

9.1: Problems

Chapter 9 – Challenges of Policing and Use of Force

Problems ^[104]



Think About It... Excessive Force

“Allegations of the use of excessive force by U.S. police departments continue to generate headlines more than two decades after the 1992 Los Angeles riots brought the issue to mass public attention and spurred some [law enforcement reforms](#) . Recent deaths at the hands of police have fueled a lively debate across the nation in recent years.” Read this [article on Excessive or reasonable force by police? Research on law enforcement and racial conflict](#) , what are your views on police force? Why do you think this topic has become a topic of national discourse? DO you think this is a recent issue in American policing or a longstanding historical trend?

New Crimes Due to Emerging Social Issues

The direction of criminology has been shifting, as the structure of the criminal justice system has been weakened over the last 200 years. “New crime” which is being countered by new crimefighting methods is conflicting with “old criminology.” The emergence of new relations between victims and offenders, criminal justice and social justice, as well as the development of innovative modes of regulation are, it is argued, changing the social and criminological landscape. This raises issues of theory and practice that challenge traditional conceptualizations of crime and punishment. ^[105]

Physician-Assisted Suicide ^[106]

Euthanasia

Euthanasia is an emotionally charged word, and definitional confusion has been fermented by characterizations such as passive versus active euthanasia. Some have suggested avoiding using the word altogether. [1](#) , [2](#) We believe it would be a mistake to abandon the word, but we need to clarify it.

The word’s etymology is straightforward: eu means good and Thanatos means death. Originally, euthanasia meant the condition of a good, gentle, and easy death. Later, it took on aspects of performativity; that is, helping someone die gently. An 1826 Latin manuscript referred to medical euthanasia as the “skillful alleviation of suffering”, in which the physician was expected to provide conditions that would facilitate a gentle death but “least of all should he be permitted, prompted either by other people’s request or his own sense of mercy, to end the patient’s pitiful condition by purposefully and deliberately hastening death”. [3](#) This understanding of euthanasia is closely mirrored in the philosophy and practice of contemporary palliative care. Its practitioners have strongly rejected euthanasia. [4](#)

Recently, the noun has morphed into the transitive verb “to euthanize”. The sense in which physicians encounter it today, as a request for the active and intentional hastening of a patient’s demise, is a modern phenomenon; the first sample sentence given by the Oxford English Dictionary to illustrate the use of the verb is dated 1975. [5](#) The notion of inducing, causing, or delivering a (good) death, so thoroughly ensconced in our contemporary, so-called “progressive values” cultural ethos, is a new reality. That fact should raise the question: “Why now?” The causes go well beyond responding to the suffering person who seeks euthanasia, are broad and varied, and result from major institutional and societal changes. [6](#)

Physicians need a clear definition of euthanasia. We recommend the one used by the Canadian Senate in its 1995 report: “The deliberate act undertaken by one person with the intention of ending the life of another person in order to relieve that person’s suffering.” [7](#)

Terms such as active and passive euthanasia should be banished from our vocabulary. An action either is or is not euthanasia, and these qualifying adjectives only serve to confuse. When a patient has given informed consent to a lethal injection, the term “voluntary euthanasia” is often used; when they have not done so, it is characterized as “involuntary euthanasia”. As our discussion

of “slippery slopes” later explains, jurisdictions that start by restricting legalized euthanasia to its voluntary form find that it expands into the involuntary procedure, whether through legalizing the latter or because of abuse of the permitted procedure.

In the Netherlands, Belgium, and Lichtenstein, physicians are legally authorized, subject to certain conditions, to administer euthanasia. For the sake of clarity, we note here that outside those jurisdictions, for a physician to administer euthanasia would be first-degree murder, whether or not the patient had consented to it.

Assisted suicide

Assisted suicide has the same goal as euthanasia: causing the death of a person. The distinction resides in how that end is achieved. In PAS, a physician, at the request of a competent patient, prescribes a lethal quantity of medication, intending that the patient will use the chemicals to commit suicide. In short, in assisted suicide, the person takes the death-inducing product; in euthanasia, another individual administers it. Both are self-willed deaths. The former is self-willed and self-inflicted; the latter is self-willed and other-inflicted. Although the means vary, the intention to cause death is present in both cases.

Some will argue that agency is different in assisted suicide and euthanasia; in the former, the physician is somewhat removed from the actual act. To further this goal, two ethicists from Harvard Medical School in Boston, Massachusetts, USA, have proposed strategies for limiting physician involvement in an active death-causing role. ⁸ It is, indeed, the case that patients provided with the necessary medication have ultimate control over if, when, and how to proceed to use it; they may change their mind and never resort to employing it. However, in prescribing the means to commit suicide, the physician’s complicity in causing death is still present. There are, however, some limits on that complicity, even in the jurisdictions where it has been legalized. For instance, even supporters of PAS in those jurisdictions agree it is unethical for physicians to raise the topic with individuals, as that might constitute subtle coercion or undue influence, whether or not intended.

PAS has been decriminalized in Oregon, Washington State, Montana, and Vermont, and absent a “selfish motive”, assisted suicide is not a crime in Switzerland. ⁹ Even in these jurisdictions, however, one cannot legitimately speak of a “right” to suicide because no person has the obligation to assist in the suicide. Rather, assisting suicide has been decriminalized for physicians in the American states listed and for any person in Switzerland; that is, it is not a criminal offence for those who comply with the applicable laws and regulations.

Terminal sedation and palliative sedation

A lethal injection can be classified as “fast euthanasia”. Deeply sedating the patient and withholding food and fluids, with the primary intention of causing death, is “slow euthanasia”. The use of “deep sedation” at the end of life has become a more common practice in the last decade and has been the focus of controversy and conflict, especially because of its probable abuse.

Certain terminology, such as “palliative terminal sedation”, creates confusion between sedation that is not euthanasia and sedation that is euthanasia. It was used, for example, by the Quebec Legislative Assembly in drafting a bill to legalize euthanasia. ¹⁰ We note that creating such confusion might constitute an intentional strategy to promote the legalization of euthanasia. In the amended bill, the term “palliative terminal sedation” was replaced by “continuous palliative sedation”, which the patient must be told is irreversible, clearly indicating the legislature’s intention to authorize “slow euthanasia”, although many people might not understand that is what it means. The bill died on the order paper when a provincial election was called before it was passed. Immediately after the election the bill was reintroduced at third reading stage by unanimous consent of all parties and passed by a large majority. This new law allowing euthanasia in Quebec, the only jurisdiction in North America to do so, remains the focus of intense disagreement and is now being challenged as ultra vires the constitutional jurisdiction of Quebec.

