CHAPTER OUTLINE

• Introduction
• Consent in Tort Law
• Self-Help Privileges
• The Defense of Sovereign Immunity
• The Defense of Official Immunity: The Personal Liability of Government Employees
• The Defense of Charitable Immunity
• The Defense of Intrafamily Tort Immunity

CHAPTER OBJECTIVES

After completing this chapter, you should be able to:
• Understand the distinction between privilege and immunity.
• List the elements of consent.
• Explain what is meant by self-help.
• Understand when self-defense is a valid defense to a tort.
• Understand when defense of others is a valid defense to a tort.
• Explain the distinction between private and public necessity.
• Understand when defense of property is a valid defense to a tort.
• Distinguish between sovereign immunity and official immunity.
• Know when the federal government has waived sovereign immunity under the Federal Tort Claims Act.
• Know when state governments waive sovereign immunity.
• Explain the distinction between governmental functions and proprietary functions in determining when local governments have waived sovereign immunity.
• Know when government employees are personally liable for common-law and constitutional torts they commit.
• Distinguish between absolute and qualified official immunity.
• Explain what are meant by charitable immunity and intrafamily tort immunity.
**INTRODUCTION**

A defense is the response of a party to a claim of another party, setting forth the reason(s) the claim should not be granted. Sometimes the defense is a simple denial (“I didn’t do it”). More often the response is more specific (e.g., “the law allowed me to do what I did because . . . ”). Throughout this text, we have studied defenses to specific torts, e.g., Chapter 17 (defenses to negligence) and Chapter 24 (defenses to defamation). In this chapter, almost all the defenses we will study apply to more than one tort.

Many defenses are privileges or immunities. A privilege is a justification for what would otherwise be wrongful or tortious conduct. A privilege is the right of an individual to act contrary to the right of another individual without being subject to tort or other liability. Self-defense is an example. Using physical force against another usually constitutes a battery. If, however, you used this force to protect yourself against attack, you may have a defense when you are sued for battery—the privilege of self-defense. Technically, a tort cannot exist if the defendant had a privilege to do what the plaintiff is now complaining about. An immunity, on the other hand, is a special protection given to someone who has committed a tort. Sovereign immunity is an example. Suppose, for example, that a government employee defames you. As we will see later, the defense of sovereign immunity may prevent you from suing the government for this tort, and the defense of official immunity may prevent you from suing the employee for this tort. The practical effect of privileges and immunities is the same: they both are defenses that prevent liability for damage or injury. Because of this similarity of effect, you will sometimes see the words “privilege” and “immunity” used interchangeably. Indeed, immunity is sometimes defined as protection from tort liability whether or not the defendant has committed a tort.

Privileges that are defenses to tort actions are different from evidentiary privileges that operate to prevent a jury from considering otherwise admissible evidence. Examples of evidentiary privileges are attorney-client privilege, doctor-patient privilege, and privilege against self-incrimination. In this chapter, we are concerned with the privileges that prevent tort liability.

**CONSENT IN TORT LAW**

A central principle of the law is *volenti non fit injuria*: no wrong is done to one who consents. If the plaintiff consented to the defendant’s conduct, the defendant should not be liable for the resulting harm. When the defendant is charged with negligence or strict liability in tort, the consent defense is the closely related concept of assumption of the risk, which we examined in Chapters 17 and 19. Here, our focus is consent as a defense to intentional torts such as assault, battery, and trespass.

Consent is a voluntary agreement or permission (express or implied) that something should happen or not happen. The basic elements of consent are presented in Exhibit 27–1.

**Exhibit 27–1** Elements of consent.

1. Plaintiff (P) must have the capacity to consent to the conduct of Defendant (D).
2. There is an express or implied manifestation from P of a willingness to let the conduct of D occur.
3. P’s willingness is voluntary.
4. D reasonably believes that P is willing to let D’s conduct occur.
5. P has knowledge of the nature and consequences of D’s conduct.
6. D’s conduct is substantially the same as the conduct P agreed to.

**Capacity to Consent**

The person giving consent must have the capacity to consent. A young girl, for example, may agree to sexual intercourse with an older male, but the latter can
still be guilty of statutory rape. If the girl later sues the male for battery in a civil case, the male cannot raise the defense of consent, just as he could not raise it in the criminal case of rape. The young girl does not have the capacity to consent if she is below the age designated by law. So too, there are statutes intended to protect children from working in dangerous conditions. If a child is injured in working conditions that violate the statute, the employer will not be able to say that the child consented to work there and took the risk of being injured—even if the child understood those risks and willingly proceeded. The statutes will be interpreted as taking away the child’s capacity to consent.

A person can also lack the capacity to consent by being too young or ill to understand the conduct involved. Unless an authorized parent or guardian gives consent for this person, the consent is invalid.

Suppose that the conduct to which consent is given is criminal conduct. Paul and Dan agree to a duel or boxing match that is a crime in the state. Both are prosecuted under criminal law. Paul then sues Dan for damages in a civil battery case. Dan’s defense is that Paul consented to being hit. Courts differ on how they handle this problem. Some hold that the consent is a defense, barring the civil action. Other courts, however, do not recognize the consent as valid on the theory that no one has the power or capacity to consent to a crime. Since the consent is invalid, the civil battery action can be brought. As a consequence, a plaintiff can receive damages growing out of a criminal act in which the plaintiff willingly participated. Of course, if both Paul and Dan were injured in their illegal fight with each other, each of them could sue the other for civil battery in a state where the consent will not be recognized.

### ASSIGNMENT 27.1

Henry and Fred are having an argument. Henry is about to hit Fred with a baseball bat. In response, Fred punches Henry with his fist and breaks Henry’s jaw. While Henry is unconscious on the ground, Fred stabs him in the leg. Henry later sues Fred for injury to his leg in a civil battery case. Fred raises the defense of consent. What result and why?

### Manifestation of Willingness

A person can demonstrate or manifest willingness in a variety of ways. There can be an express manifestation such as telling someone he or she can enter the land or use a car. Written or verbal manifestation is not always needed. The wave of a hand can indicate consent to come on one’s land. Consent by silence is also common if the person would normally be expected to speak if he or she objected to conduct about to occur. If a trespasser enters your yard and you fail to object or fail to take steps to remove the individual, your silence or nonaction is strong evidence that you do not object. This is an implied consent. If you voluntarily agree to play football, you are implying consent to the kind of rugged contact that is usually associated with this sport. If you walk downtown into a crowded store, you are implying consent to the kind of everyday contact that is normal in crowds.

### ASSIGNMENT 27.2

At a college dance, Jessica asks Dan, a stranger, to dance. After the dance, Jessica kisses Dan on the cheek and walks away. Dan sues Jessica for battery. Does she have a defense?
Voluntariness

If the plaintiff has been coerced into agreeing to the defendant’s conduct, the consent is invalid. Coercion is compelling something by force or threats and thereby overcoming free will by undue influence. Coercion renders consent involuntary, invalidating the defense. When, for example, you hand over your wallet at the point of a gun, you have not consented to the conversion of your wallet. Suppose that a foreign passenger about to enter port does not want to be vaccinated, but nevertheless rolls up her sleeve to the doctor injecting the vaccine. Her conduct led the doctor to believe that she consented. She may have been under pressure to be vaccinated in order to avoid the hassle of being detained at port, yet the consent was still the product of a free will. The consent was voluntary.

Extreme or drastic pressure, however, can be enough to invalidate consent, e.g., a threat of force against the plaintiff or a member of the plaintiff’s family, or a threat against the valuable property of the plaintiff. The plaintiff’s agreement as a result of such pressure would probably not be voluntary.

Coercion
Compelling something by force or threats; overpowering another’s free will by undue influence.

Assignment 27.3
Tom calls Linda on the phone and tells her that he has her very valuable painting, which he will destroy if she does not come to his apartment and engage in sexual intercourse. Linda is frantic about the painting. She goes to his apartment and has sex with him. He then gives her the painting. Later, she brings a civil battery action against him. Does he have a defense? Would it make any difference if his threat was to harm Linda’s neighbor?

Reasonable Belief

The defendant must be reasonable in believing that the plaintiff has consented to the conduct in question. Problems often arise when the defendant claims to have relied on the plaintiff’s implied consent. Suppose that the defendant has always played practical jokes on the plaintiff, to the latter’s great amusement, e.g., squirting the plaintiff with a water pistol or pretending to steal the plaintiff’s hat. It would be reasonable for the defendant to believe that the plaintiff would continue to agree to such jokes as long as they were of the same kind as practiced in the past. If the plaintiff has decided that enough is enough and does not want to be subjected to such jokes anymore, he or she must communicate this to the defendant. Otherwise, the defendant is justified in believing that plaintiff continues to consent. The test of consent is not what the plaintiff subjectively thinks, but what someone reasonably interprets the plaintiff to be communicating based upon the latter’s words, actions, silence, and any relevant cultural customs in the area on how people normally interpret each other’s behavior.

Assignment 27.4
Mary is riding in her car when she spots Alex injured on the side of the road. Mary pulls over to try to help. She sees that his arm is broken and puts it in a sling. Later, Alex sues Mary for battery. Does she have a defense? Does it make any difference that Mary is a doctor? Why or why not?
Knowledge

The plaintiff must know what conduct is being consented to and its probable consequences in order for the consent to be an effective bar to a later tort action against the defendant. If a doctor obtains the consent of a patient to undergo an operation, but fails to tell the patient of the very serious probable side effects of the operation, the patient has not consented to the operation. The defendant has not provided the patient with the basic knowledge to enable the patient to give an informed consent. As we saw in Chapter 18, if an emergency exists, the doctor can proceed with treatment to save the patient's life or to avoid serious further injuries if it is not possible or practical to obtain the patient's consent and the doctor does not have an express prior direction to the contrary from the patient.

Consent obtained by trickery or misrepresentation is not effective. The classic case is the plaintiff who buys candy that turns out to be poisoned. The implied representation of the seller is that the candy is wholesome. The plaintiff consented to eat candy, not poison. So too if the defendant entices the plaintiff to play a game of ice hockey in order to get the plaintiff into a position where the defendant can intentionally cut the plaintiff with skates, the defendant cannot later claim that the plaintiff consented to such contact. The plaintiff’s consent was obtained by misrepresentation.

When the plaintiff has made a mistake about what he or she is consenting to, it is important to know whether the defendant caused the plaintiff’s mistake and whether the defendant knew about it. If the mistake was not caused by and was not known to the defendant, the consent is still valid as long as the defendant was reasonable in believing that the consent was valid.

EXAMPLE
Mary tells her assistant to let Ted know that he cannot drive over the portion of Mary’s land where she is building a golf course. By mistake, however, the assistant tells Ted that he can drive there. When he does so, Mary sues him for trespass. Ted’s defense of consent will defeat the action so long as he did not know that a mistake was made, did not procure or cause the mistake by Mary’s assistant, and was reasonable in believing that the permission (consent) was valid.

Substantially the Same Conduct

If the defendant’s conduct deviates in a minor way from the conduct the plaintiff consented to, the consent is still effective. The deviation must be substantial for the consent to be invalid. If, for example, the plaintiff agrees to let the defendant throw a bucket of water on him or her, the consent is still effective if the same approximate amount of water is poured on the plaintiff by using a garden hose. The defendant’s conduct is substantially different, however, if the bucket of water contains rocks, unknown to the plaintiff.

Sexual fidelity can sometimes raise consent issues.

