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Deadly Misunderstandings About Police Use of Deadly Force

By Gerald S. Reamey¹

Misunderstanding when deadly force is justified by law has terrible consequences, for citizens, for the public, for law enforcement agencies, and for individual officers. What most officers know is based on academy and – sometimes – in-service training, mixed with liberal amounts of advice, misstatements, and half-right pronouncements from other officers, as well as the officers' own preconceived notions. When the "test" comes, the answer always is influenced by panic, fear, and more reaction than reflection. In the leisurely process of reviewing an officer's use of deadly force, it is easy to see the mistakes that were made – often they can be viewed by the entire world on social media sites. But it's too late to undo the harm those mistakes caused.

After decades of studying and teaching criminal law and procedure, advising police officers, and reviewing deadly force cases, I have observed repeated and common misunderstandings that often produced tragic results. When good officers go wrong, it may be because they have forgotten, or never knew, the basic tenets of the law of justification.² Here are some of the recurring ways officers can get it wrong:

If I'm in fear for my life, I can use deadly force. The law of justification has nothing to do with "fear." It's based on some very simple principles that should guide every officer, whether using deadly force or non-deadly force. Keep these in mind:

The law requires you to use the least amount of force necessary, and

The law allows you to use deadly force only as a last resort.

In Chapter 9 of the Texas Penal Code, the repository for all of the state law governing justification for the use of force, you'll find in virtually every section the following phrase: "when and to the degree the actor reasonably believes the force (or deadly force) is immediately necessary."³ Notice that the belief must be "reasonable." That's a word with legal significance, meaning what an objectively reasonable officer would believe in the same situation. That's the standard by which the officer will be judged – not by whether she or he was in "fear."

An officer may use deadly force to stop a fleeing felon. An officer might think this is true, and it might be true in some situations, but the justification is governed by necessity. That magic phrase in Chapter 9 restricting use of force to the actor's reasonable belief expresses the "less is best" requirement in its "when and to the degree" language. If, for example, an officer finds that a motorist he has stopped for a traffic offense has an outstanding felony warrant, the use of deadly force, or even non-deadly force, is not justified to make the arrest unless it is necessary.⁴ But doesn't Section 9.52(c) of the Penal Code permit using deadly force to arrest if the officer "reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force"? Yes, it does, but that subsection – like the one allowing deadly force to arrest if a delay would create a substantial risk of death or serious bodily injury to the officer or another person⁵ – is limited by the "to the degree" restriction. If the use of non-deadly force, or none at all, can be used safely, then deadly force is not justified. And, even if deadly force seems required, it must be reasonable to believe it is required *right then*.

Imagine that during that traffic stop, while you're approaching the driver's side of the vehicle after learning of the felony warrant, you see the driver has a knife in his hand. Could you shoot the suspect because he's threatening you with deadly force? The word "when" in "when and to the degree" means that you cannot use deadly force until it's necessary. If you're outside the range of that knife and would have time to react if the threat becomes more immediate, the law expects you not to use deadly force yet.

This weighing of factors to determine necessity is reflected not only in Texas law, but in the notion of due process guaranteed by the United States Constitution. In *Tennessee v. Garner*,⁶ the Supreme Court held that arresting a fleeing burglar by shooting him was unreasonable under the Fourth Amendment and violated that person's due process rights because the burglary was not a crime involving deadly force, and there was no reason to think the fleeing teenage felon posed a danger of causing death or serious bodily injury to others if he escaped. The Court noted that the crime of burglary does not permit the death penalty, and it might be added that, in any event, the suspect is entitled to the due process of a trial before being punished for a crime he may or may not have committed.

I can use deadly force if a suspect doesn't show me his hands or refuses to comply with my orders. Reasonable belief governs the timing of deadly force. The question is not whether a suspect is noncompliant or furtive, but whether that behavior would, under the circumstances, warrant an officer's *reasonable* belief that the suspect is presently threatening the officer with deadly force. Ask whether there are reasons for the suspect's actions other than being a threat, perhaps even innocent ones, that would explain the conduct. If several readily come to mind, an officer can't assume the worst and expect her use of deadly force to be justified. There must be some better reason to believe the suspect is threatening the use of deadly force, some reason the officer will be able

to articulate from the witness stand if she is charged with homicide or aggravated assault, or sued for using excessive force. Although the presence of a weapon on the fleeing burglar probably would not have changed the Supreme Court's holding in *Tennessee v. Garner*, it was not lost on the Justices that the teenager was unarmed. It would not suffice to say, "Well, he might have had a weapon. Burglars sometimes do." *Might have* is not the equivalent of *reasonable belief*.

When I investigate a residential burglary, I should tell the resident that he can shoot an intruder he finds in his home. Unfortunately, officers sometimes take it upon themselves to advise citizens that the law allows them to shoot intruders on their property, and especially inside their residences. Texas law actually does not permit the use of deadly force against burglars and trespassers merely because they enter without consent.

Generally for citizens, justification must fall under self-defense, defense of others, or – in very limited circumstances – defense of property. All of these are subject to the same "when and to the degree" requirement that governs the use of force by law enforcement. In other words, a homeowner who finds a burglar in the living room is not justified in using deadly force unless it is reasonable to believe that much force is "immediately necessary." If non-deadly force will suffice, deadly force cannot be used at all, but it's never justified if there's time to do something else.