“Palliative sedation”, which is relatively rarely indicated as an appropriate medical treatment for dying people, is used when it is the only reasonable way to control pain and suffering and is given with that intention. It is not euthanasia. “Terminal sedation” refers to a situation in which the patient’s death is not imminent and the patient is sedated with the primary intention of precipitating their death. This is euthanasia. The terms palliative terminal sedation and continuous palliative sedation confound these two ethically and legally different situations.

Euthanasia advocates have been arguing that we cannot distinguish the intention with which these interventions are undertaken, and therefore, this distinction is unworkable. But the circumstances in which such an intervention is used and its precise nature allow us to do so. For instance, if a patient’s symptoms can be controlled without sedation, yet they are sedated, and especially if the patient is not otherwise dying and food and fluids are withheld with the intention of causing death, this is clearly euthanasia. Needing to discern the intention with which an act is carried out is not unusual. For instance, because intention is central to determining culpability in criminal law, judges must do so on a daily basis. We note, also, that intention is often central in determining the ethical and moral acceptability of conduct, in general.

Within the realm of decision-making in a medical context, withdrawal of artificial hydration and nutrition has continued to be a very contentious issue in situations in which persons are not competent to decide for themselves about continuing or withdrawing this treatment. The questions raised include: When does its withdrawal constitute allowing a person to die as the natural outcome of their disease (when it is not euthanasia)? And when does its withdrawal constitute starving and dehydrating a person to death (when it is euthanasia)?

Basic concepts related to euthanasia and PAS

-The right to die

The “right to die” terminology is used in the euthanasia debate to propose there is a right to have death inflicted. Death is inherent to the human body, vulnerable and inexorably aging; death can be accelerated or temporarily delayed, but never thwarted. The inevitability of death is an explicit, necessary, noncontingent, and universalizable phenomenon true for all living beings. There is no “right to die”. In contradistinction, there are fundamental human rights to “life, liberty and security of the person”.

Where there is a right, there is an obligation; therefore, were a “right to die” to exist, a logical consequence would be that some other person or agent would have a duty to inflict death (especially if the requisitioner were physically incapable of accomplishing the act themselves). Pro-euthanasia advocates rely heavily on this line of logic and have used it to impose responsibility for carrying out euthanasia onto the medical profession.

The claim to a right to die must be distinguished from a “right to be allowed to die”; for instance, by refusing life-support treatment. The right to permit the dying process to unfold unimpeded flows from and is a consequence of persons’ exercise of their right to inviolability, the right not to be touched without their informed consent. It does not establish any right to die in the sense of a “right to be killed”.

A recent case from British Columbia, *Carter v. Canada (Attorney General)*, [12](#) illustrates the arguments that emerge between those arguing for a right to die (legalized euthanasia) and those opposing it. Gloria Taylor, a woman with amyotrophic lateral sclerosis who was one of the plaintiffs, challenged the constitutional validity of the prohibition on assisted suicide in the Canadian Criminal Code. [13](#) Suicide and attempted suicide used to be crimes under the code, but these crimes were repealed by the Canadian Parliament in 1972. However, the crime of assisting suicide was not repealed. The trial judge in the Carter case, Justice Lynn Smith, considered the reasons for that repeal. She accepted that it was not done to give a personal choice to die priority over “the state interest in protecting the lives of citizens; rather, it was to recognize that attempted suicide did not mandate a legal remedy”. [12](#) With respect, we propose an alternative explanation: The designation of those acts as crimes was abolished to try to save the lives of suicidal people. It was hoped that if society removed the threat of possibly being charged with a criminal offence, they and their families would be more likely to seek medical assistance.

In coming to her conclusions that PAS can be ethically acceptable and ought to be legally allowed in certain circumstances, Justice Smith relied heavily on the fact that it is no longer a crime to commit or attempt to commit suicide and asked, why, then, is it a crime to assist it? “What is the difference between suicide and assisted suicide that justifies making the one lawful and the other a crime, that justifies allowing some this choice, while denying it to others?” [12](#)

The answer is that decriminalizing suicide and attempted suicide is intended to protect life; decriminalizing assisted suicide does the opposite. As explained earlier, intentions are often central in deciding what is and is not ethical.

Society tries to prevent suicide. Notwithstanding the influence of pro-euthanasia advocates, the preponderant societal view is that suicide, at least outside the context of terminal illness, must not be tolerated. Suicide is generally considered a failure of sorts: the manifestation of inadequately treated depression, a lapse in community support, a personal shortcoming, societal disgrace, or a combination thereof. Even if in certain societies in ancient times suicide was not illegal, it was generally frowned upon.

Importantly, the decriminalization of suicide does not establish any right to die by suicide. Furthermore, if there were such a right, we would have a duty not to treat people who attempt suicide. In other words, if there were a right to choose suicide, it would mean that we have correlative obligations (perhaps subject to certain conditions such as ensuring the absence of coercion) not to prevent people from making that choice. Hospital emergency rooms and health care professionals faced with a patient who has attempted suicide do not, at present, act on that basis. Psychiatrists who fail to take reasonable care that their patients do not commit suicide, including by failing to order their involuntary hospitalization to prevent them committing suicide, when a reasonably careful psychiatrist would not have failed to do so, can be liable for medical malpractice, unprofessional conduct, and even, in extreme cases, criminal negligence.

Another distinguishing feature between suicide and assisted suicide must be underlined. Suicide is a solitary act carried out by an individual (usually in despair). PAS is a social act in which medical personnel licensed and compensated by society are involved in the termination of the life of a person. It asks not that we attempt to preserve life, the normal role of medicine and the state, but that we accept and act communally on a person's judgment that his or her life is unworthy of continuance. (We are indebted to Canadian bioethicist Dr Tom Koch for this particular formulation of the issue.)

