

Use of Force Handout

Chapter 9, Texas Penal Code

Justification as a defense, 9.02 – justification for conduct is (excusable) a defense to prosecution if conduct was justified in Chapter 9. To prove justification, it must be beyond a reasonable doubt and not by a preponderance of evidence. The defense must prove the justification.

Confinement as justifiable force, 9.03 – confinement is a type of force. Confinement is justified when force is justified and the actor (officer) takes reasonable measures to terminate the confinement when the person can safely be released, unless the person is under arrest. Confinement as “justified force” does not apply to persons who have been confined due to an arrest.

Threat as justifiable force, 9.04 – threats to use force are “force.” Threats to use force can be justified when the use of force is justified in Chapter 9. A threat to cause death or serious bodily injury by showing (displaying) a weapon does not constitute the use of deadly force [as long as the actor’s (officer’s) purpose is to create an apprehension that deadly force will be used if necessary]. Whenever force or deadly force is justified, threats of force or deadly force are justified.

Reckless injury of innocent third person, 9.05 – an actor’s (officer’s) use of justified force is no longer justified if, in using force or deadly force, the actor (officer) recklessly injures or kills an innocent third person.

Civil remedies unaffected, 9.06 – even though an actor’s (officer’s) use of force may be justified under Chapter 9, civil lawsuits can still be filed for the force used.

Public Duty, 9.21 – except as stated below, the use of force or deadly force is justified if the actor (officer) reasonably believes the force/deadly force is required or authorized by law, the judgment or court order of a competent court, or governmental tribunal, or in execution of legal process. The use of deadly force is not justified in Chapter 9 unless the actor (officer) reasonably believes the deadly force is specifically required by statute or unless it occurs in war. If deadly force is justified there is no duty to retreat before using deadly force. An actor (officer) is justified in using force if he reasonably believes the force is required or authorized to assist a public servant in performing his official duty, even though the public servant exceeds his authority.

Necessity, 9.22 – conduct (force/deadly force) is justified if:

1. The actor (officer) reasonably believes it is immediately necessary to avoid imminent harm
2. The desirability and urgency of avoiding harm clearly outweigh (according to ordinary standards of reasonableness) the harm sought to be prevented by the law prescribing the conduct (force)
3. A legislative purpose to exclude the justification is claimed for the conduct (force) does not otherwise clearly appear

The conduct (force/deadly force) must be reasonable and necessary. The actor (officer) must be able to articulate these three areas:

1. I had to do it
2. I had to do it right now
3. Nothing less would do

The amount of force necessary in any situation must be the least amount necessary to affect the purpose. Any force above the minimum amount necessary to affect a lawful purpose is unlawful.

Self-Defense, 9.31 – a person is justified in using force against another when he believes the force is immediately necessary to protect himself against the other’s use or attempted use of unlawful force.

The use of force against another person is not justified

1. In response to verbal provocation
2. To resist an arrest or search that the person knows is being made by a peace officer (or by a person acting in a peace officer’s presence and at his direction), even though the arrest or search is unlawful (unless the resistance is justified)
3. If the actor provoked the other’s use or attempted use of unlawful force
4. If the actor provoked the other’s use or attempted use of unlawful force unless
 - a. The actor abandons the encounter, or tells the other he wants to stop the use of force
 - b. The other person continues or attempts to use unlawful force against the actor
 - c. The use of force to resist an arrest or search is justified
 - 1) Before the actor (suspect) offers any resistance, the peace officer (or the person acting under his authority) uses or attempts to use greater force than necessary to make the arrest or search
 - 2) When and to the degree that the actor (suspect) reasonably believes the force is necessary to protect himself against the officer’s (or other’s) use or attempted use of greater force than necessary

Deadly force in defense of person, 9.32 – deadly force is justified against another

1. If the actor would be justified in using force against the other in self-defense
2. If a reasonable person in the same situation would not have retreated
3. When and to the degree the actor reasonably believes the deadly force immediately necessary
 - a. To protect himself against another’s use or attempted use of unlawful deadly force
 - b. To prevent the other’s imminent commission of
 - 1) Aggravated kidnapping
 - 2) Murder
 - 3) Sexual assault
 - 4) Aggravated sexual assault
 - 5) Robbery
 - 6) Aggravated robbery

Defense of third person, 9.33 – force or deadly force is justified against another to protect a third person if

1. Under the circumstances as the actor reasonably believes them to be, the actor would be justified (under self defense 9.31 and defense of third person 9.32) in using force or deadly force to protect himself against unlawful force or unlawful deadly force he or she reasonably believes to be threatening the third person he or she wants to protect
2. The actor reasonably believes his intervention is immediately necessary to protect the third person

Protection of life or health, 9.34 – force (but not deadly force) is justified against another when, and to the degree the actor reasonably believes, the force is immediately necessary to prevent the other from committing suicide or inflicting serious bodily injury to himself or herself.

Force and deadly force is justified when, and to the degree a person reasonably believes, the force or deadly force is immediately necessary to preserve the other's life in an emergency.

Protection of one's own property, 9.41 – a person in lawful possession of land or tangible, movable property is justified in using force when, and to the degree he reasonably believes, the force is immediately necessary to prevent or terminate the other's trespass on land or unlawful interference with the property.