EXAMPLE
Thomas and Mary Neal are married. They engage in sexual relations during a time when Thomas is having an affair. When Mary finds out about the affair, she brings a battery action against Thomas for those times they had sexual relations while the affair was going on. Tom’s defense is that Mary consented to these relations. (Assume that the intrafamily tort immunity discussed in Chapter 22 does not apply.)

If Mary had known of Thomas’s sexual involvement with another woman, she says she would not have consented to continue having sex with him since sexual relations
ASSIGNMENT 27.5

In the example of Thomas and Mary Neal, assume that several weeks after Mary found out about Thomas’s affair, she resumed sexual relations with her husband. Later, however, she still sues him for battery to cover the time they had sexual relations when she was unaware of the affair. Does Thomas now have a better argument that her consent was valid during this time?

under those circumstances would have been offensive to her. Therefore, his failure to disclose the fact of the affair rendered her consent ineffective.¹

The defendant must substantially comply with any restrictions or conditions imposed on the consent by the plaintiff that are communicated to the defendant. If, for example, the plaintiff tells the defendant that he or she can cut one truckload of timber from the plaintiff’s land on January 3 or 4, the defendant will be liable for trespass to land if he or she cuts three truckloads on those dates, or if any timber is cut on January 10.

ASSIGNMENT 27.6

Ted and Maureen agree to have sexual intercourse. Maureen gets a venereal disease from Ted and sues him for battery. How, if at all, would the following factors affect Ted’s defense of consent?

a. Ted was a prostitute and Maureen knew it.
b. Ted led Maureen to believe that he was a virgin.
c. Ted and Maureen confided to each other that both had had many lovers before.
d. Ted lied to Maureen about wanting to marry her.
e. Maureen lied to Ted about wanting to marry him.
f. This was the first time Ted and Maureen met.
g. Ted and Maureen are married to each other.

CASE

Peterson v. Sorlien
299 N.W.2d 123 (1980)
Supreme Court of Minnesota

Background: Susan Jungclaus Peterson joined a religion called The Way Ministry. Her father, Norman Jungclaus, enlisted the support of Susan’s former minister, Paul Sorlien, and of deprogrammers to try to separate her from what the father believed was a cult. Later Susan sued for false imprisonment. The lower courts dismissed the suit. The case is now on appeal in the Supreme Court of Minnesota.

Decision on Appeal: Judgment affirmed. There was no false imprisonment.

OPINION OF COURT

Chief Justice SHERAN delivered the opinion of the court . . .

This action by plaintiff Susan Jungclaus Peterson for false imprisonment . . . arises from an effort by her parents . . . to prompt her disaffiliation from an organization known as The Way Ministry. . . . [T]his case marks the emergence of a new cultural phenomenon: youth-oriented religious or pseudoreligious groups which utilize the techniques of what has been termed “coercive persuasion” or “mind control” to cultivate an uncritical and devoted following. Commentators have used the term “coercive persuasion,” originally coined to identify the experience of American prisoners of war during the Korean conflict to describe the cult-induction process. The word “cult” is not used pejoratively but in its dictionary sense to describe an unorthodox system of belief characterized by “[g]reat or excessive devotion or dedication to some person, idea, or thing.” Webster’s New International Dictionary of the English Language Unabridged 552 (1976). Coercive persuasion is fostered through the creation of a controlled environment that heightens the susceptibility of a subject to suggestion and manipulation through sensory deprivation,
physiological depletion, cognitive dissonance, peer pressure, and a clear assertion of authority and dominion. The aftermath of indoctrination is a severe impairment of autonomy and the ability to think independently, which induces a subject’s unyielding compliance and the rupture of past connections, affiliations and associations. See generally Delgado, Religious Totalism: Gentle and Ungentle Persuasion under the First Amendment, 51 Southern California Law Review 1 (1977). One psychologist characterized the process of cult indoctrination as “psychological kidnapping.” Id. at 23.

At the time of the events in question, Susan Jungclaus Peterson was 21 years old. For most of her life, she lived with her family on a farm near Bird Island, Minnesota. In 1973, she graduated with honors from high school, ranking second in her class. She matriculated that fall at Moorhead State College. A dean’s list student during her first year, her academic performance declined and her interests narrowed after she joined the local chapter of a group organized internationally and identified locally as The Way of Minnesota, Inc.

The operation of The Way is predicated on the fundraising activities of its members. The family’s fund-raising strategy centers upon the sale of pre-recorded learning programs. Members are instructed to elicit the interest of a group of ten or twelve people and then play for them, at a charge of $85 per participant, a taped introductory course produced by The Way International. Advanced tape courses are then offered to the participants at additional cost, and training sessions are conducted to more fully acquaint recruits with the orientation of the group and the obligations of membership. Recruits must contribute a minimum of 10 percent of their earnings to the organization; to meet the tithe, student members are expected to obtain part-time employment. Members are also required to purchase books and other materials published by the ministry, and are encouraged to make larger financial contributions and to engage in more sustained efforts at solicitation.

By the end of her freshman year, Susan was devoting many hours to The Way, listening to instructional tapes, soliciting new members and assisting in training sessions. As her sophomore year began, Susan committed herself significantly, selling the car her father had given her and working part-time as a waitress to finance her contributions to The Way. Susan spent the following summer in South Dakota, living in conditions described as appalling and overcrowded, while recruiting, raising money and conducting training sessions for The Way.

As her junior year in college drew to a close, the Jungclaus grew increasingly alarmed by the personality changes they witnessed in their daughter; overly tired, unusually pale, distraught, and irritable, she exhibited an increasing alienation from family, diminished interest in education and decline in academic performance. The Jungclaus, versed in the literature of youth cults and based on conversations with former members of The Way, concluded that through a calculated process of manipulation and exploitation Susan had been reduced to a condition of psychological bondage.

On May 24, 1976, defendant Norman Jungclaus, father of plaintiff, arrived at Moorhead to pick up Susan following the end of the third college quarter. Instead of returning to their family home, defendant drove with Susan to Minneapolis to the home of Veronica Morgel. Entering the home of Mrs. Morgel, Susan was greeted by Kathy Mills and several young people who wished to discuss Susan’s involvement in the ministry. Each of those present had been in some way touched by the cult phenomenon. Kathy Mills, the leader of the group, had treated a number of former cult members, including Veronica Morgel’s son. It was Kathy Mills, a self-styled professional deprogrammer, to whom the Jungclaus turned, and intermittently for the next sixteen days, it was in the home of Veronica Morgel that Susan stayed.

The avowed purpose of deprogramming is to break the hold of the cult over the individual through reason and confrontation. Initially, Susan was unwilling to discuss her involvement; she lay curled in a fetal position in the downstairs bedroom where she first stayed, plugging her ears and crying while her father pleaded with her to listen to what was being said. This behavior persisted for two days during which she intermittently engaged in conversation, at one point screaming hysterically and flailing at her father. But by Wednesday Susan’s demeanor had changed completely; she was friendly and vivacious and that night slept in an upstairs bedroom. Susan spent all day Thursday reading and conversing with her father and on Saturday night went roller-skating. On Sunday she played softball at a nearby park, afterwards enjoying a picnic lunch. The next week Susan spent in Columbus, Ohio, flying there with a former cult member who had shared with her the experiences of the previous week. While in Columbus, she spoke every day by telephone to her fiancé who, playing tapes and songs from the ministry’s headquarters in Minneapolis, begged that she return to the fold. Susan expressed the desire to extricate her fiancé from the dominion of the cult.

Susan returned to Minneapolis on June 9. Unable to arrange a controlled meeting so that Susan could see her fiancé outside the presence of other members of the ministry, her parents asked that she sign an agreement releasing them from liability for their past weeks’ actions. Refusing to do so, Susan stepped outside the Morgel residence with the puppy she had purchased in Ohio, motioned to a passing police car and shortly thereafter was reunited with her fiancé in the Minneapolis headquarters of The Way. Following her return to the ministry, she was directed to counsel and initiated the present action.

Plaintiff [alleges] that defendants unlawfully interfered with her personal liberty by words or acts which induced a reasonable apprehension that force would be used against her if she did not otherwise comply. The jury, instructed that an informed and reasoned consent is a defense to an allegation of false imprisonment and that a nonconsensual detention could be deemed consensual if one’s behavior so indicated, exonerated defendants with respect to the false imprisonment claim.

The period in question began on Monday, May 24, 1976, and ceased on Wednesday, June 9, 1976, a period of 16 days. The record clearly demonstrates that Susan willingly remained in the company of defendants for at least 13 of those days. During that time she took many excursions into the public sphere, playing softball
and picnicking in a city park, roller-skating at a public rink, flying aboard public aircraft and shopping and swimming while relaxing in Ohio. Had Susan desired, manifold opportunities existed for her to alert the authorities of her allegedly unlawful detention; in Minneapolis, two police officers observed at close range the softball game in which she engaged; en route to Ohio, she passed through the security areas of the Twin Cities and Columbus airports in the presence of security guards and uniformed police; in Columbus she transacted business at a bank, went for walks in solitude and was interviewed by an F.B.I. agent who sought assurances of her safety. At no time during the 13-day period did she complain of her treatment or suggest that defendants were holding her against her will. If one is aware of a reasonable means of escape that does not present a danger of bodily or material harm, a restriction is not total and complete and does not constitute unlawful imprisonment. Damages may not be assessed for any period of detention to which one freely consents.

In his summation to the jury, the trial judge instructed that to deem consent a defense to the charge of false imprisonment for the entire period or for any part therein, a preponderance of the evidence must demonstrate that such plaintiff voluntarily consented. The central issue for the jury, then, was whether Susan voluntarily participated in the activities of the first three days. The jury concluded that her behavior constituted a waiver.

We believe the determination to have been consistent with the evidence. See Faniel v. Chesapeake & Potomac Telephone Co., 404 A.2d 147 (D.C. 1979); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); F. Harper & F. James, The Law of Torts § 3.10, at 235 (1956). Were the relationship other than that of parent and child, the consent would have less significance.

To determine whether the findings of the jury can be supported upon review, the behavior Susan manifested during the initial three days at issue must be considered in light of her actions in the remainder of the period. Because, it is argued, the cult conditioning process induces dramatic and non-consensual change giving rise to a new temporary identity on the part of the individuals whose consent is under examination, Susan's volitional capacity prior to treatment may well have been impaired. Following her readjustment, the evidence suggests that Susan was a different person, “like her old self.” As such, the question of Susan's consent becomes a function of time. We therefore deem Susan’s subsequent affirmation of defendants’ actions dispositive.

In Weiss v. Patrick, 453 F. Supp. 717 (D. R.I.), aff'd, 588 F.2d 818 (1st Cir. 1978), the federal district court in Rhode Island confronted a situation similar to that which faces us. Plaintiff, a devotee of the Unification Church, brought an action for false imprisonment against individuals hired by her parents to prompt her disassociation from the church. Because plaintiff's mother was dying of cancer, the church authorities permitted her to join her family for the Thanksgiving holiday. Met at the airport by her mother, she testified that she was restrained against her will in the home of one of the defendants and subjected to vituperative attacks against the church until she seized an opportunity to flee. Despite the evidently traumatic experience sustained by plaintiff, the district court found that she failed to demonstrate a meaningful deprivation of personal liberty, reasoning that “any limitation upon personal mobility was not her primary concern.” Id. at 722. In so reasoning, the court underscored a parental right to advocate freely a point of view to one's child, “be she minor or adult.” To assure freedom, the court observed, “the right of every person ‘to be left alone’ must be placed in the scales with the right of others to communicate.” Id. (quoting Rowan v. United States Post Office Department, 397 U.S. 728, 736, 90 S. Ct. 1484, 1490, 25 L. Ed. 2d 736 (1970)).