Autonomy

Advocates of euthanasia rely heavily on giving priority to the value of respect for individuals' rights to autonomy and self-determination. Respect for autonomy is the first requirement listed in the principlism approach to biomedical ethics, known as the "Georgetown mantra", which strongly influenced the early development of applied ethics in the 1980s. ¹⁵ It refers to a person's right to self-determination, to the inherent right of individuals to make decisions based on their constructions of what is good and right for themselves. The autonomous personal self is seen to rule supreme. It washes over the relational self, the self that is in connection with others in the family and community. Autonomy is often treated as an "uber" right trumping all other rights. It renders moot many obligations, commitments, and considerations beyond the risks, harms, and benefits to the individual involved. The inclination to attribute primary importance to autonomy may be alluring at first glance; clearly, no physician educated in today's ethical zeitgeist (patient-centered, partnership-seeking, and consent-venerating) would want to be seen to be violating someone's autonomy by disrespecting their right to make personal choices. That would smack of paternalism or authoritarianism, which are seen by "progressives" as heinous wrongs.

The way in which respect for autonomy is implemented in practice and in law is through the doctrine of informed consent. Among many requirements, it demands that the patient be fully informed of all risks, harms, benefits, and potential benefits of the proposed procedure and its reasonable alternatives. As a consequence, to obtain legally valid informed consent to euthanasia, the patient must be offered fully adequate palliative care. As well, the patient must be legally and factually mentally competent, and their consent must be voluntary: free of coercion, duress, or undue influence. We question whether these conditions can be fulfilled, at least with respect to many terminally ill patients.

Individual autonomy and perspectives from the individual's family

It is useful to consider the historical roots of individual autonomy and its possible links to the movement to legalize euthanasia. The belief that one has the right to die at the time, place, and in the conditions of one's choosing is based on the conviction that one owns one's body and that one can do with it as one pleases. It is an idea deeply rooted in the humanist worldview.

The notion of a personal self emerged in the Renaissance, where it was thought that the personal self could be worked on and perfected. It was quite distinct from more ancient concepts of humans as part of a greater and unified whole. Pica della Mirandola (quoted in Proctor 1988) ¹⁶ captures the sentiment: "We have made thee neither of heaven nor of earth, neither mortal nor immortal, so that with freedom of choice and with honor, as though the maker and molder of thyself, thou mayest fashion thyself in whatever shape thou shalt prefer." It does not require a huge conceptual leap to appreciate that if the self can be created, the process should be reversible: self-making balanced with self-annihilation. Self-determinationism is a type of solipsism discernible at the very core of most philosophical arguments in favor of euthanasia.

The concept of autonomy can be problematized. It is, as ethicist Alfred Tauber has suggested, two-faced. ¹⁷ He describes two conceptions of autonomy: one that is dependent on radical self-direction and human separateness and another that is other-entwined and constitutive of social identities. He places interdependence, interpersonal responsibility, and mutual trust as counterpoints to free choice. He argues that both are necessary for society to thrive and for medicine to fulfill its moral imperative. Autonomy is also being rethought by some feminist scholars through a concept called "relational autonomy". ¹⁸ This recognizes that, hermits aside, we do not live as solitary individuals but, rather, in a web of relationships that influence our decisions, and that these must be taken into account in assessing whether or not our decisions are autonomous. The role that respect for autonomy should play in relation to the decision whether to legalize euthanasia must be examined not only from the perspective of the patient but also from the perspective of the patient's relations. In the current debate, the latter have often been neglected.

It is ethically necessary to consider the effects on a person's loved ones of that person's decision to request euthanasia. We illustrate this by making reference to the BBC television program "Coronation Street", the longest-running television soap opera in history. It recently focused on a character named Hayley Cropper. In a series of episodes in early 2014, Hayley was diagnosed with pancreatic cancer and subsequently resorted to suicide in the presence of her husband, Roy Cropper. The producers of the show succeeded in plucking at heart strings and eliciting empathic responses from the audience. The character had a complex personal narrative that permitted one to appreciate why she might have wanted to hasten her own death: she was a transsexual woman who feared

reverting to her previous male identity as her dying process progressed. The producers, always attuned to contemporary societal issues, made sure to balance Hayley's suffering with a reciprocal harm, wrought on her husband Roy and another character, Fiona (Fiz) Brown. Roy became tormented with guilt by association, and Fiz was seriously traumatized because she was deprived of the opportunity to say goodbye to Hayley, her foster mother. The point made was that self-willed death may be merciful to oneself and simultaneously cruel to others. There is an essential reciprocity in human life. We are neither islands in the seas nor autonomous, self-sufficient planets in the skies.

We must also examine the effect of legalizing euthanasia from the perspective of physicians' and other health care professionals' autonomy with respect to freedom of conscience and belief, and the effect it would have on institutions and society as a whole. The overwhelming thrust of the euthanasia debate in the public square has been at the level of individual persons who desire euthanasia. Although that perspective is an essential consideration, it is not sufficient. Even if euthanasia could be justified at the level of an individual person who wants it (a stance with which we do not agree), the harm it would do to the institutions of medicine and law and to important societal values, not just in the present but in the future, when euthanasia might become the norm, means it cannot be justified.

Loss of autonomy, experienced or anticipated, is one of the reasons that might prompt a patient to request death from their physician. Other reasons include pain, but it is not the most important. Thankfully, modern medicine is, with few exceptions, effective at relieving physical symptoms, particularly pain. These other sources of suffering are largely in the psychosocial domain, as the recent annual report by Oregon's Public Health Division (released on January 28, 2014) demonstrates. During a 14-year period (1998–2012), the three most frequently mentioned end-of-life concerns were loss of autonomy (91.4%), decreasing ability to participate in activities that made life enjoyable (88.9%), and loss of dignity (80.9%). ¹⁹ A loss in bodily function is linked to the fear of becoming a burden on loved ones and is often experienced as an assault on human dignity. It is important to note that depression can represent either an indication or a contraindication for euthanasia. A list of end-of-life concerns that can be linked to requesting euthanasia is presented in Figure 9.1.

