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Police Use of Force Laws in Texas

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ARTICLE

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* Professor of Law, St. Mary's University School of Law, San Antonio, Texas. My interest in police reform and the use of force stems from my private practice experience representing those accused of crime, and from my service as Police Legal Advisor for the Irving, Texas, police department. For decades, I have actively participated in law enforcement training in Texas, teaching classes for officers, and consulting with police agencies. These experiences convince me that meaningful reform must be undertaken with a thorough understanding of the needs and culture of modern policing, as well as a sensitivity to the ways in which abuses of policing affect communities and individuals. In the end, the success of policing is measured by the relationship between law enforcement agencies and the people they serve. The goal is to create an accurate perception that the police act in service of the community, and not as a "thin blue line" that divides "us" from "them." Law plays an important role in defining the boundaries of effective policing, but it is by no means the only limiting force, or even the most significant one. To the extent that it reflects an appropriate police culture rather than expressing an unmet aspiration, society will be well served by its law enforcement officers. In this hope, I dedicate this Article to the men and women who serve selflessly in law enforcement, and who strive every day to achieve the legitimate ends of sound policing.

At the heart of calls for police reform lie use of force laws. While policing agencies adopt and enforce their own policies regarding when and how force may be used by officers of those agencies, state laws rarely define the uniform limits under which officers operate.[1]

Policing in the United States is highly fractured.[2] In any county, dozens—or even hundreds—of law enforcement agencies may be operating.[3] Most of these are autonomous. They determine the policies under which they operate, including those for use of force.[4] They also decide whether and how to investigate violations of internal policies, as well as the punishment that will be meted out for policy violations.[5]

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1. *See* Congressional Research Service, *Police Use of Force: Overview and Considerations for Congress*, 3 (July 10, 2020), https://fas.org/sgp/crs/misc/LSB10516.pdf [https://perma.cc/53JX-J6TD] (introducing "use-of-force policies" at both "federal departments and agencies" level and "local law enforcement" level).

2. *See* Jill Lapore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police [https://perma.cc/5BV4-4YPW] (discussing a summary of the development of policing in the United States and the proliferation and decentralized growth of law enforcement agencies); *see also* Seth W. Stoughton, Jeffrey J. Noble, Geoffrey P. Alpert, *How to Actually Fix America's Police*, ATLANTIC (June 3, 2020), https://www.theatlantic.com/ideas/archive/2020/06/how-actually-fix-americas-police/612520/ [https://perma.cc/X6PZ-ZJQ2] [hereinafter *How to Actually Fix America's Police*] (discussing the "hyperlocalized nature of policing in the United States" as a factor in police reform).

3. *See* Brian A. Reaves, *Local Police Departments, 2013: Personnel, Policies, and Practices*, U.S. Dep't of Justice Bureau of Justice Statistics Bulletin 2 (May 2015), https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf [https://perma.cc/3CDT-A6ZM] (reporting in 2013, approximately 15,388 general purpose state and local law enforcement agencies existed in the United States).

4. *See Local Police Departments: Policies and Procedures, 2016*, U.S. Dep't of Justice Bureau of Justice Statistics 4 (Aug. 2020), https://www.bjs.gov/content/pub/pdf/lpdpp16.pdf [https://perma.cc/UYM5-FEWE] (reporting local police departments' policies, procedures, and compliance).

5. *See* Darrel W. Stephens, *Police Discipline: A Case for Change*, New Perspectives in Policing, Washington, D.C.: U.S. Dep't of Justice, NAT'L INST. OF JUSTICE (June 2011), https://www.ncjrs.gov/pdffiles1/nij/234052.pdf [https://perma.cc/W3AF-TFEM].

Predictably, this fragmentation of policing produces inconsistency. While some agencies take seriously the creation of policy, the training of officers to comply with that policy, the supervision of officers, and the enforcement of internal rules, others neglect policy matters from inception to enforcement.[6] The overarching principles that govern all state law enforcement agencies in the conduct of their policing function are those adopted at the state and federal level.

The principal limiting norms of police conduct are incorporated in the Constitution of the United States, particularly in the Fourth, Fifth, Sixth, and Fourteenth Amendments.[7] But these constitutional constraints, while explicated in countless state and federal appellate opinions, remain vague contours rather than sharp and bright lines.[8] They are suitably broad and conceptual, and not specific and prescriptive. It is important to prohibit unreasonable searches and seizures as the Fourth Amendment of the Constitution does, but those words only hint at the limits on an officer's conduct.[9]

Internal policies, on the other hand, tend to be encompassing and, in many cases, quite detailed.[10] For example, a departmental policy might specify that in the event of an accident in which a vehicle is inoperable due to damage, the officer will initiate an impoundment process and will inventory the personal effects within the vehicle prior to its being towed away. Standard operating procedures (SOPs) or policy manuals operate like an instruction book, prescribing what should or must be done in certain specific situations.

Use of force policies adopted by agencies are sometimes written in sweeping terms, but they can be similarly specific.[11] Officers may be prohibited, for instance, from engaging in any high-speed pursuit, or officers may be forbidden from discharging a firearm at a vehicle in which the driver

6. *See How to Actually Fix America's Police*, *supra* note 2 (hyperlocalizing policing results in varying policies and training in those policies).

7. *See* U.S. CONST. amends. IV–VI, XIV (enumerating the freedom from unreasonable searches and seizures, the freedom from compelled self-incrimination, the right to assistance of counsel in criminal prosecutions, and the right to due process of law).