One unlawfully dispossessed of land or tangible, movable property by another is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to reenter the land or recover the property **if the actor uses the force immediately or in fresh pursuit after the dispossession and**

1. The actor reasonably believes the other person had no claim of right to the land or property
2. The other (suspect) accomplished the dispossession by using force, threat, or fraud against the actor

Deadly force to protect property, 9.42 – deadly force is justified against another to protect land or tangible, movable property if

1. The actor would be justified in using force, as in "protection of one's own property," when and to the degree the actor reasonably believes, the deadly force would be immediately necessary to
 - a. Prevent the imminent commission of
 - 1) Arson
 - 2) Burglary
 - 3) Robbery
 - 4) Aggravated robbery
 - 5) Theft at nighttime
 - 6) Criminal mischief at nighttime
 - b. Prevent another from fleeing immediately after committing
 - 1) Burglary
 - 2) Aggravated robbery
 - 3) Robbery
 - 4) Theft at nighttime from escaping
2. The actor must reasonably believe that

- a. The land or property cannot be protected or recovered any other way
- b. The use of force other than deadly force would expose the actor or another to a substantial risk of death or serious bodily injury (used to protect or recover land or property)

Protection of third person’s property, 9.43 – force or deadly force is justified to protect land or tangible, movable property or a third person if, under the circumstances as the person reasonably believes them to be, he or she would be justified in using force or deadly force to protect his or her own land or property (as listed in Protection of one’s own property, 9.41 & Deadly force to protect property, 9.42), and

- 1. The person reasonably believes the unlawful interference constitutes attempted or consummated theft or criminal mischief of tangible movable property
- 2. The person reasonably believes that
 - a. The third person has requested the person to protect the land or property
 - b. The person has a legal duty to protect the third person’s land or property
 - c. The other person’s land or property the actor is using force or deadly force to protect is the actor’s spouse, parent, or child; resides with the person; or is under their care

Use of device to protect property, 9.44 – the justification afforded in “Protection of one’s own property, 9.41 & Protection of third person’s property, 9.43” applies to this section if

- 1. The device is not designed to cause, or known by the person to create a substantial risk of causing, death or serious bodily injury, and
- 2. The use of the device is reasonable under all circumstances as the person believes them to be when he or she installs the device

Arrest and Search, 9.51 – a peace officer (or person acting under direction of a peace officer) is justified in using force when and to the degree he reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest if

- 1. The person reasonably believes the arrest or search is lawful or if made under warrant he reasonably believes the warrant was valid, and
- 2. Before using force the person manifests his purpose to arrest or search and identifies as a peace officer (or another acting under authority of a peace officer), unless identity is already known or cannot reasonably be made known to the person being arrested

A peace officer is justified in using deadly force to make an arrest or to prevent escape after arrest if the use of force would have been justified under section (a) 9.51 as above, and

- 1. He or she reasonably believes the offense prior to the arrest included the use or attempted use of deadly force, or
- 2. He or she reasonably believes there is a substantial risk the person to be arrested will cause death or serious bodily injury to the officer or another if the arrest is delayed

A person other than a peace officer acting in the peace officer’s presence or direction is justified in using deadly force against another when he reasonably believes the deadly force is immediately necessary to make a lawful arrest, prevent escape after lawful arrest (if the force would have been justified under subsection (b) 9.51 above), and

1. The person reasonably believes the felony or offense includes the use or attempted use of deadly force
2. The person reasonably believes a delay in arrest will cause the suspect to cause death or serious bodily injury to another person

Prevention of escape, 9.52 – force to prevent escape of an arrested person from custody is justified when force could have been employed to make the arrest, except that a guard in a penal institution or a peace officer is justified in using any force, including deadly force, to prevent escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of crimes

Maintaining security in penal institutions, 9.53 – a peace officer, jailer, guard employed at a municipal or county jail, or correctional officer employed by the Texas Department of Criminal Justice (TDCJ) is justified in using force against a person in custody to maintain security in the institute, the safest security of other persons in custody, and/or a person employed at the institute for his own safety

Parent-Child, 9.61 – force (but not deadly force) is justified against a child younger than 18 years of age

1. If the person is the child's parent or stepparent, or acting in loco parentis to the child, and
2. When and to the degree the person reasonably believes the force is necessary to discipline the child, or safeguard or promote the child's welfare

In loco parentis includes grandparents and guardians; any person acting by, through, or under the direction of a court with jurisdiction over the child; and anyone who has express consent of the parent or parents

Educator-student, 9.62 – force (but not deadly force) is justified

1. If the person (teacher, etc.) is entrusted with the care, supervision, or administration of the person for a special purpose, and
2. When and to the degree the person, teacher, etc. reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group

Guardian-Incompetent, 9.63 – force (but not deadly force) is justified on a mental incompetent

1. If the person is the guardian or someone similarly responsible for the general care and supervision of the incompetent, and
2. When and to the degree the actor (guardian) reasonably believes the force is necessary
 - a. To safeguard and promote the incompetent's welfare
 - b. If the incompetent is in an institution for his or her care and custody, to maintain discipline in the institution