Reason
Loss of autonomy and independence (eg, loss of control over decisions, inability to make decisions, loss of self-care abilities)
Less able to engage in activities making life enjoyable
Perceived loss of human dignity; this is often related to an impairment of physiological functions in basic body systems (eg, bowel functioning, swallowing, speech, reproduction) or preoccupations with bodily appearance
A fear of becoming a burden on family, friends, and community
Cognitive impairment or fear of cognitive impairment
Depression, hopelessness (nothing to look forward to), or demoralization ²⁰
Feeling useless, unwanted, or unloved; social isolation
Inadequate pain control or concern about it
Existential angst or terror, mortality salience, fear of the unknown
Intractable symptoms other than pain (eg, pruritus, seizures, paresthesias, nausea, dyspnea)
Financial implications of treatment

Figure 9.1 A list of end-of-life concerns that can be linked to requesting euthanasia ^[107]

We turn now to another critically important value, respect for life, which, in the context of euthanasia, is in conflict with respect for autonomy. In discussing euthanasia, the one cannot be properly considered in isolation from the other.

Respect for Human Life

Respect for human life must be maintained at two levels: respect for each individual human life and respect for human life in general. Even if it were correct, as pro-euthanasia advocates argue, that when a competent adult person gives informed consent to euthanasia there is no breach of respect for human life at the level of the individual, there is still a breach of respect for human life in general. If euthanasia is involved, how one person dies affects more than just that person; it affects how we all will die.

Respect for life is implemented through establishing a right to life. We return to the trial judgment in the Carter case because it illustrates how such a right can be distorted and co-opted in the service of legalizing PAS or even euthanasia. In applying the right to life in section 7 of the Canadian Charter of Rights and Freedoms ²⁰ to Ms. Taylor's situation, Justice Smith says:

[T]he [Criminal Code] legislation [prohibiting assisted suicide] affects her right to life because it may shorten her life. Ms. Taylor's reduced lifespan would occur if she concludes that she needs to take her own life while she is still physically able to do so, at an earlier date than she would find necessary if she could be assisted. ¹²

What is astonishing is the novel, to say the least, way in which Justice Smith constructs a breach of Ms. Taylor's Charter right to life. In effect, Justice Smith's reasoning converts the right to life to a right to death by PAS or euthanasia. Justice Smith's judgment was overturned by a two to one majority in the British Columbia Court of Appeal, as contrary to a Supreme Court of Canada precedent ruling that the prohibition of assisted suicide is constitutionally valid. ²¹ It is now on appeal to the Supreme Court of Canada; we note its liberty to override its previous precedents.

Main Arguments of Proponents and Opponents

Proponents of euthanasia often use rhetorical devices to foster agreement with their stance by making it more palatable. One of these is to eliminate the use of words that have a negative emotional valence. As mentioned previously, "suicide" has been a taboo for many cultures and across time. Some commentators have described concepts such as suicide clusters, suicidal contagion, and suicide scripting; none of these are considered beneficial to society. As a consequence, there have been efforts at replacing the terminology of assisted suicide with assisted dying. A former editor of the *New England Journal of Medicine*, Marcia Angell, has stated that the latter expression is more appropriate because it describes someone "who is near death from natural causes anyway while the former refers to something occurring in someone with a normal life expectancy". ²² We doubt that she was actually meaning to imply that human lives have less intrinsic worth as persons approach death; however, that interpretation is logical and inevitable.

Another strategy to whitewash "death talk" is to figuratively wrap it within the white coat of medicine. Cloaking these acts in medical terms softens them and confers legitimacy. This has spawned a host of euphemisms such as "medically assisted death", "medical-aid-in-dying", and "death with dignity". After all, we all want good medical care when we are dying. A strategy that may escape scrutiny is to link assisted suicide with physicians; that is, PAS. However, assisted suicide and euthanasia are not necessarily glued to physicians. Nurses could perform these procedures, although most recoil at the prospect. In theory, almost anyone (ambulance drivers, veterinarians, pharmacists, lawyers) could be empowered and trained to euthanize. We have argued elsewhere that if society is going to legalize euthanasia (which we oppose it doing), it could equip itself with a new occupation of euthanology, ²³ thereby relieving physicians of having to contravene their ancient guiding principle of *primum non nocere*.

One must also be wary of euphemisms because they dull our moral intuitions and emotional responses that warn us of unethical conduct. In our world of desktops, laptops, and smartphones, where one's existence is proclaimed and validated on computer screens and intersubjectivity is channelled in cyberspace, we would not be surprised to see some enterprising euthanologist of the future advertise a gentle "logging-off". Although fanciful, this prediction is well aligned with a conception of the world that views persons as reducible to bodies with complex networks of neurological circuits wherein the entire range of human experiences can be created, recorded, interpreted, and terminated.

This conception of human existence can also breed rather extreme points of view, such as the one that considers the failing body as "unwanted life support". David Shaw has suggested that, "if a patient is mentally competent and wants to die, his body itself constitutes unwarranted life support unfairly prolonging his or her mental life". ²⁴

Many current attitudes and values could affect how terminally ill, dying, and vulnerable people are treated. For example, if materialism and consumerism are priority values, euthanasia fits with the idea that, as one pro-euthanasia Australian politician put it: "When you are past your 'use by' or 'best before' date, you should be checked out as quickly, cheaply and efficiently as possible." But we are not products to be checked out of the supermarket of life. As this shows, some who advocate in favor of euthanasia resort to intense reductionism in buttressing their arguments. If one thinks of a human being as having an essence comprised of more than bodily tissues, then the intellectual, emotional, and social barriers to euthanasia come to the fore.

Euphemizing euthanasia through choice of language is not the only "legalizing euthanasia through confusion" strategy. ²⁵ Another is the "no difference" argument. The reasoning goes as follows: refusals of treatment that result in a shortening of the patient's life are ethical and legal; this is tantamount to recognizing a right to die. Euthanasia is no different from them, and it's just another way to implement the right to die. Therefore, if we are to act consistently, that too should be seen as ethical and legal. The further, related, argument is that euthanasia is simply another form of medical treatment. However, as explained previously, the right to refuse treatment is not based on a right to die, and both the intention of the physician and the causation of death are radically different in those cases compared with euthanasia.

The main arguments in favor of and in opposition to euthanasia are presented in Figure 9.2. Prominent on the yea side are the autonomy principle and the belief that putting an end to suffering through euthanasia is merciful and justifies euthanasia. Prominent on the nay side are the corrosive consequences for upholding society's respect for life, the risks of abuse of vulnerable people, and the corruption of the physician's role in the healing process.