In light of our examination of the record and rules of construction providing that upon review the evidence must be viewed in a manner most favorable to the prevailing party, we find that a reasonable basis existed for the verdict exonerating defendants of the charge of false imprisonment. Although carried out under colorably religious auspices, the method of cult indoctrination, viewed in a light most favorable to the prevailing party, is predicated on a strategy of coercive persuasion that undermines the capacity for informed consent. While we acknowledge that other social institutions may utilize a degree of coercion in promoting their objectives, none do so to the same extent or intend the same consequences. Society, therefore, has a compelling interest favoring intervention. The facts in this case support the conclusion that plaintiff only regained her volitional capacity to consent after engaging in the first three days of the deprogramming process. As such, we hold that when parents, or their agents, acting under the conviction that the mental capacity of their adult child is impaired, seek to extricate that child from what they reasonably believe to be a religious or pseudo-religious cult, and the child at some juncture assents to the actions in question, limitations upon the child's mobility do not constitute meaningful deprivations of personal liberty sufficient to support a judgment for false imprisonment. But owing to the threat that deprogramming poses to public order, we do not endorse self-help as a preferred alternative. In fashioning a remedy, the First Amendment requires resort to the least restrictive alternative so as to not impinge upon religious belief. Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 2d 1213 (1940). . . .

Affirmed.

Justice WAHL (dissenting in part).

I must respectfully dissent. In every generation, parents have viewed their children’s religious and political beliefs with alarm and dismay if those beliefs were different from their own. Under the First Amendment, however,
adults in our society enjoy freedoms of association and belief. In my view, it is unwise to tamper with those freedoms and with longstanding principles of tort law out of sympathy for parents seeking to help their “misguided” offspring, however well-intentioned and loving their acts may be. . . .

Any imprisonment “which is not legally justifiable” is false imprisonment, Kleidon v. Glascock, 215 Minn. 417, 10 N.W.2d 394 (1943); therefore, the fact that the tort-feasor acted in good faith is no defense to a charge of false imprisonment. . . . The majority opinion finds, in plaintiff’s behavior during the remainder of the 16-day period of “deprogramming,” a reasonable basis for acquitting [her father] of the false imprisonment charge for the initial three days, during which time he admittedly held plaintiff against her will. Under this theory, plaintiff’s “acquiescence” in the later stages of deprogramming operates as consent which “relates back” to the events of the earlier three days, and constitutes a “waiver” of her claim for those days. . . . Certainly, parents who disapprove of or disagree with the religious beliefs of their adult offspring are free to exercise their own First Amendment rights in an attempt, by speech and persuasion without physical restraints, to change their adult children’s minds. But parents who engage in tortious conduct in their “deprogramming” attempts do so at the risk that the deprogramming will be unsuccessful and the adult children will pursue tort remedies against their parents. To allow parents’ “conviction that the judgmental capacity of their [adult] child is impaired [by her religious indoctrination]” to excuse their tortious conduct sets a dangerous precedent.

Here, the evidence clearly supported a verdict against Norman Jungclaus on the false imprisonment claim. . . .

**ASSIGNMENT 27.7**

a. Explain why the court said Susan consented to the confinement during the first three days. Is the court saying that she did not have the capacity to consent during these three days? Or is the court saying that there really was no confinement during these three days?

b. Susan’s parents asked her to sign an agreement releasing them from liability for their past weeks’ actions. Suppose she had signed. Would the agreement have had legal effect?

c. Can you falsely imprison someone who is mentally retarded?

d. Does this opinion set good social policy? Why or why not?

## SELF-HELP PRIVILEGES

When serious conflict arises, our society encourages people to use the legal system—the police and the courts—to resolve the conflict. In effect, we say, “Don’t take the law into your own hands; tell it to a judge!” There are situations, however, where it simply is not practical to ask the courts to intervene. A person may need to act immediately to protect an interest or a right. Such immediate, protective action is called **self-help**. It consists of acting on one’s own to prevent or correct the effects of a tort or other wrong without using the courts or other public authority. Self-help is a form of **extrajudicial** enforcement. It is justified when there is a privilege to act without first obtaining the permission or involvement of the legal system.

We shall consider nine self-help privileges:

1. self-defense
2. defense of others
3. necessity
4. abating a nuisance
5. defense of property
6. recapture of chattels
7. retaking possession of land forcibly
8. discipline
9. arrest

The question often arises whether a defendant loses the protection of a privilege because the defendant has made a mistake. As we shall see, some reasonable
mistakes do not destroy the privilege, whereas other mistakes—even if reasonably made—do destroy it.

**Self-Defense**

The privilege of self-defense is the use of reasonable force to prevent an immediate harmful or offensive contact against you by someone who is making an apparent threat of this contact. In short, it is the right to protect yourself from immediate physical harm. (Occasionally self-defense has a broader meaning—protecting one’s property as well as one’s person. Later we will consider the former separately as defense of property.) If you are in your residence, you do not have to retreat before inflicting deadly force or serious bodily harm in self-defense if this response is otherwise reasonable. If you are not in your residence, states differ on whether you must retreat before inflicting death or serious bodily harm in self-defense. The threat must be immediate (today, you cannot hit someone who has threatened to hurt you tomorrow) and the force used to prevent the threat must be reasonable (you cannot shoot someone who has threatened to blow smoke in your face). Aside from the rule on residences, you cannot inflict death or great bodily harm unless you are threatened with death or serious bodily harm yourself.

What happens if you make a mistake in trying to protect yourself?

**EXAMPLE**

Nathan sees Diana running toward him with a raised baseball bat. Thinking that she is going to hit him, Nathan throws a brick at Diana, breaking her leg. In fact, unknown to Nathan, Diana was simply expressing jubilation after just coming from a softball game that her team won.

Nathan acted in self-defense, but he made a mistake. There was no actual threat to him from Diana. In most states, the defense is not lost if this mistake was reasonable as to the amount of force needed for self-protection or, indeed, as to whether any protection was needed.

Exhibit 27–2 presents an overview of the elements of the privilege of self-defense, the effect of a mistake, examples of the kinds of torts to which this privilege can be used as a defense, examples of paralegal interviewing and investigation tasks to uncover facts that are relevant to proving that the privilege applies (including the reasonableness of mistakes), and a list of facts that could make it impossible to use the privilege.

**ASSIGNMENT 27.8**

In the following situations, assess whether the defendant can successfully use the privilege of self-defense.

a. Richard raises his cane over his head and shouts at Gary, saying, “If my daughter wasn’t here with me, I’d smash you in the head.” Gary is afraid. He grabs Richard’s cane and knocks him down. Richard then sues Gary for battery.

b. Jane asks Clayton to leave Jane’s store because she does not like the style of Clayton’s hair. Clayton refuses to leave. Jane comes at Clayton with a broom. Jane is over twenty-five feet away and walks with a cane. As Jane approaches, Clayton shoots her. Jane sues Clayton for battery.

c. Lou is in Robin’s home. Lou starts yelling obscenities at Robin in front of Robin’s family. Lou spits in Robin’s face and throws Robin’s coat out the window. Just as Lou is about to spit in Robin’s face again, Robin stabs Lou. Lou sues Robin for battery.
**Defense of Others**

We are also allowed to defend others. The privilege of the defense of others is the use of reasonable force to prevent an immediate harmful or offensive contact against a third person by someone who is making an apparent threat of this contact. This privilege is similar to self-defense in that the threat must be immediate and the use of force must be proportionate to the threat. A major distinction between the two privileges concerns the effect of a mistake. As we just saw, the privilege of self-defense is not lost if you make a reasonable mistake in what you thought was needed to protect yourself. Suppose, however, you make a mistake when trying to protect a third person.
**EXAMPLE**

Dan sees that Paul is about to knock Bill down. To prevent this, Dan runs over and pushes Paul away. Paul sues Dan for battery. Dan raises the defense of the defense of others—Dan was trying to prevent Paul from harming Bill. Unknown to Dan, however, Bill had just pulled a knife on Paul. Paul was acting in self-defense when he was about to knock Bill down. Hence, Paul had a privilege to harm Bill.

In this case, the third person—Bill—was the aggressor against Paul. Dan didn’t know this. He made a mistake. Does this mistake mean that Dan loses the defense of defense of others? Yes, in most states. Even a reasonable mistake will not save Dan. When you intervene to protect a third person, you take the risk that this third person has no right to be protected. In a minority of states, however, a reasonable mistake will preserve the defense. In our example, if Dan was reasonable in thinking that Bill needed protection, Dan can use the defense of defense of others to defeat Paul’s battery action against him. But this is so only in a minority of states.

Exhibit 27–3 presents an overview of the elements of this privilege, the effect of mistake on the privilege, examples of the kinds of torts to which this privilege

<table>
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<tr>
<th>Elements of the Privilege of Defense of Others</th>
<th>Effect of Mistake on the Privilege</th>
<th>The Torts Involved (Examples)</th>
<th>Paralegal Tasks: What to Find Out Through Interviewing and Investigation</th>
<th>Facts That Destroy the Privilege</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Belief by D that P will immediately inflict harmful or offensive contact on a third person. (The third person does not have to be a member of D’s family.)</td>
<td>In most states, if D makes a mistake on whether P is about to inflict an immediate harmful or offensive contact on the third person, the defense is lost even if the mistake was reasonable under the circumstances.</td>
<td>Battery • P is about to hit a third person. D sees this and hits P to prevent P’s attack on the third person. P sues D for battery. D can raise the defense of defense of others.</td>
<td>Has P threatened the third person in the past? • Has P hit the third person in the past? • Does P have a reputation for aggressiveness? • What age and strength differences appear to exist between P and the third person? Between P and D?</td>
<td>D’s response was disproportionate to the harm P was threatening the third person with. • P’s threat was to impose future harm on the third person.</td>
</tr>
<tr>
<td>b. Reasonable force used by D with the intent to prevent P from carrying out the apparent threat of an immediate harmful or offensive contact on the third person.</td>
<td>In a minority of states, D’s mistake was reasonable under the circumstances.</td>
<td>Assault • P is about to hit a third person. D sees this and threatens to hit P if D does not stop. P sues D for assault. D can raise the defense of defense of others.</td>
<td>How much time appeared to exist before P would carry out P’s threat against the third person? • Was P’s threat against the third person immediate or for the future?</td>
<td>P was merely insulting the third person and not threatening the latter with immediate harm.</td>
</tr>
<tr>
<td>c. On the amount of force that D can use, D stands in the shoes of the third person. D can use the amount of force that the third person could have reasonably used to protect him or herself. This could include deadly force only if the third person was in danger of death or serious bodily harm from P.</td>
<td>Has P hit the third person? • Does P appear to be bluffing?</td>
<td>False Imprisonment and Battery • P is about to hit a third person. D sees this and locks P in a “bear hug” until the third person can escape. P sues D for false imprisonment and for battery. D can raise the defense of defense of others.</td>
<td>D knew P was bluffing. • D was acting out of revenge and not to prevent immediate harm to the third person.</td>
<td>In most states, D loses the privilege if D made a mistake and the third person turns out to have been the aggressor against P. This is so even if the mistake was reasonable. In a minority of states, however, the privilege is not lost if D’s mistake was reasonable.</td>
</tr>
</tbody>
</table>
can be used as a defense, examples of paralegal interviewing and investigation tasks to uncover facts that are relevant to proving that the privilege applies, and a list of facts that could make it impossible to use the privilege.

