

5.3.11 Exercises

- 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.

5.3.12 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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