Arguments

Arguments in favor of euthanasia

Persons have an inalienable right to self-determination; that is, patients can decide how, where, and when they are going to die. Euthanasia is a profoundly humane, merciful, and noble humanitarian gesture because it relieves suffering. Assistance in dying is a logical and reasonable extension to end-of-life care and involves only an incremental expansion of practices that are legal and seen as ethical. It bypasses physicians' reluctance to accept patients' advanced directives and their requests to limit interventions. It can be carried out humanely and effectively, with negligible risk of slippery slopes.

Arguments against euthanasia

Intentionally taking a human life, other than to save innocent human life, is inherently wrong and a violation of a universal moral code. The value of respect for autonomy must be balanced by other values, particularly respect for individual human life and respect for human life in general. It is different in kind from other palliative care interventions aimed at relieving suffering, such as pain management, and from respect for patients' refusals of life support treatment. Slippery slopes are unavoidable. It introduces an unacceptable potential for miscommunication within the doctor–patient relationship. It is incompatible with the role of the physician as healer and would erode the character of the hospital as a safe refuge.

Figure 9.2 Main arguments advanced by proponents and opponents of euthanasia ^[108]

Alternatives to Euthanasia

There are two great traditions in medicine: the prolongation of life and the relief of suffering. The concept of suffering, the fact that it is an affliction of whole persons, rather than bodies only, was explicated several decades ago by the American physician Eric Cassel in his seminal paper: “The Nature of Suffering and the Goals of Medicine.” This understanding represents one of the central tenets of palliative care medicine. The provision of high-quality care by individuals who share in this belief and are able to act to address the full range of human suffering is the most important goal with respect to terminally ill patients. It also constitutes the obvious and necessary alternative to euthanasia.

A specific approach to palliative care, with conceptual anchors in the concept of healing, has recently been described and used by Canadian psychiatrist Harvey Max Chochinov and colleagues; it is called “dignity therapy”. Although we prefer the original term, “dignity-conserving care”, because it implies somewhat more modest goals and suggests less of a transfer of agency from patient to physician, this approach holds great promise for assisting patients at the end of life. It provides an entry for a deep exploration of dignity: How does the individual patient conceive of it? How is it threatened? How does it link to vulnerability or a sense of “control”? Where does one get the idea that we are ever in control? It is focused on issues such as “intimate dependencies” (e.g., eating, bathing, and toileting) and “role preservation”. Chochinov has described one’s social roles and their associated responsibilities as “the bricks and mortar” of self. ³⁴ The therapeutic approach described aims to preserve persons’ inherent dignity, in part by helping them to see that their intimate dependencies can be attended to without their losing self-respect and that they can continue to play meaningful roles.

Consequences

A major disagreement between euthanasia advocates and opponents revolves around the existence of slippery slopes. There are two types: the logical slippery slope, the extension of the circumstances in which euthanasia may be legally used, and the practical slippery slope, its abuse (see Figure 9.3). The evidence during the last decade demonstrates that neither slope can be avoided. ³⁵ ,

36 For example, although access to euthanasia in the Netherlands has never required people to be terminally ill, since its introduction it has been extended to include people with mental, but not physical, illness, as well as to newborns with disabilities and older children. In Belgium, euthanasia has recently been extended to children, it is being considered whether to do the same for people with dementia, and organs are being taken from euthanized people for transplantation. 37 The logical and practical slippery slopes are unavoidable because once we cross the clear line that we must not intentionally kill another human being, there is no logical stopping point.

Slopes
<p>The practical slippery slope</p> <ul style="list-style-type: none"> Performing euthanasia without informed consent or any consent Persons administering euthanasia who are not legally authorized to do so Failure of reporting euthanasia or physician assisted suicide as required Misclassifying euthanasia as "palliative sedation" Noncompliance with safeguard protocols (eg. not obtaining psychiatric evaluations of competence, circumventing policies for mandatory second opinions, functioning as "willing providers" without having had a previous clinical relationship with the patient) <p>The logical slippery slope</p> <ul style="list-style-type: none"> Euthanasia offered to those with existentialist angst, mental illness, anorexia nervosa, depression Euthanasia expanded to include patients with dementia Euthanasia expanded to persons who are neither physically nor mentally ill: "over 70 and tired of life" Extending legislation to include children Euthanasia becomes accepted as medical care, as a sort of "therapeutic homicide"

Figure 9.3 Slippery Slopes ^[109]

When euthanasia is first legalized, the usual justification for stepping over the "do not kill" line is a conjunctive one composed of respect for individual autonomy and the relief of suffering. This justification is taken as both necessary and sufficient for euthanasia. But as people and physicians become accustomed to euthanasia, the question arises, "Why not just relief of suffering or respect for autonomy alone?" and they become alternative justifications.

As a lone justification, relief of suffering allows euthanasia of those unable to consent for themselves according to this reasoning: If allowing euthanasia is to do good to those mentally competent people who suffer, denying it to suffering people unable to consent for themselves is wrong; it is discriminating against them on the basis of mental handicap. So, suffering people with dementia or newborns with disabilities should have access to euthanasia.

If one owns one's own life, and no one else has the right to interfere with what one decides for oneself in that regard (as pro-euthanasia advocates claim), then respect for the person's autonomy as a sufficient justification means that the person need not be suffering to access euthanasia. That approach is manifested in the proposal in the Netherlands that euthanasia should be available to those "over 70 and tired of life".

Once the initial justification for euthanasia is expanded, the question arises, "Why not some other justification, for instance, saving on health care costs, especially with an aging population?" Now, in stark contrast to the past when saving health care costs through euthanasia was unspeakable, it is a consideration being raised.

Familiarity with inflicting death causes us to lose the awesomeness of what euthanasia entails; namely, inflicting death. The same is true in making euthanasia a medical act. And both familiarity with inflicting death and making euthanasia a medical act make its extension, and probably abuse, much more likely, indeed, we believe inevitable, were it to be legalized. We need to stay firmly behind the clear line that establishes that we must not intentionally kill one another.