Necessity

Necessity is the privilege to make a reasonable use of the property of others to avoid immediate harm or damage to persons or property. The property can be personal property or real property.

**Examples**

Without permission, you use a stranger’s car to drive a member of your family to the emergency room of a hospital.

Without permission, you bulldoze a wide path over the crops of a neighbor in order to stop the spread of a fire that is headed toward the town on the other side of the neighbor’s field containing the crops.

When you use someone’s property in this way, do you have to compensate them for any damage that you do? The answer depends on the kind of necessity that existed. You must provide compensation if a private necessity existed. This is the privilege to make a reasonable use of someone’s property to avoid immediate private harm or damage. The use of the car in the first example demonstrates a private necessity. You were trying to protect a member of your family. A public necessity, on the other hand, is the privilege to make a reasonable use of someone’s property to avoid immediate public harm or damage. This was the case in the second example. There was a danger of the town going up in flames—clearly a public danger. There is no requirement to provide compensation to someone whose property is used to prevent public harm or danger. In many states, however, special statutes exist that provide compensation in these cases, particularly when the damage is done by public employees such as the police or fire department.

Exhibit 27–4 presents an overview of the elements of the privilege of necessity, examples of the kinds of torts to which the privilege can be used as a defense, examples of paralegal interviewing and investigation tasks to uncover facts that are relevant to proving that the privilege applies, and a list of facts that could make it impossible to use the privilege.

**ASSIGNMENT 27.9**

Tom has a highly contagious disease. He has no money to buy medicine and no hospitals are in the area. Tom breaks into a doctor’s office at night and steals what he thinks is medicine that will help. In fact, he takes the wrong medicine. The doctor sues Tom for conversion. Does Tom have a defense? If Tom has a defense, does he still have to pay the doctor for losses sustained due to the break-in?

Abating a Nuisance

There are times when a defendant has a privilege to enter someone’s land in order to abate a nuisance. This is the privilege to take reasonable steps to correct a nuisance that is interfering with the use and enjoyment of your land. The privilege is a defense to the tort of trespass to land. For a discussion of this privilege, see Chapter 23.
Exhibit 27–4 An overview of the privilege of necessity.

<table>
<thead>
<tr>
<th>Elements of the Privilege of Necessity</th>
<th>The Torts Involved (Examples)</th>
<th>Paralegal Tasks: What to Find Out Through Interviewing and Investigation</th>
<th>Facts That Destroy the Privilege</th>
</tr>
</thead>
</table>
| a. Reasonable belief by D that persons or property will be immediately harmed or damaged. | Conversion  
D destroys P’s liquor to prevent it from getting into the hands of an invading army. P sues D for conversion. D can raise the defense of public necessity and avoid paying P for the loss D caused.  
Conversion  
D is injured in a car accident and uses P’s scarf as a tourniquet. The scarf is ruined. P sues D for conversion. D can raise the defense of private necessity, but must compensate P for any damage done to P’s scarf.  
Trespass to Land  
D runs onto P’s land to escape a bear. P sues D for trespass to land. D can raise the defense of private necessity but must compensate P for any damage D does to P’s land, e.g., to a fence. | • What alternatives, if any, were available to D and how realistic were they?  
• How much time did D have to act?  
• How much damage did D do?  
• What were the indications that the public was in danger (for public necessity)?  
• Did D seek advice on what to do—if any time was available? | • D’s belief in the existence of the danger was unreasonable.  
• D’s use of P’s personal or real property was disproportionate to the danger. (For example, D cannot blow up P’s house to prevent the spread of a fire when the fire is minor and water is easily available to put it out.) |
| b. Reasonable use by D of the personal or real property of another to avoid the immediate harm or damage to the persons or property. | | | |

**Defense of Property**

The privilege of the defense of property is the right to use reasonable force to prevent a present interference with the possession of your personal or real property or to end an interference with such property that just started. You cannot use deadly force, however, to protect your property. This kind of force was one of the main issues in the Katko case we will examine shortly.

There are two major kinds of mistakes that can occur when trying to use this privilege:

- mistake about the amount of force needed to protect your possession, and
- mistake about whether you had the right to possess the property you protected.

A reasonable mistake about the amount of force needed will not defeat the privilege. Any mistake, however, about your right to possession will defeat the privilege, regardless of how reasonable your mistake might have been.

**EXAMPLE**

Dan buys a painting from Kevin, a reputable art dealer, not knowing that Kevin stole the painting from Peter. When Peter sees the painting on Dan’s wall, Peter starts to take the painting off the wall. To prevent this, Dan pushes Peter away. Peter sues Dan for battery.

In the battery action, Dan cannot use the defense of defense of property. He made a reasonable mistake in believing that he had a right to possess the painting since he bought it from a reputable dealer without knowing the dealer was a thief. Mistakes about the right to possession, however, destroy the privilege to defend
property—even reasonable mistakes. The only exception would be if the person with the superior right to possession caused the other person to make the mistake.

Exhibit 27–5 presents an overview of the elements of this privilege, the effect of mistake on the privilege, examples of the kinds of torts to which this privilege can be used as a defense, examples of paralegal interviewing and investigation tasks to uncover facts that are relevant to proving that the privilege applies, and a list of facts that could make it impossible to use the privilege.

**Exhibit 27–5** Overview of the privilege of defense of property.*

<table>
<thead>
<tr>
<th>Elements of the Privilege of Defense of Property</th>
<th>Effect of Mistake on the Privilege</th>
<th>The Torts Involved (Examples)</th>
<th>Paralegal Tasks: What to Find Out Through Interviewing and Investigation</th>
<th>Facts That Destroy the Privilege</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. D has possession of personal or real property.</td>
<td>• If D makes a mistake about whether P has a right to possession of the personal or real property, the defense-of-property privilege is lost even if the mistake was reasonable, unless P caused D to make this mistake.</td>
<td>• Battery: P enters D’s land and refuses to leave when D asks him to do so immediately after P entered. D takes P by the collar and pushes him out. P sues D for battery. D can raise the defense of defense of property.</td>
<td>• Did D have possession of the personal or real property?</td>
<td>• P had a privilege to be on the real property or to have the personal property.</td>
</tr>
<tr>
<td>b. D’s right to possession is superior to P’s claim of possession, if any.</td>
<td>• If D makes a mistake about the amount of force that is needed to stop the interference, the defense-of-property privilege is not lost if the mistake was reasonable under the circumstances.</td>
<td>• Assault: P reaches for D’s purse on the table. D raises her fist at P and shouts at him to keep away from her purse. P sues D for assault. D can raise the defense of defense of property.</td>
<td>• What age and strength differences existed between P and D?</td>
<td>• P’s right to possession was superior to D’s.</td>
</tr>
<tr>
<td>c. D has a reasonable belief that immediate force is needed to prevent P’s present threat of interference with D’s possession or to end an interference that P just started.</td>
<td>• If D makes a mistake about whether P has a right to possession of the personal or real property, the defense-of-property privilege is lost even if the mistake was reasonable, unless P caused D to make this mistake.</td>
<td>• What alternatives to force, if any, were available to D?</td>
<td>• What did P say or do?</td>
<td>• P’s threat to interfere was in the future—it was not an immediate threat.</td>
</tr>
<tr>
<td>d. D requests that P cease the interference with D’s possession, unless the request would be unsafe or impractical for D.</td>
<td>• If D makes a mistake about the amount of force that is needed to stop the interference, the defense-of-property privilege is not lost if the mistake was reasonable under the circumstances.</td>
<td>• What harm was inflicted on D by P?</td>
<td>• What did P do?</td>
<td>• D’s use of force was disproportionate to the threat posed by P to D’s possession.</td>
</tr>
<tr>
<td>e. D uses reasonable force against P to prevent the interference by P of D’s possession.</td>
<td>• If D makes a mistake about whether P has a right to possession of the personal or real property, the defense-of-property privilege is lost even if the mistake was reasonable, unless P caused D to make this mistake.</td>
<td>• Was D’s force reasonable or practical.</td>
<td>• What did P say or do?</td>
<td>• D was motivated solely by hatred and revenge. D was not trying to prevent interference by P.</td>
</tr>
<tr>
<td>f. In most states, D cannot use deadly force or force calculated to cause serious bodily harm (e.g., shoot P), even if D adequately warns P that such force will be used. D has a privilege to use great force only if P’s interference with property also threatens life or limb.</td>
<td>• If D makes a mistake about whether P has a right to possession of the personal or real property, the defense-of-property privilege is lost even if the mistake was reasonable, unless P caused D to make this mistake.</td>
<td>• What was the amount of force used?</td>
<td>• What indications were there that P was going to interfere immediately or was going to continue the interference shortly after it began?</td>
<td>• D knew that P was bluffing when P threatened interference.</td>
</tr>
</tbody>
</table>

*Recapture of property is covered separately in Exhibit 27–6.
Background: The Brineys own an unoccupied farm house that had been broken into several times. Boarding up the windows and posting no-trespassing signs did not deter the break-ins. On June 11, 1967 Mr. Briney set "a shotgun trap" in the north bedroom. He secured the gun to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. He first pointed the gun so an intruder would be hit in the stomach. At Mrs. Briney's suggestion, however, it was lowered to hit the legs. He admitted he did so "because I was mad and tired of being tormented" but "he did not intend to injure anyone." Tin was nailed over the bedroom window. The spring gun could not be seen from the outside and no warning of its presence was posted. When Katko and a companion tried to break in, Katko was seriously injured when he triggered the gun. Much of his leg, including part of the tibia, was blown away. In a criminal proceeding, Katko pled guilty to larceny, was fined $50, and was paroled during good behavior from a sixty-day jail sentence. He then brought a civil suit against the Brineys for damages. At the trial, the jury returned a verdict for Katko for $20,000 actual and $10,000 punitive damages. The case is now on appeal before the Supreme Court of Iowa.

Decision on Appeal: Judgment affirmed. Deadly force cannot be used to protect uninhabited property.

OPINION OF COURT

Chief Justice MOORE delivered the opinion of the court. The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury. We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident.

In the statement of issues the trial court stated plaintiff and his companion committed a felony when they broke and entered defendants' house. In instruction 2 the court referred to the early case history of the use of spring guns and stated under the law their use was prohibited except to prevent the commission of felonies of violence and where human life is in danger. The instruction included a statement [that] breaking and entering is not a felony of violence.

Instruction 5 stated: "You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the injured party is a trespasser and is in violation of the law himself."

Instruction 6 stated: "An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore a person owning a premise is prohibited from setting out 'spring guns' and like dangerous devices which will likely take life or inflict great bodily injury, for the purpose of harming trespassers. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act." . . .

The overwhelming weight of authority, both textbook and case law, supports the trial court's statement of the applicable principles of law.

Prosser on Torts, Third Edition, pages 116–118, states: "the law has always placed a higher value upon human safety than upon mere rights in property. [It] is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify a self-defense. . . . [S]pring guns and other mankilling devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person, would be free to inflict injury of the same kind." . . .

Affirmed.