Citizens and officers sometimes prove that a little knowledge is a dangerous thing by believing that Texas has a "castle doctrine" that allows homeowners and residents to use deadly force freely to protect their property. Actually, Texas does not have a "castle doctrine" at all, and if it did, it would not allow the unrestricted use of deadly force against intruders. "Standing your ground" does not mean deadly force is justified. It means only that retreat is not required.

Because police officers are seen by members of the public as authorities on the law, it is important for officers to use extra care in advising others on what the law allows or prohibits. If the officer gets it wrong, it is the citizen who relied on the officer's interpretation who will pay the price

I am allowed to use deadly force to prevent the escape of a prisoner or inmate. Section 9.52 of the Texas Penal Code is cast broadly, and seems to permit the use of any force necessary to prevent escape from a "correctional facility." Specifically, the section purports to allow a guard "or a peace officer" to use any force, "including deadly force," that is reasonably believed to be immediately necessary to prevent escape. That section, however, is almost certainly unconstitutional.

The usual temporal limitation applies to the use of deadly force in this situation, of course. The use of force, even non-deadly force, must be immediately necessary in order to stop the escape. But a literal reading of the section would allow any peace officer, for example, to shoot a prisoner who was arrested for misdemeanor shoplifting and fleeing from a city jail, merely because the officer reasonably believed he would not be able to catch up with the escapee. Clearly, such an action would violate due process and the Fourth Amendment under the holding in *Tennessee v. Garner*, subjecting the officer to criminal prosecution, civil liability, and internal discipline. This section is a good reminder that you can't always believe what you read in a statute.

An arrestee is never allowed to use force against an arresting officer. As often happens, a kernel of truth can sprout and grow in unintended directions. For sound policy reasons, persons who are being arrested are not allowed to use force to resist that arrest,⁷ and that is true even if the arrest is unlawful.⁸ This rule is based on the notion that disputes about the lawfulness of an arrest should not be settled on the street by forcible resistance, but should be resolved at a later time in a court of law.

It would be legally incorrect, however, to interpret this rule to mean that an arresting officer is free to use whatever force she wishes to make an arrest, or that an arrestee may never use force against the officer in self-defense. The use of force by officers to arrest or search is controlled by Section 9.51 of the Penal Code. In conformity with other justifications, the amount of force and the timing of the use of force are subject to familiar limitations: using the least force necessary and only when it is immediately necessary.

The use of force by an arrestee to resist not only subjects that person to prosecution under Section 38.03, but also strips the arrestee of any claimed justification.⁹ If an officer uses excessive force, however, whether deadly or non-deadly, the arrestee's justification is revived.¹⁰ For instance, if an officer would be justified in using only non-deadly force to make an arrest, but uses or threatens deadly force instead, the person being arrested now has a right to defend himself or herself against the officer's use of deadly force. And that self-defense will be justified because the officer's use of deadly force is "unlawful;" that is, it is not justified because it is excessive. The arrestee isn't allowed to fight off the arrest, even if it's unlawful, but he *is* allowed to protect himself if the officer gets carried away and uses excessive force.

A Few More Deadly Thoughts: The use of force, especially deadly force, by law enforcement is one of the most important issues in contemporary policing. Nothing less than lives and community trust are at stake. No technological innovation, body cameras, modified taser policy, or social media campaign, will be able to dissipate public dissatisfaction with law enforcement's use of force unless judicious and appropriate levels of force are applied consistently.

It is more important than ever that use-of-force training be universal, regular, and frequent, and that it include more than just how-to lessons on deployment. Ultimately, officers and the public's opinion of those officers will be judged by whether

they are seen to be adhering to the letter and spirit of the law. That law values human life very highly, as it should, and not only the life of a law-abiding citizen, but that of every person. Adherence to the law of justification requires all of us – not only law enforcement officers – to take some risk and to

consider carefully before pulling a trigger. The law does not require anyone to act foolishly or imprudently, but it also does not allow for a “shoot first, ask questions later” approach.

Resources in the legal community and elsewhere are readily available to assist in learning and applying the sometimes complicated rules of justification. The rewards for hewing closely to the law are many; the consequences for departing from them can be deadly.

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² The law of justification I discuss in this article is limited to that of Texas and the United States Constitution. Justification rules in other states may vary, and even agencies and governmental subdivisions in Texas may impose more restrictive rules on the use of deadly force than the state law requires.

³ See, e.g., TEX. PENAL CODE ANN. Secs. 9.31(a), 9.32(a)(2).

⁴ Justification for the use of any level of force to make an arrest also depends on the officer reasonably believing that the arrest is lawful, which includes a reasonable belief that a valid warrant exists. See TEX. PENAL CODE ANN. Sec. 9.51(a)(1). An officer must “manifest his purpose to arrest or search” and must identify himself or herself as a peace officer *prior* to using either deadly or non-deadly force. See TEX. PENAL CODE ANN. Sec. 9.51(a)(2).

⁵ See TEX. PENAL CODE ANN. Sec. 9.51(c)(2).

⁶ 471 U.S. 1 (1985).

⁷ See TEX. PENAL CODE ANN. Sec. 38.03(a).

⁸ See TEX. PENAL CODE ANN. Sec. 38.03(b).

⁹ See TEX. PENAL CODE ANN. Sec. 9.31(b)(2)

¹⁰ See TEX. PENAL CODE ANN. Sec. 9.31(c).