Those most at risk from the abuse of euthanasia are vulnerable people: those who are old and frail or people with mental or physical disabilities. We have obligations to protect them, and euthanasia does the opposite, it places them in danger. We need, also, to consider the cumulative effect of how we treat vulnerable people. What would be the effect of that on the shared values that bind us as a society and in setting its "ethical tone"? As one of us (MAS) has repeatedly pointed out, we should not judge the ethical tone of a society by how it treats its strongest, most privileged, most powerful members, but rather by how it treats its weakest, most vulnerable and most in need. Dying people belong to the latter group.

Among the most dangerous aspects of legalizing euthanasia are the unintended boomerang effects it will have on the medical profession. The concept of "unanticipated consequences of purposive social action" is a well-described phenomenon in sociology. 39 In his classic paper, American sociologist Robert Merton distinguishes between the consequences of purposive actions that are exclusively the result of the action and those, unpredictable and often unintended, that are mediated by social structures, changing conditions, chance, and error. For example, with respect to euthanasia, there is really no guarantee that the legal and administrative

policies erected today, even if currently they functioned as intended, which is doubtful, will be as effective in a different cultural context decades hence.

Then there are the insidious changes induced by the force of habit: the unexamined and autonomic modes of human behavior. How will the legitimization of euthanasia and its insertion in the everyday professional vernacular and practice alter the ethos of medicine? The risks are of a grave nature and are immeasurable. How will the involvement of physicians in inflicting death affect their thinking, decisions, and day-to-day practice? Given that euthanasia may be routinized and expedient, there is a distinct possibility that death will become trivialized and that avenues for dignity-preserving care will remain unexplored. What are the potential corrosive effects on hospitals of accepting the language of euthanasia and in implementing that mandate? The language we use not only reflects reality but constructs reality. As German philosopher Martin Heidegger has said, “Language is the house of Being. In its home man dwells”. One can imagine that “H”, currently a symbol of hospice and hope, will become conflated with an “H” that stands for hollowness and hastened death. We have little doubt that the slippery slopes include a language of abandonment, generating medical practices that will vitiate hope, and a profession that will struggle to identify a true north on its moral compass.

Stalking ^[110]

Learning Objectives

- Identify the individuals covered by domestic violence statutes.
- Identify some of the special features of domestic violence statutes.
- Define the criminal act element required for stalking.
- Define the criminal intent element required for stalking and compare various statutory approaches to stalking criminal intent.
- Define the harm element required for stalking and compare various statutory approaches to ascertaining harm.
- Analyze stalking grading.

Domestic violence and stalking are modern crimes that respond to societal problems that have escalated in recent years. Domestic violence statutes are drafted to address issues that are prevalent in crimes between family members or individuals living in the same household. Stalking generally punishes conduct that is a precursor to assault, battery, or other crimes against the person.

Domestic Violence

Domestic violence statutes generally focus on criminal conduct that occurs between family members. Although family cruelty or interfamily criminal behavior is not a new phenomenon, enforcement of criminal statutes against family members can be challenging because of dependence, fear, and other issues that are particular to the family unit. In addition, historical evidence indicates that law enforcement can be reluctant to get involved in family disputes and often fails to adequately protect victims who are trapped in the same residence as the defendant. Specific enforcement measures that are crafted to apply to defendants and victims who are family members are an innovative statutory approach that many jurisdictions are beginning to adopt. In general, domestic violence statutes target crimes against the person, for example, assault, battery, sex offenses, kidnapping, and criminal homicide.

Domestic Violence Statutes' Characteristics

The purpose of many domestic violence statutes is equal enforcement and treatment of crimes between family members and maximum protection for the domestic violence victim (RCW § 10.99.010, 2011). Domestic violence statutes focus on individuals related by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together (Ariz. Rev. Stat. § 13-3601(A), 2011). Domestic violence statutes commonly contain the following provisions:

- Special training for law enforcement in domestic issues (RCW § 10.99.030, 2011)
- Protection of the victim by no-contact orders and nondisclosure of the victim's residence address (RCW § 10.99.040, 2011)
- Duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims (RCW § 10.99.060, 2011)
- Ability to arrest domestic violence offenders with or without a warrant (Ariz. Rev. Stat. § 13-3601(B), 2011)
- Special factors to consider in the sentencing of domestic violence defendants (RCW § 10.99.100, 2011)
- Peace officer immunity for enforcement of domestic violence provisions (Ariz. Rev. Stat. § 13,3601(G), 2011)

Stalking

California was the first state to enact a stalking law in 1990, in response to the high-profile murder of a young actress named Rebecca Schaeffer whose attacker stalked her for two years. Now all states and the federal government have stalking laws (18 U.S.C. § 2261A, 2011). Although statutes criminalizing stalking are gender-neutral, in reality, most stalking victims are women, and most stalking defendants are men.

Before the states enacted stalking laws, a victim who was threatened and harassed but not assaulted had no remedy except to go to court and obtain a restraining order. A restraining order is a court order mandating that the defendant neither contact nor come within a certain distance of the victim. If the defendant violated the restraining order, law enforcement could arrest him or her. Until a restraining order was in place, however, the defendant was free to continue frightening the victim. Restraining orders typically take some time to obtain. The victim must contact and employ an attorney and also set up a court hearing. For this reason, the restraining order method of preventing a defendant from stalking was cumbersome, ineffective, and frequently resulted in force or violence against the stalking victim.

The modern crime of stalking allows law enforcement to arrest and incapacitate defendants before they complete an assault, battery, or other violent crime against a victim. Like all crimes, stalking requires the defendant to commit a voluntary act supported by criminal intent. In many jurisdictions, stalking also has the elements of causation and harm.

Stalking Act

Various approaches have been made to criminalize stalking, and a plethora of descriptors now identify the stalking criminal act. In the majority of jurisdictions, the criminal act element required for stalking includes any course of conduct that credibly threatens the victim's safety, including following (Tex. Penal Code § 42.072, 2011), harassing (Cal. Penal Code § 646.9, 2011), approaching (Md. Code Ann. § 3-802, 2011), pursuing, or making an express or implied threat to injure the victim, the victim's family member (Ala. Code § 13A-6-90, 2011), or the victim's property (Tex. Penal Code § 42.072(a), 2011). In general, credible threat means the defendant has the apparent ability to effectuate the harm threatened (S. D. Codified Laws § 22-19A-6, 2011). The stalking criminal act is unique among criminal acts in that it must occur on more than one occasion or repeatedly (Colo. Rev. Stat. Ann. § 18-3-602, 2011). The popularity of social networking sites and the frequency with which defendants use the Internet to stalk their victims inspired many states to specifically criminalize cyberstalking, which is the use of the Internet or e-mail to commit the criminal act of stalking (Alaska Stat. § 11.41.270, 2011).