ASSIGNMENT 27.10

a. Do you agree with the result in this case? Why or why not?
b. Would the case have been decided differently if the Brineys had posted a large sign on the farm property saying, "WARNING: Property Protected by Spring Guns"? Would assumption of the risk bar recovery?
c. Smith owns a liquor store that has been burglarized often. He buys a pit bull dog to stay in the store after he closes. A midnight burglar is mauled by the dog. Does Katko apply?
Recapture of Chattels

The defense-of-property privilege is used when you have possession of property with which someone is interfering. Suppose, however, you no longer have possession. Someone has wrongfully dispossessed you of a chattel (personal property) and you want to recapture it. The privilege you need to try to use in this situation is called recapture of chattels. It is the right to use reasonable force to obtain the return of personal property promptly after someone obtains it wrongfully. The attempt to regain possession must occur promptly after the dispossession. This is sometimes referred to as fresh pursuit, which means promptly, without undue delay. (Fresh pursuit also refers to the right to retrain the property if done promptly.) If a long period of time elapses after the dispossession, the preference of the law is that the victim use the courts (rather than self-help) to resolve any dispute over the right of possession.

Merchants often use the recapture-of-chattels privilege when they suspect a person of stealing merchandise in their store. As we saw in Chapter 7, their right is referred to as the shopkeeper’s privilege.

Before force is used to recapture a chattel, a request for its return must be made unless such a request would be impractical or unsafe. Like the defense of property, you cannot use deadly force to recapture the chattels. Also, the privilege of recapture does not apply unless the chattel was taken from you wrongfully.

chattel Personal property; property other than land or things attached to land.

dispossession Depriving someone of possession or occupancy of property. (See glossary for another definition.)

fresh pursuit 1. Promptly, without undue delay. 2. The right of a victim whose property has been dispossessed to use reasonable force to take the property back just after it is taken. Also called hot pursuit.

shopkeeper’s privilege The right of a merchant to detain someone temporarily for the sole purpose of investigating whether the person has committed any theft against the merchant.

ASSIGNMENT 27.11

In the following situations, examine what defenses, if any, can be raised in the suits brought.

a. George is invited to Henry’s house for dinner. They have an argument and Henry asks George to leave. George refuses. Henry pushes George through a glass window. George sues Henry for battery.

b. Tom is terrified by dogs. Leo’s little dog starts barking at Tom in the street. Tom picks up a stick and is about to hit the dog. Leo sees this and clubs Tom with a baseball bat. Tom sues Leo for battery.

c. Helen is in her boat when a storm suddenly begins. Helen takes the boat to Kevin’s private dock in order to prevent the destruction of her boat. When Kevin sees Helen’s boat at his dock, he tells her to leave immediately or he will punch her in the nose. Helen leaves even though the storm is still raging. Helen sues Kevin for assault.
CHAPTER 27  ADDITIONAL TORT DEFENSES

EXAMPLE
David lets his friend, Paul, use David’s bike for a brief ride in the playground. When Paul is on the bike for a few moments, he decides not to return it and tells David this. David immediately pushes Paul off the bike and retrieves it. Paul sues David for battery.

Paul wins. David cannot use the defense of recapture of chattels because Paul initially obtained possession of the bike rightfully—David agreed to let him use it. The privilege does not apply unless it is being used to obtain it back from someone who obtained it wrongfully. Paul rightfully obtained possession, but he has wrongfully kept it. To get the bike back in such a case, David must resort to the courts. The case would be different if Paul took the bike without permission. Then David would have the privilege to recapture.

You must be sure that you have the right to possess the chattel you want to recapture. If you make a mistake—even a reasonable one—the privilege is destroyed and you can be liable for any torts resulting from your use of force. To demonstrate this, let’s look at another bike example:

EXAMPLE
David sees Pete, a total stranger, take a bike out of the playground. David immediately pushes Pete off the bike and retrieves it. In fact, Pete was riding his own bike, which looks exactly the same as David’s bike. Pete sues David for battery.

Pete wins. David made a mistake about his right to possess the bike. Even though the mistake may have been reasonable since the bikes looked alike, the mistake is fatal. If you use force to recapture a chattel, you must have the right to possess that chattel. The only exception would be if the person with the superior right to possession caused the other person to make the mistake.

Exhibit 27–6 presents an overview of the elements of this privilege, the effect of mistake on the privilege, examples of the kinds of torts to which this privilege can be used as a defense, examples of paralegal interviewing and investigation tasks to uncover facts that are relevant to proving that the privilege applies, and a list of facts that could make it impossible to use the privilege.

ASSIGNMENT 27.12

In the following situations, determine whether the defendant can claim the defense of recapture of chattels.

a. Tom is playing football. He asks Fred to hold his watch. While Tom is on the field, Fred suddenly must leave. Fred asks Joe to hold the watch for Tom. Fred does not know that Joe is Tom’s archenemy. When Tom finds out that Joe has the watch, he asks for it back. Joe refuses. Tom hits Joe over the head with a football helmet and takes the watch back. Joe sues Tom for battery.

b. Sam steals John’s ring and sells it for $1 in a dark alley to Fred, who knows neither John nor Sam. Two weeks after John finds out that Fred has the ring, John breaks into Fred’s house and takes the ring from Fred’s jewelry box. Fred sues John for trespass to land.

Retaking Possession of Land Forcibly

Assume that someone is on land wrongfully, e.g., a squatter moves into a vacant building or a tenant remains in an apartment long after ceasing to pay rent. Can
### Elements of the Privilege of Recapture of Chattels

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<th>Paralegal Tasks: What to Find Out Through Interviewing and Investigation</th>
<th>Facts That Destroy the Privilege</th>
</tr>
</thead>
</table>
| a. P acquired possession of the chattel wrongfully, e.g., by fraud or force. | • If D makes a mistake about whether P has a right to possession of the chattel, the recapture-of-chattel privilege is lost even if the mistake was reasonable, unless P caused D to make this mistake. | • How did P get possession of the chattel?  
• Did P claim P had a right to possession? If so, on what basis?  
• What is D's basis for the claim that D had a right to possess the chattel?  
• Did either P or D claim that they owned the chattel, that they had properly rented it, or that they were properly holding it for someone else? | • P did not have actual possession nor did P control possession.  
• P in fact got possession rightfully (even though P's continued possession may now be wrongful, in which case D does not have the privilege of recapture—D must use the courts to get the chattel back). |
| b. D has the right to immediate possession. | • Battery  
P has just stolen D's television, and refuses to return it. D pushes P aside in order to take the television back. P sues D for battery. D can raise the defense of recapture of chattels. | • P originally get possession with the consent of D?  
• Did D request P to return the chattel? Was such a request realistic and safe?  
• When did D discover that P had possession, and how long after discovery did D try to recapture it?  
• Could D have discovered that P had possession sooner? Why or why not?  
• Could D have acted sooner to recapture the chattel? Why or why not?  
• How much force was necessary to take the chattel back from P? Could less force have been used? Why or why not?  
• What did P and D say to each other just prior to D's use of force? | • D has no right to possession.  
• D failed to request a return when such a request was practical and safe.  
• D took too long to discover that P had possession.  
• D took too long to recapture after D knew that P had possession. |
| c. D requests that P return the chattel. This request is made before D uses force to recapture it unless the request would be unrealistic or unsafe for D. | • Assault  
Same facts as above, except that instead of pushing P, D raises his fist and threatens to hit P if P does not return the television. P sues D for assault. D can raise the defense of recapture of chattels. | • Did P originally get possession with the consent of D?  
• Did D request P to return the chattel? Was such a request realistic and safe?  
• When did D discover that P had possession, and how long after discovery did D try to recapture it?  
• Could D have discovered that P had possession sooner? Why or why not?  
• Could D have acted sooner to recapture the chattel? Why or why not?  
• How much force was necessary to take the chattel back from P? Could less force have been used? Why or why not?  
• What did P and D say to each other just prior to D's use of force? | • D has no right to possession.  
• P in fact got possession rightfully (even though P's continued possession may now be wrongful, in which case D does not have the privilege of recapture—D must use the courts to get the chattel back). |
| d. D's use of force to recapture the chattel occurs promptly after P took possession of the chattel (fresh pursuit). | • Trespass to Land  
Same facts as above on the television. P has the television in his garage. When D finds out, D immediately goes into the garage to recapture the television. P sues D for trespass to land. D can raise the defense of recapture of chattels. | • Did P originally get possession with the consent of D?  
• Did D request P to return the chattel? Was such a request realistic and safe?  
• When did D discover that P had possession, and how long after discovery did D try to recapture it?  
• Could D have discovered that P had possession sooner? Why or why not?  
• Could D have acted sooner to recapture the chattel? Why or why not?  
• How much force was necessary to take the chattel back from P? Could less force have been used? Why or why not?  
• What did P and D say to each other just prior to D's use of force? | • P in fact got possession rightfully (even though P's continued possession may now be wrongful, in which case D does not have the privilege of recapture—D must use the courts to get the chattel back). |
| e. D uses reasonable force (not force calculated to cause death or serious bodily injury) with the intent to recapture the chattel from P. | • How did D use of force?  
• What did D use of force have been used?  
• How much force was necessary to take the chattel back from P? Could less force have been used? Why or why not?  
• What did P and D say to each other just prior to D's use of force? | • Did P originally get possession with the consent of D?  
• Did D request P to return the chattel? Was such a request realistic and safe?  
• When did D discover that P had possession, and how long after discovery did D try to recapture it?  
• Could D have discovered that P had possession sooner? Why or why not?  
• Could D have acted sooner to recapture the chattel? Why or why not?  
• How much force was necessary to take the chattel back from P? Could less force have been used? Why or why not?  
• What did P and D say to each other just prior to D's use of force? | • P in fact got possession rightfully (even though P's continued possession may now be wrongful, in which case D does not have the privilege of recapture—D must use the courts to get the chattel back). |

The owner use force to regain possession by ousting the wrongdoer? In general, the answer is no. The law requires the owner to use the courts (rather than self-help) to regain possession of land through eviction proceedings and actions for **unlawful detainer or ejectment**. If, however, the rightful owner is in possession, which a wrongdoer attempts to seize, the rightful owner can use reasonable force (self-help) to prevent the dispossession. But the courts must be used to oust a wrongdoer who has already settled into his or her wrongful possession of the land. 

**unlawful detainer** Remaining in possession of real property unlawfully by one whose original possession was lawful.

**ejectment** An action for the recovery of the possession of land and for damages for the wrongful dispossession.
Discipline

Parents have the privilege of disciplining their children. This can include physically hitting and confining the children, as long as such force is reasonable. (Teachers and others who stand in the place of parents—in loco parentis—also have this privilege unless it has been restricted by special statute.) Suits within the family are discussed elsewhere. See Exhibit 22–1 in Chapter 22.

Arrest

When a public officer or a private citizen tries to arrest someone, the latter might respond with a suit for battery, assault, or false imprisonment. The privilege of arrest can be raised as a defense to such suits. The elements of this privilege and its special circumstances are considered in Chapter 7 on false imprisonment and false arrest. The arrest of an individual can also raise issues of defamation, invasion of privacy, malicious prosecution, and abuse of process. Finally, the arrested person might claim a violation of his or her civil rights.

THE DEFENSE OF SOVEREIGN IMMUNITY

When is a government liable for the torts committed on its behalf? The old answer was: never. The king cannot be sued because the king can do no wrong. This was the essence of the doctrine of sovereign immunity. Over the years, however, the government (i.e., the sovereign) has agreed to be sued for torts in limited situations. In this section, we will discuss the boundaries of what is now a limited sovereign immunity. Government, of course, acts only through its agents or employees. Hence, when the government is liable, it will be on a theory of respondeat superior: let the master answer for the wrongful acts of its servants committed within the scope of employment. The servant is the government employee. We also need to explore when this employee is personally liable for the torts he or she commits while carrying out governmental functions. In summary, the issues are:

1. When has the federal government agreed to be liable for the torts of its employees?
2. When have the state governments in the country agreed to be liable for the torts of their employees?
3. When have local governments agreed (on their own or on order from the state government) to be liable for the torts of their employees?
4. When is a federal, state, or local government employee independently and personally liable for the torts he or she commits on the job? As we will see later, when official immunity applies, government employees are exempt from personal liability for torts they commit within the scope of their employment. Official immunity is separate from sovereign immunity.

If you are the victim of a tort committed by a government employee (e.g., slander, conversion), you will have no one to sue if both sovereign immunity and official immunity apply.

Before we examine these immunities, two closely related issues need to be mentioned. First, legislatures sometimes pass special legislation that allows a private individual to sue the government when the individual’s suit would otherwise be barred by sovereign or official immunity. This individualized or private waiver from immunity is more narrow than the general waiver for designated classes of torts or other claims that are our concern here. Second, if the government forces you to give up your land for a public purpose (e.g., to build a road through it), you must receive just compensation. This is because the constitution forbids government taking of property from a private individual without just compensation. To the extent that the government is forced by the constitution to provide compensation for a “taking,” the government is waiving its sovereign immunity.
Federal Government

The basic law containing the federal government's consent to be sued is the Federal Tort Claims Act (FTCA). The FTCA does not abolish sovereign immunity for the federal government. The general rule established by the FTCA is as follows: The United States (this phrase refers to the federal government) will be liable for its torts in the same manner as a private individual would be liable according to the local law in the place where the tort occurs, unless the United States is specifically exempted for that tort in the FTCA.

Assume that a federal employee in Delaware commits a tort such as negligence against you. According to the general rule, if the negligence law of the state of Delaware would make a private person liable for negligence for doing what the federal employee did, then the federal government will be liable for the tort—unless there is a specific exemption for that tort in the FTCA. Hence, we need to know what the FTCA specifically excludes and covers. Exhibit 27–7 tells us.

Before a citizen tries to bring a claim under the Federal Tort Claims Act, the administrative agency involved must be given the chance to settle the case on its own within certain dollar limits. If the citizen is still dissatisfied, he or she can sue under the Act in a federal court.

ASSIGNMENT 27.13

When delivering a letter, a mail carrier carelessly left a package on the porch. The owner of the house trips over the package and sues the U.S. Postal Service for negligence. Is sovereign immunity a defense in this suit? How does the Federal Tort Claims Act apply?

Federal employees themselves are generally excluded as claimants under the Federal Tort Claims Act. Injuries that they receive on the job are covered by other statutory schemes, such as the Federal Employees’ Compensation Act.

State Government

A state government consists of the governor’s office, state agencies such as the state police, state hospitals, and state commissions and boards. To what extent has a state government waived its own sovereign immunity so that citizens can sue the state for the torts of state employees? States differ in their answers to this question. Some states have come close to abolishing sovereign immunity. Other states have schemes modeled in whole or in part on the Federal Tort Claims Act. Finally, other states have retained most of the traditional immunity.

Special protection is always given to agencies and offices when they are carrying out policy deliberations involving considerable judgment and discretion. It is sometimes said that it is not a tort for a government to govern! Rarely, for example, will any government waive immunity for tortious injury caused a citizen by a judge, legislator, or high administrative officer. Negligence by a lower-level employee in the judicial, legislative, or executive branches, however, may constitute a wrong for which the state will waive immunity, e.g., when a court clerk negligently loses a pleading that was properly filed. Acts that do not involve much discretion and that do not involve the formulation of policy will often subject the state to tort liability because the state has waived immunity for such acts.

Keep in mind that we are not talking about individual or personal liability of the government employee at this point. Personal liability will be discussed later. Our focus is on the government’s liability via respondeat superior for the torts its employees commit within the scope of their employment.
Exhibit 27–7
Federal Tort Claims Act (FTCA).

THE SCOPE OF THE FEDERAL GOVERNMENT’S TORT IMMUNITY UNDER THE FTCA
(The FTCA states a broad waiver of sovereign immunity, but then provides numerous exceptions to the waiver.)

- **Broad Waiver:** The federal government is treated like a private person. If a private person would be liable for harm resulting from an act or omission (in the state where the act or omission occurred), then the federal government will be liable when a federal employee’s act or omission within the scope of employment causes the harm.

- **Exception: Discretionary Action or Inaction.** The federal government will not be liable (sovereign immunity is not waived) for harm that results while a government employee performs or fails to perform a discretionary act, whether or not the discretion is abused. Examples: the decision of a federal agency to deny a waste permit to a business or to parole a prisoner. Discretionary decisions are policy judgments—those that result from an analysis of social, economic, or political policy concerns. A federal park ranger’s decision on how fast to drive a truck would be an operational decision rather than a policy decision. Sovereign immunity would not prevent a suit against the federal government for an injury caused by negligent driving by such a driver.

- **Exception: Enforcing a Statute or Regulation.** The federal government will not be liable (sovereign immunity is not waived) for harm that results while a government employee is using due care in carrying out a statute or regulation, even if the statute or regulation is ruled to be invalid.

- **Exception: Some Intentional Torts.** The federal government’s immunity for intentional torts depends on which intentional torts we are talking about and which federal employee committed them. Here are the rules:
  - The federal government will be liable (sovereign immunity is waived) if a federal investigative or law enforcement officer commits one of the following six torts:
    - assault
    - battery
    - false imprisonment
    - false arrest
    - abuse of process
    - malicious prosecution
  
  Example: a police brutality claim.
  - The federal government will not be liable (sovereign immunity is not waived) if a federal investigative or law enforcement officer commits one of the following four torts:
    - libel
    - slander
    - misrepresentation (deceit)
    - interference with contract rights

  Example: a claim that a police officer called a pedestrian a thief.
  - For federal employees other than investigative or law enforcement officers, the federal government will not be liable (sovereign immunity is not waived) for the following ten torts:
    - assault
    - battery
    - false imprisonment
    - false arrest
    - malicious prosecution
    - abuse of process
    - libel
    - slander
    - misrepresentation (deceit)
    - interference with contract rights

- **Exception: Strict Liability.** The federal government will not be liable (sovereign immunity is not waived) for harm based on strict liability. Example: a claim based on harm caused by leakage of ultrahazardous materials being transported by the federal government on a highway.

- **Exception: Combatant Activity.** The federal government will not be liable (sovereign immunity is not waived) for claims arising out of combatant activities during a time of war.

- **Exception: Mail and Taxes.** The federal government will not be liable (sovereign immunity is not waived) for claims based on the negligent transmission of mail or for the assessment or collection of taxes.
Local Government

Local government units have a variety of names: cities, municipalities, municipal corporations, counties, towns, villages, etc. Also part of local government are public schools, transportation agencies, some hospitals, recreational agencies, and some utilities. Whether any of these local units of government can be sued in tort is again a problem of sovereign immunity. A number of possibilities exist:

- Sovereign immunity has been completely or almost completely waived.
- The sovereign immunity of the units of local government is the same as that enjoyed by the state government.
- The sovereign immunity of the units of local government is different from that of the state government.
- Different units of local government have different sovereign immunity rules.

In short, extensive legal research must be done every time you want to sue a unit of local government. You must determine its category or status. What is it called? Who created it? Why was it created? What are its powers? Is it part of the state government? Is it separate from the state government? Is it a hybrid combination of both state and local government? Many cities and counties receive substantial state aid. Does such aid entitle them to the same sovereign immunity protection as the state? You may find that for some purposes, the unit of government is considered part of the state, whereas for other purposes it is considered entirely separate and local. Over the years, a great deal of litigation has dealt with the problem of determining the nature of the unit of government in order to decide what sovereign immunity principles apply.

Units of local government perform many different kinds of functions. These functions are often grouped into two classifications: governmental and proprietary. The sovereign immunity rules may differ depending on what category of function the employee was carrying out when the tort was committed. The general rule is that sovereign immunity is *not* waived when the tort grows out of a governmental function, whereas it *is* waived when it grows out of a proprietary function. (An important exception is when the city, county, town, or other unit has created a public or a private nuisance. Even if this nuisance grows out of a governmental function, sovereign immunity will usually not prevent the suit.) Of course, there is always the possibility that a government will waive its sovereign immunity for torts arising out of both governmental and proprietary functions. The waiver, however, is usually limited to proprietary functions.

Unfortunately, there are few clear rules on the distinction between a governmental and a proprietary function.

**Governmental Functions** A governmental function is one that can be performed adequately only by the government. The operation of local courts and local legislatures (e.g., a city council) is considered governmental. The same is true of the chief administrative offices of the local government (e.g., office of the mayor, office of the county commissioner) where basic policy is made. Police and fire departments also fall into the category of governmental functions where sovereign immunity will prevent suits for the torts that grow out of these functions.3

**Proprietary Functions** A proprietary function is one that (1) traditionally or principally has been performed by private enterprise, or (2) is conducted primarily to produce a profit or benefit for the government rather than for the public at large. Examples include government-run airports, docks, garages, and utilities such as water and gas. For some of these functions, the local government often collects special fees or revenue. The test for a proprietary function, however, is not whether a “profit” is made. This is simply one factor that tends to indicate a proprietary function. Some functions are very difficult to classify, such as the operation of a city hospital. You will find courts going both ways for these and similar functions.

**governmental function** A function that can be performed adequately only by the government.

**proprietary function** A function of government that (1) traditionally or principally has been performed by private enterprise, or (2) is conducted primarily to produce a profit or benefit for the government rather than for the public at large.
There are courts that do not rely totally on the distinction between governmental and proprietary functions to decide whether sovereign immunity prevents the suit against the local government. Some courts make the same distinction we saw earlier under the Federal Tort Claims Act between a claim arising out of discretionary or policy decisions made by the government (for which sovereign immunity will not be waived) and claims arising out of nondiscretionary or operational decisions (for which sovereign immunity will be waived). For example, a city may be immune from liability for damages resulting from its negligent decision on where to construct sewers, but would be liable for damages resulting from the negligent construction or repair of a particular sewer.

Finally, some governments have tied the waiver of sovereign immunity to the purchase of liability insurance: the waiver extends only to the maximum coverage provided by the insurance.

ASSIGNMENT 27.14

Select any three agencies: one that is part of the federal government, one that is part of your state government, and one that is part of your local government. For each agency, assume that one of its employees has committed a tort against you for which sovereign immunity has been waived. For example, while in a government car, the employee negligently hit your car. What steps are required to file a tort claim against each agency? Check guidelines available online, including relevant statutes and ordinances on tort claims against the government.

THE DEFENSE OF OFFICIAL IMMUNITY:
THE PERSONAL LIABILITY OF GOVERNMENT EMPLOYEES

What about a suit against the individual government employee as opposed to one against the sovereign, or the government itself? If the employee is sued personally, any judgment is paid out of the employee’s own pocket. Although there are circumstances in which personal liability is imposed on government employees, it should be pointed out that the law is reluctant to impose such liability. Public employees must be “free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.” On the other hand, critics argue that public employees should not be treated differently from employees in the private sector. When an employee of a business commits a tort, the employer is vicariously liable if the tort was committed within the scope of employment, but the employee is also personally liable. The critics say that the same rule should apply to government employees. For the most part, however, it does not.