Example of a Case Lacking Stalking Act

Elliot tells Lisa on two separate occasions that he loves her. Lisa intensely dislikes Elliot and wants nothing to do with him. Although Elliot's proclamations of love are unwelcome, Elliot probably has not committed the criminal act element required for stalking. Elliot's behavior does not threaten Lisa's safety or the safety of her family members or property. Thus, Elliot may not be charged with and convicted of stalking in most jurisdictions.

Example of Stalking Act

Change the above example so that Elliot tells Lisa he loves her on one occasion. Lisa frowns and walks away. Elliot then follows Lisa and tells her that he will "make her pay" for not loving him. Lisa ignores Elliot's statement, climbs into her car, and drives away. Later that evening, Elliot rings Lisa's doorbell. Lisa does not answer the door but yells at Elliot, telling him to leave. Disgruntled and angry, Elliot carves, "you will die for not loving me" into Lisa's front door with his pocketknife.

Elliot's conduct could constitute the criminal act element required for stalking in most jurisdictions. In this example, Elliot has followed Lisa and approached her, which is a repeated course of conduct. On two occasions Elliot threatened Lisa: once by telling her he will "make her pay" and again by carving a death threat into her front door. Keep in mind that Elliot's threat to Lisa's safety must be credible in many jurisdictions. Thus, if Elliot is unable to actually harm Lisa for any reason, the trier of fact could find that he does not have the apparent ability to carry out his threat, and he could not be convicted of stalking.

Stalking Intent

The criminal intent element required for stalking also varies, depending on the jurisdiction. In most states, the defendant must commit the criminal act willfully or maliciously (Cal. Penal Code § 646.9, 2011). This indicates a specific intent or purposeful conduct. However, in states that require the victim to experience harm, a different criminal intent could support the harm offense element. States that include bad results or harm in their stalking statutes require either specific intent or purposely, general intent or knowingly, reckless intent, negligent intent, or strict liability (no intent) to cause the harm, depending on the state (Ncvc.org, 2011).

Example of Stalking Intent

Review the stalking act example in [Section 10 “Example of Stalking Act”](#) . In the majority of states, Elliot must make the threatening statement and carve the threatening message into Lisa’s front door willfully or maliciously . However, the requirement that Elliot act with the intent to cause Lisa’s reaction to this conduct varies, depending on the jurisdiction. In some jurisdictions, Elliot must act with the specific intent or purposely to cause Lisa to suffer the stalking harm, which is generally fear for bodily safety, the safety of family members, or fear of damage to Lisa’s property. In others, Elliot can act to cause Lisa’s fear with general intent or knowingly, reckless intent, or negligent intent. In some jurisdictions, Elliot’s purpose or awareness as to Lisa’s feeling of fear is irrelevant because strict liability is the intent supporting the harm or bad results requirement.

Stalking Causation

In jurisdictions that require harm for stalking, the defendant’s criminal act must be the factual and legal cause of the harm, which is defined in [Section 10 “Stalking Harm”](#) .

Stalking Harm

As stated previously, some states require a specific harm element in their stalking statutes. This element is defined differently depending on the state but generally amounts to victim fear . The fear is typically fear of bodily injury or death of the victim (Ala. Code § 13A-6-90, 2011) or of the victim’s family member (Alaska Stat. § 11.41.270, 2011), or damage to the victim’s property (Tex Penal Code § 42.072(a), 2011). States also employ different tests to ascertain the harm element. States can require subjective and objective fear (Tex. Penal Code § 42.072(a), 2011), just subjective fear (Alaska Stat. § 11.41.270, 2011), or just objective fear (Md. Code Ann. § 3-802, 2011). Subjective fear means the victim must actually experience fear. Objective fear means a reasonable victim under similar circumstances would experience fear.

Example of Stalking Harm

Review the stalking act example presented previously in this chapter. In jurisdictions that require subjective and objective victim fear as the harm element for stalking, Elliot must cause Lisa to experience fear that is reasonable under the circumstances. In a jurisdiction that requires only subjective victim fear, Elliot must cause Lisa to feel fear, either reasonably or unreasonably. In a jurisdiction that requires only objective fear, Elliot must act in a manner that would cause a reasonable victim under similar circumstances to experience fear. Keep in mind that if Lisa is aware of a circumstance that makes it unlikely that Elliot can carry out his threat, Elliot could not be convicted of stalking in a jurisdiction that requires Lisa to experience subjective fear.

Stalking Grading

Jurisdictions vary as to how they grade stalking. Many states divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a misdemeanor (Alaska Stat. §§ 11.41.260, 2011). Factors that could enhance grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking (Alaska Stat. § 11.41.260, 2011).