When government employees are not liable, it is because of official immunity. If this defense applies, government employees will not be personally liable for the torts they commit within the scope of employment. Three questions need to be asked in this area of the law:

- Was a tort committed by the government employee?
- If so, was the tort within the scope of employment?
- If so, can the employee avoid personal liability by using the defense of official immunity?
The first question to ask is whether a tort has been committed by the government employee. It may be that the government employee had a privilege to act so that there was no tort. For example, a police officer has the privilege to arrest someone. (See Exhibit 7–2 in Chapter 7.) The privilege prevents liability for torts such as battery and false imprisonment. If, however, a tort was committed, the second question is whether it was committed within the scope of employment. (See Exhibit 14–9 in Chapter 14 on the factors that determine scope of employment.) Judges may have official immunity for defamation they commit from the bench against attorneys or defendants, but not for defamation they commit against their neighbor in an argument over a football game. The latter is clearly outside the judge’s scope of employment. A government employee is as liable for torts outside the scope of employment as any citizen would be. If a tort was committed by the government employee and if it was within the scope of employment, we then ask a third question: Can the employee avoid personal liability under the doctrine of official immunity?

A citizen who has been the victim of a government tort may face one of several scenarios in looking for a defendant to sue:

- Sovereign immunity may prevent a suit against the government, and official immunity may prevent a suit against the employee; the citizen is without remedy.
- Sovereign immunity may have been waived so that the government can be sued, but official immunity may prevent a suit against the employee; the citizen can sue only the government.
- Sovereign immunity may have been waived so that the government can be sued, and official immunity may not apply so that the employee can also be sued; the citizen can sue either or both.

If the citizen can sue both the government and the employee, and successfully does so, the citizen does not receive double damages for the same injury. There is one recovery only. The plaintiff can usually collect from either defendant until there has been a satisfaction of the judgment.

Official immunity must be examined under two main categories: the employee’s personal liability for a traditional common-law tort (e.g., negligence, battery, defamation), and the employee’s personal liability for a civil rights violation. First, let us examine civil rights violations.

Section 1983 of the Civil Rights Act of 1871 provides as follows:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, . . .” 42 U.S.C. § 1983.

Under this statute, a person who acts or pretends to act as a state official in a governmental capacity is said to be acting under color of law, or, to be specific, under color of state law. If that person deprives someone of a federal civil right, a special cause of action arises.

**EXAMPLE**

Fred Jamison is a state police officer. He sees Loretta Walker driving down the street. Jamison decides to give Walker a speeding ticket solely because she is black. Jamison knows that she was not speeding at the time.

Such racial discrimination is forbidden by the Equal Protection Clause of the United States Constitution. Since Jamison was charging Walker with violating the speeding law (a state law), the police officer was acting under color of law when he deprived Walker of the constitutional right not to be subjected to racial discrimination. Walker can sue Jamison under § 1983 of the Civil Rights Act. A civil rights suit
seeking damages under this Act is called a 1983 action, which asserts a federal cause of action called a 1983 tort. The phrase constitutional tort refers to a special cause of action that arises when someone is deprived of federal civil rights. The generic name for this constitutional law tort cause of action is civil rights violation. For its elements, see Exhibit 27–8.

### Exhibit 27-8
Elements of a civil rights violation.

<table>
<thead>
<tr>
<th>Number</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>A person acting under color of law</td>
</tr>
<tr>
<td>2.</td>
<td>Deprives someone of a federal right</td>
</tr>
</tbody>
</table>

Liability for a traditional common-law tort such as battery is separate from liability for a constitutional tort. It is possible for a government employee to commit a constitutional tort that is not, in addition, a common-law tort. An example is the Jamison/Walker case just discussed. There is no indication that the police officer committed a common-law tort when he wrote the ticket, but he did commit a constitutional tort for which he might be liable in a 1983 action. Sometimes, however, the wrong committed by the employee is both a common-law tort and a constitutional tort:

**EXAMPLES**
- A police officer punches a citizen (battery) to prevent him or her from voting.
- A government tax auditor destroys the flag of a citizen (conversion) in order to stop him or her from participating in a lawful demonstration.

A plaintiff can assert the common-law tort and the constitutional tort in the same lawsuit. A major benefit of winning a constitutional tort is that attorney fees can be awarded, whereas for common-law torts, the parties pay their own attorneys.

Finally we come to the third question posed earlier. Can a government official who has committed a tort within the scope of employment avoid liability through the defense of official immunity? It may be clear that a government official has committed a common-law tort, a constitutional tort, or both within the scope of employment. Yet the official will not be personally liable if he or she is covered by official immunity.

Two kinds of official immunity exist: absolute and qualified. Absolute immunity avoids personal liability when a government employee is carrying out official functions, even if the employee was acting with malice. Qualified immunity avoids personal liability when a government employee is carrying out official functions, unless the employee was acting with malice. Here is an overview of who can claim these immunities:

- Judges and legislators. These employees have absolute immunity for common-law torts and for constitutional torts.
- High administrative officials. In most states, these officials have absolute immunity for common-law torts and qualified immunity for constitutional torts.
- Lower-level administrative officials who exercise considerable discretion in their job. These officials have qualified immunity for common-law torts and qualified immunity for constitutional torts.
- Lower-level administrative officials who function at the ministerial level with little or no discretion. In many states, these employees have no immunity for common-law torts (unless a special statute provides otherwise) and qualified immunity for constitutional torts.

See also Exhibit 27–9 for an outline of who can claim the immunities and how they can be lost.
Unfortunately, the distinction between discretionary functions and ministerial functions is often unclear. In general, ministerial functions are duties performed in a prescribed manner with little or no judgment or discretion involved. Ministerial functions occur at the operational level of government. Discretionary functions, on the other hand, involve the choice of options, usually at the policy level.

In Exhibit 27–9, note that when high administrative officials are charged with a violation of the Civil Rights Act (see the fourth column), they have a qualified immunity that is lost if a reasonable official would have believed that his or her conduct violated a “clearly established” constitutional or statutory right. In the case of Conn and Najera v. Gabbert on the practice of law, we will examine an allegation by an attorney that such a right was violated.
**Case**

**Conn and Najera v. Gabbert**

119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999)

United States Supreme Court

**Background:** Paul Gabbert was an attorney for Traci Baker, a witness appearing before the grand jury in a nationally-publicized state criminal trial involving two brothers accused of murdering their wealthy parents in Beverly Hills. While Baker was being questioned, the prosecutors obtained a search warrant and searched Gabbert for evidence Baker may have given him earlier. Gabbert then brought a § 1983 action against the prosecutors for damages, claiming that their search interfered with his “clearly established” constitutional right to practice law. The Fourteenth Amendment says that no state shall “deprive any person of life, liberty, or property without due process of law.” Part of the “liberty” protected by this clause is the right to practice one’s employment. If the state unreasonably interferes with this liberty right, the victim can sue for damages under § 1983. Government officials such as prosecutors have a qualified immunity against such suits as long as they have not violated a “clearly established” right. Gabbert argued that his right to practice law without unreasonable interference was “clearly established” at the time the prosecutors violated it. The trial court (a U.S. Federal District Court) disagreed and dismissed the § 1983 action. Gabbert appealed to the Court of Appeals. During oral argument at the Court of Appeals, one of the judges expressed shock at what had occurred: “If you described what happened in this case to a stranger and didn’t [say] what country it had happened in, America is not the first place that would come to mind.” The Court of Appeals reversed the District Court and held that the prosecutors had violated Gabbert’s right to practice law, thus reinstating his § 1983 action. The prosecutors then petitioned to the United States Supreme Court to reverse the Court of Appeals. They are the petitioners; Gabbert, the respondent, is responding to their petition.

**Decision on Appeal:** Judgment reversed. Gabbert’s Fourteenth Amendment right to practice law was not violated by the search ordered by the prosecutors. His client had no right to have him present during the grand jury proceeding. An attorney has a Fourteenth Amendment right to practice his profession, but this right can be restricted by reasonable government regulation. Since Gabbert was subjected to no more than reasonable regulation when he was forced to submit to a search warrant, his right to practice law was not violated. This defeats the basis of the § 1983 action. There is no need, therefore, to decide whether the prosecutors lost their qualified immunity by violating a “clearly established” right.

**OPINION OF COURT**

Chief Justice REHNQUIST delivered the opinion of the court . . . :
again returned to the grand jury room and asserted her Fifth Amendment privilege. At this point, the grand jury recessed.

Believing that the actions of the prosecutors were illegal, Gabbert brought suit against them and other officials in Federal District Court under 42 U.S.C. § 1983. Relevant to this appeal by Conn and Najera, he contended that his Fourteenth Amendment right to practice his profession without unreasonable government interference was violated when the prosecutors executed a search warrant at the same time his client was testifying before the grand jury. [The District Court ruled for the prosecutors on the basis that their actions were protected by qualified immunity.]

The Court of Appeals reversed in part, holding that Conn and Najera were not entitled to qualified immunity on Gabbert’s Fourteenth Amendment claim. 131 F.3d 793 (C.A.9 1997). Relying on Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), and earlier cases of this Court recognizing a right to choose one’s vocation, the Court of Appeals concluded that Gabbert had a right to practice his profession without undue and unreasonable government interference. The Court of Appeals also held that . . . the right allegedly violated in this case was clearly established, and as a result, Conn and Najera were not entitled to qualified immunity: “The plain and intended result [of the prosecutors’ actions] was to prevent Gabbert from consulting with Baker during her grand jury appearance. These actions were not objectively reasonable, and thus the prosecutors are not protected by qualified immunity from answering Gabbert’s Fourteenth Amendment claim.” Id., at 802–803. We granted certiorari and now reverse.

Section 1983 provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. 42 U.S.C. § 1983. In order to prevail in a § 1983 action for civil damages from a government official performing discretionary functions, the defense of qualified immunity that our cases recognize requires that the official be shown to have violated “clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800 (1982). Thus a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, to determine whether that right was clearly established at the time of the alleged violation. See Siegert v. Gilley, 500 U.S. 226, 232–233 (1991).

We find no support in our cases for the conclusion of the Court of Appeals that Gabbert had a Fourteenth Amendment right which was violated in this case. The Court of Appeals relied primarily on Board of Regents v. Roth. In Roth, this Court repeated the pronouncement in Meyer v. Nebraska, 262 U.S. 390, 399 (1923) that the liberty guaranteed by the Fourteenth Amendment “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” Roth, supra, at 572 (quoting Meyer, supra, at 399). But neither Roth nor Meyer even came close to identifying the asserted “right” violated by the prosecutors in this case. Meyer held that [a state could not pass a law] that prohibited teaching in any language other than English. And Roth . . . held that an at-will college professor had no “property” interest in his job within the meaning of the Fourteenth Amendment so as to require the university to hold a hearing before terminating him. . . . Neither case supports the conclusion that the actions of the prosecutors in this case deprived Gabbert of a liberty interest in practicing law.

Similarly, none of the other cases relied upon by the Court of Appeals or suggested by Gabbert provide any more than scant metaphysical support for the idea that the use of a search warrant by government actors violates an attorney’s right to practice his profession. In a line of earlier cases, this Court has indicated that the liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due process right to choose one’s field of private employment, but a right which is nevertheless subject to reasonable government regulation. See, e.g., Dent v. West Virginia, 129 U.S. 114 (1889) (upholding a requirement of licensing before a person can practice medicine); Truax v. Raich, 239 U.S. 33 (1915) (invalidating on equal protection grounds a state law requiring companies to employ 80% United States citizens). These cases all deal with a complete prohibition of the right to engage in a calling, and not the sort of brief interruption which occurred here.

Gabbert also relies on Schware v. Board of Bar Examiners of N.M., 353 U.S. 232, 238–239, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), for the proposition that a State cannot exclude a person from the practice of law for reasons that contravene the Due Process Clause. Schware held that former membership in the Communist Party and an arrest record relating to union activities could not be the basis for completely excluding a person from the practice of law. Like Dent, supra, and Truax, supra, it does not deal with a brief interruption as a result of legal process. No case of this Court has held that such an intrusion can rise to the level of a violation of the Fourteenth Amendment’s liberty right to choose and follow one’s calling. That right is simply not infringed by the inevitable interruptions of our daily routine as a result of legal process which all of us may experience from time to time. . . .

We hold that the Fourteenth Amendment right to practice one’s calling is not violated by the execution of a search warrant, whether calculated to annoy or even to prevent consultation with a grand jury witness. In so holding, [there is no need to address] the question of whether such a right was “clearly established” as of a given day. The judgment of the Court of Appeals holding to the contrary is therefore reversed.

It is so ordered.
THE DEFENSE OF CHARITABLE IMMUNITY

There was a time when a charitable, educational, religious, or other benevolent organization enjoyed an immunity for the torts it committed in the course of its work. The law was reluctant to allow the resources of such organizations to be depleted in a suit brought against the organization because of a tort committed by one of its employees or volunteers. Charitable immunity, however, was never complete. An organization, for example, was liable for its negligence in selecting personnel and in raising money. Most states, however, have abolished the immunity altogether, and other states have severely restricted its applicability, particularly in light of the availability of liability insurance that charitable organizations can purchase to cover tort actions against them.

At the end of the twentieth century, numerous lawsuits were brought against priests and the Catholic Church for the sexual abuse of children by priests and the resulting cover-up of this abuse by church officials. If a state still had the defense of charitable immunity, it was often raised in the suits. In some of these states, the defendants were successful with the defense. In others, the defense was interpreted narrowly. For example, a court might rule that the defense protected the church but not individual perpetrators. Some courts ruled that the defense was available for negligent conduct that led to the abuse or the church’s response to it, but did not prevent liability for the extensive intentional conduct that most of the abuse entailed.

THE DEFENSE OF INTRAFAMILY TORT IMMUNITY

Suppose that one family member wrongfully injures another. Can they sue each other in tort? If they are not allowed to do so, it is because of the intrafamily tort immunity. This topic is covered in Exhibit 22–1 at the end of Chapter 22 on Torts Against and Within the Family.

CHECK THE CITE

Plaintiffs alleged that defendants induced the plaintiffs to enter a residential group psychiatric treatment program by false representations as to the therapeutic value and limited term of the program. In fact, the plaintiffs claimed that the defendants used the program as a pretext to employ psychological coercion, humiliation, and physical violence to subjugate the plaintiffs, to coerce them to remain in the residential program, to give the defendants donations, to recruit new patients, and to believe that their well-being depended upon remaining in the program and loyally serving defendants to the exclusion of the outside world. How did the court resolve the defense of the defendants that the plaintiffs consented to the treatment program? Read the case of Rains v. Superior Court, 150 Cal. App. 3d 933, 198 Cal. Rptr. 249 (Ct. App. 1984). To read the case online, (1) Go to Findlaw (caselaw.lp.findlaw.com/ca/calapp3d/150.html). You will need to sign up for a free account.
(2) Go to FindACase (www.findacase.com). Select California. Run a citation search. Select 198 for the volume, Cal. Rptr. for the reporter, and 249 for the page. (3) Run a citation search (“198 Cal. Rptr. 249”) or a party search (Rains Superior Court) in the Legal Opinions and Journals database of Google Scholar (scholar.google.com).

■ PROJECT

In Google, Bing, or another general search engine, run the following search: “sovereign immunity” tort (substitute the name of your state for “aa” in the search, e.g., Louisiana “sovereign immunity” tort). Write a short essay in which you describe the law in your state on when the state can be sued for torts committed by a state employee. Explain the extent to which sovereign immunity prevents suits for such torts in your state. You can consult as many websites as you wish, but you must quote from at least three separate sites, only one of which can be a law firm site.

■ ETHICS IN A TORTS PRACTICE

You are a paralegal working in the law office of Harold Dunton, Esq. You are also a notary. Dunton wants you to notarize a document for one of the clients in the office. The notarized document must be filed in court by tomorrow noon. Dunton gives you the document and asks you to notarize it. The client already signed it yesterday before going out of town for two weeks. You make a long-distance call to the client to confirm that the client signed the document. You then notarize it as instructed. What ethical problems, if any, might exist?

■ SUMMARY

A defense is the response of a party to a claim of another party, setting forth the reason(s) the claim should not be granted. The defense of privilege is the right to act contrary to the right of another without being subject to tort or other liability. It authorizes conduct that would otherwise be wrongful. The defense of immunity treats wrongful conduct as nonwrongful. It is a complete defense to a tort claim, whether or not the defendant committed the tort.

Consent is a defense to most torts. The plaintiff must have the capacity to consent and must voluntarily manifest the consent. The test is the reasonableness of the defendant’s belief that the plaintiff consented, not the plaintiff’s subjective state of mind. For the consent to be valid, the plaintiff must know the nature and consequences of what the defendant wants to do; gaining consent by misrepresentation renders the consent invalid.

There are several self-help privileges. The defendant can use reasonable force to protect him- or herself in the reasonable belief that the plaintiff will immediately inflict harmful or offensive contact on the defendant (self-defense). The defendant can use reasonable force to prevent the plaintiff from immediately inflicting on a third person harmful or offensive contact, which the plaintiff does not have the privilege to inflict (defense of others). If the defendant reasonably believes that persons or property will be immediately injured or damaged, he or she can make reasonable use of the plaintiff’s personal property or land to prevent the injury or damage (necessity). If the defendant possesses land or chattels and this right of possession is superior to the plaintiff’s claim of possession, the defendant can use reasonable force to prevent the plaintiff’s immediately threatened interference with the defendant’s possession or to end an interference with such property that just started (defense of property). If the plaintiff wrongfully acquires possession of a chattel and the defendant has the right to immediate possession, the defendant can use reasonable force to recapture it shortly after the plaintiff takes possession (recapture of chattels).
Under the Federal Tort Claims Act, the federal government has waived sovereign immunity for designated torts. Examples include negligence at the operational (non-policy-making) level, trespass to land committed by any federal employee, and battery or false arrest committed by a federal law enforcement officer. Further exceptions apply for which sovereign immunity is not waived, such as claims based on the negligent transmission of the mail.

State governments differ on the extent to which sovereign immunity is waived. The state often retains its immunity to cover the conduct of its judges, legislators, and high administrative officers. The less discretion and policy involvement a state employee has, the more likely the state will waive its sovereign immunity for harm caused by that employee. Local governments often waive their sovereign immunity for the proprietary functions they perform, but not for their governmental functions.

Government employees with official immunity cannot be personally liable for the common-law or constitutional torts they commit within the scope of their employment. (A constitutional tort is a special cause of action, such as a 1983 action, that arises when someone is deprived of a federal civil right under color of state law.) Generally, judges, legislators, and high administrative officials have an absolute immunity; lower-level officials who exercise considerable discretion in their jobs have a qualified immunity; and lower-level officials who exercise little or no discretion in their jobs have no official immunity unless changed by statute.

Most states have eliminated or substantially restricted the charitable immunity that once relieved charities and similar organizations of liability for their torts.

**KEY TERMS**

- defense 572
- privilege 572
- immunity 572
- *volenti non fit injuria* 572
- consent 572
- implied consent 573
- coercion 574
- informed consent 575
- self-help 579
- extrajudicial 579
- self-defense 580
- defense of others 581
- necessity 583
- private necessity 583
- public necessity 583
- abate a nuisance 583
- defense of property 584
- chattel 587
- recapture of chattels 587
- dispossession 587
- fresh pursuit 587
- shopkeeper’s privilege 587
- squatter 588
- unlawful detainer 589
- ejectment 589
- *in loco parentis* 590
- arrest 590
- sovereign immunity 590
- respondent superiors 590
- official immunity 590
- just compensation 590
- taking 590
- Federal Tort Claims Act (FTCA) 591
- governmental function 593
- proprietary function 593
- personal liability 594
- vicarious liability 594
- civil rights 595
- Civil Rights Act of 1871 595
- color of law 595
- 1983 action 596
- 1983 tort 596
- constitutional tort 596
- absolute immunity 596
- qualified immunity 596
- ministerial 596
- charitable immunity 600
- intrafamily tort immunity 600

**REVIEW QUESTIONS**

1. What is a defense?
2. How does a privilege differ from an immunity?
3. What is the meaning of *volenti non fit injuria*?
4. What are the elements of consent?
5. Can someone consent to criminal conduct?
6. What is implied consent?
7. How does someone decide if his or her conduct is consented to?
8. What is informed consent?
9. What is a self-help privilege?
10. What are the major self-help privileges?
11. What are the elements of the defense of self-defense?
12. What is the effect of mistake in using this privilege?
13. Can deadly force be used?
14. What are the elements of the defense of defense of others?
15. What is the effect of mistake in using this privilege?
16. Can deadly force be used?
17. What are the elements of the defense of necessity?
18. How does private necessity differ from public necessity?
19. What are the elements of the defense of defense of property?
20. What is the effect of mistake in using this privilege?
21. Can deadly force be used?
22. What is the defense of abating a nuisance?
23. What are the elements of the defense of recapture of chattels?
24. What is the shopkeeper’s privilege?
25. What actions are the preferred methods of retaking possession of land?
26. What is the defense of discipline?
27. What is sovereign immunity?
28. When has the federal government waived sovereign immunity?
29. When has a state government waived sovereign immunity?
30. When has a local government waived sovereign immunity?
31. How does sovereign immunity differ from official immunity?
32. What is a constitutional tort?
33. How does absolute immunity differ from qualified immunity?
34. Who is entitled to absolute immunity?
35. Who is entitled to qualified immunity?
36. What is charitable immunity?
37. What is intrafamily tort immunity?

**HELPFUL WEBSITES**

- **Defenses to Intentional Torts**
  sparkcharts.sparknotes.com/legal/torts/section3.php
- **Consent in Tort law**
  www.lexisnexis.com/lawschool/study/outlines/html/torts/torts02.htm
  en.wikipedia.org/wiki/Consent
  www.answers.com/topic/consent
- **Sovereign Immunity**
  topics.law.cornell.edu/wex/sovereign_immunity
  www.justicelives.com
  en.wikipedia.org/wiki/Sovereign_immunity
  www.copyright.gov/docs/regstat72700.html
- **Charitable Immunity**
  www.ohioafp.org/pdfs/members/CharityImmunityLaws.pdf
  www.premack.com/links/cil-stat.htm
  www.lexisnexis.com/lawschool/study/outlines/html/torts/torts02.htm

**ENDNOTES**