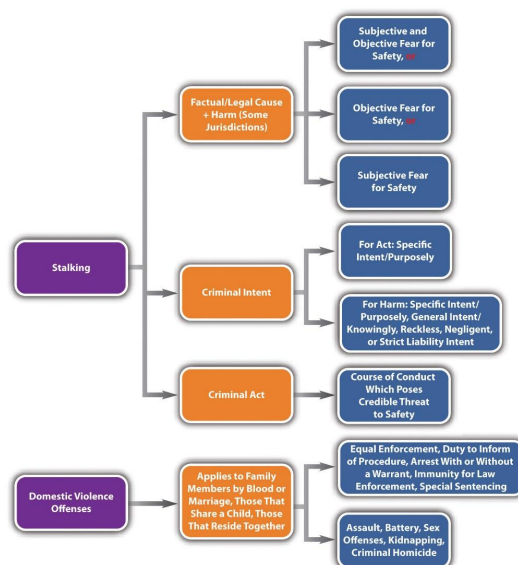


Figure 9.4 Diagram of Domestic Violence and Stalking

Key Takeaways

- Individuals covered by domestic violence statutes are relatives by blood or marriage, individuals who share a child, ex-spouses and ex-lovers, and individuals who reside together.
- Some special features of domestic violence statutes are special training for law enforcement in domestic issues, protection of the victim by no-contact orders and nondisclosure of the victim's residence address, the duty of law enforcement or prosecutors to inform the victim of the decision of whether to prosecute and the duty to inform the victim of special procedures available to protect domestic violence victims, the ability to arrest domestic violence offenders with or without a warrant, special factors to consider in the sentencing of domestic violence defendants, and peace officer immunity for enforcement of domestic violence provisions.
- The criminal act element required for stalking varies, but in general it is repeatedly engaging in a course of conduct that poses a credible threat to the victim's safety, including following, harassing, approaching, or pursuing the victim.
- The criminal intent supporting the stalking criminal act is specific intent or purposely in most jurisdictions. Some jurisdictions require a different criminal intent to support the harm requirement: either specific intent or purposely, general intent or knowingly, reckless intent, negligent intent, or strict liability.
- Some jurisdictions require the defendant to cause harm, which is victim fear of serious bodily injury, fear of death of the victim or the victim's family member, or damage to the victim's property. The test for victim fear varies and could be either subjective and objective fear, just subjective fear, or just objective fear.
- It is common to divide stalking into degrees or grade it as simple and aggravated. First-degree or aggravated stalking is generally graded as a felony, and second-degree or simple stalking is generally graded as a misdemeanor. Factors that can aggravate grading are the violation of a restraining or protective order, the use of a weapon, a youthful victim, or previous convictions for stalking.

Legalizing Marijuana ^[111]



Figure 9.5 Washington is one of several states where marijuana use has been legalized, decriminalized, or approved for medical use. ^[112]

Twenty-three states in the United States have passed measures legalizing marijuana in some form; the majority of these states approve only medical use of marijuana, but fourteen states have decriminalized marijuana use, and four states approve recreational use as well. Washington state legalized recreational use in 2012, and in the 2014 midterm elections, voters in Alaska, Oregon, and Washington DC supported ballot measures to allow recreational use in their states as well (Governing 2014). Florida's 2014 medical marijuana proposal fell just short of the 60 percent needed to pass (CBS News 2014).

The Pew Research Center found that a majority of people in the United States (52 percent) now favor legalizing marijuana. This 2013 finding was the first time that a majority of survey respondents supported making marijuana legal. A question about marijuana's legal status was first asked in a 1969 Gallup poll, and only 12 percent of U.S. adults favored legalization at that time. Pew also found that 76 percent of those surveyed currently do not favor jail time for individuals convicted of minor possession of marijuana (Motel 2014).

Even though many people favor legalization, 45 percent do not agree (Motel 2014). Legalization of marijuana in any form remains controversial and is actively opposed; Citizen's Against Legalizing Marijuana (CALM) is one of the largest political action committees (PACs) working to prevent or repeal legalization measures. As in many aspects of sociology, there are no absolute answers about deviance. What people agree is deviant differs in various societies and subcultures, and it may change over time.

Tattoos, vegan lifestyles, single parenthood, breast implants, and even jogging were once considered deviant but are now widely accepted. The change process usually takes some time and may be accompanied by significant disagreement, especially for social norms that are viewed as essential. For example, divorce affects the social institution of family, and so divorce carried a deviant and stigmatized status at one time. Marijuana use was once seen as deviant and criminal, but U.S. social norms on this issue are changing.

Use of Force ^[113]

Police officers have the power to use force if deemed necessary. If an officer uses more force than required for the situation, this brings up many red flags. The Violent Crime Control and Law Enforcement Act of 1994 authorized the Civil Rights Division of the U.S. Department of Justice (DOJ) to initiate civil actions against policing agencies if the use of force utilized is excessive or constitutes a pattern of depriving individuals of their rights.

One additional issue in police use of force situations is that it is difficult to measure. There are many types of force police can use. The force utilized varies from going hands-on to pepper spray, taser, ASP baton, control holds or takedowns, to deadly force. Every situation is different because it involves human beings and can be interpreted differently from those involved to those standing on the side-lines.

Types of Force ^[114]

Learning Objectives

- Ascertain the elements required for the defense of others.
- Define real and personal property.
- Explain the appropriate circumstances and degree of force a defendant can use when defending property.
- Ascertain the elements required for the defense of ejection of trespasser.
- Distinguish defense of property from defense of habitation.
- Ascertain the three elements required for the use of deadly force in defense of habitation under modern castle laws.
- Identify three common features of modern castle laws.
- 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. 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.

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

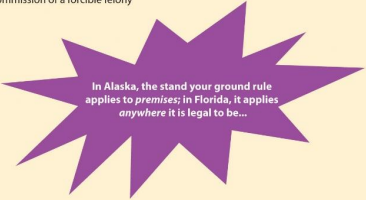
(1) **on premises**

(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 9.6 Crack the Code ^[115]

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

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.

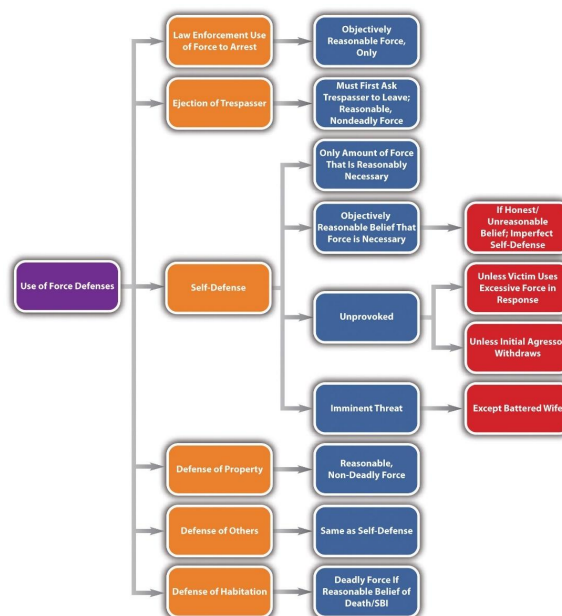


Figure 9.7 Diagram of Use-of-Force Defenses ^[116]

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.

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