8. *See How to Actually Fix America's Police*, *supra* note 2 (finding Fourth Amendment doctrines are a "mess," providing "little meaningful guidance").

9. *See id.* (noting state laws are supposed to be broader than Fourth Amendment constraints).

10. *See id.* ("Policy manuals are too lengthy for anyone to realistically expect officers to memorize the whole thing . . . .").

11. *See id.* (some use-of-force policies require only the minimum amount of force while others are quite specific about varying situations).

is evading apprehension. Not intended to address all of the situations an officer might confront,[12] these policies often aim to curb some of the foreseeable and undesirable uses of force that might otherwise occur.[13]

Despite their best efforts to "pre-judge" the necessity or advisability of using force, all law enforcement agencies ultimately rely on the judgment, training, and experience of individual officers. For many, and perhaps for most officers, that judgment will be exercised appropriately and use of force will be restrained. But there will, of course, be lapses in judgement, lack of training or experience, fear, or implicit or explicit biases that will lead to tragic results.[14]

In order to further limit the bounds of an officer's discretion, agencies often adopt policies that are more restrictive than constitutional constraints, or even state laws, dictate.[15] An agency might prohibit the use of deadly force except in self-defense or the defense of another, or might require officers to use the minimum amount of force necessary to accomplish a legitimate policing function.[16] State law would likely permit an officer to use deadly force in situations not involving self-defense, or to use a greater degree of force than is absolutely necessary in some situations.[17] But the agency is free to adopt a more restrictive policy position.

State laws governing the use of force, including those of Texas, are written in terms of the circumstances in which some level of force is

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12. The police department for which I worked as a legal advisor had not previously employed a lawyer in that position. In anticipation of my arrival, the chief of the department invited all departmental personnel to make a "wish list" of things the department's new legal advisor should address in order to improve law enforcement within the city. One erstwhile young officer suggested that I write a procedure manual detailing all of the situations in which police officers could search someone, either with or without a warrant. I explained to the officer that if I were to be able to create such a specific manual, each officer would need to drive a large truck in which to carry the manual, and that in any event, the manual would still not address every possible situation that might arise.

13. *See How to Actually Fix America's Police*, *supra* note 2.

14. *See generally* David Brooks, *The Culture of Policing is Broken*, ATLANTIC (June 16, 2020), https://www.theatlantic.com/ideas/archive/2020/06/how-police-brutality-gets-made/613030/ [https://perma.cc/RFD8-W7B5] (describing various factors contributing to police abuses).

15. *See Federal Power over Local Law Enforcement Reform: Legal Issues*, EVERYCRSREPORT 2 (July 13, 2015–July 7, 2016), https://www.everycrsreport.com/reports/R44104.html#_Toc455758066 [https://perma.cc/W9TQ-SLL2] [hereinafter *Federal Power*] (discussing the U.S. Constitution as a "floor" while states can impose greater restrictions).

16. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 15.24 (providing officer may not use more force than is necessary to secure arrest and detention).

17. *See, e.g.*, TEX. PENAL CODE ANN. § 9.32 (deadly force may be used in self-defense when it is reasonable to believe it to be immediately necessary); *id.* § 9.51(c) (officer may use deadly force to arrest or prevent escape after arrest in some circumstances).

justified, the timing of the use of that force, and the quantum of force that is justified.[18] In short, these laws establish a "ceiling" for an officer's use of force, but not a "floor."[19] And state laws almost always do so, not by explicitly delineating what an officer may not do, but rather by describing guidelines for what an officer *may* do. If the officer acts within those boundaries, she has a defense to prosecution based on the use of force.[20] If not, no justification exists.

Texas's laws regarding the use of force by the police might be seen as consisting of the following categories: criminal statutes;[21] justifications (defenses) that are available to all persons;[22] justifications that apply only to peace officers acting in an official capacity;[23] and general limitations other than justifications on the use of force by peace officers.[24] Internal agency policies fall outside these statutory norms, although they may reinforce, restate, or expand on them. Policy violations may result in disciplinary action—definite or indefinite suspension, reprimand, or demotion in rank—but not in prosecution.[25]

As an example of how law and policy work together, consider the case of a police officer who unlawfully shoots and kills a person. The officer has committed a crime. Whether that crime is best understood as murder, manslaughter, criminally negligent homicide, aggravated assault, or some other offense depends on the culpability with which the act was done. But the officer may have a defense to prosecution for the crime she has committed. That defense will likely be in the form of a "justification." The

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18. *See, e.g.*, *id.* §§ 9.31–.32, 9.51–.52.

19. *See Federal Power*, *supra* note 15 (stating the U.S. Constitution is a "floor," and states can impose greater restrictions).

20. *See, e.g.*, PENAL CODE §§ 9.31–.32, 9.51–.52.

21. *See id.* ch. 19, 22 (explaining an officer's actions might constitute criminal activity, usually for violating the civil rights of another or for committing a crime against the person, like murder, manslaughter, criminally negligent homicide, aggravated assault, or assault).

22. *See, e.g.*, *id.* §§ 9.31–.32 (use of non-deadly force in self-defense and use of deadly force in self-defense).

23. *See, e.g.*, *id.* §§ 9.51–.52 (comparing use of non-deadly or deadly force to arrest or search, or to prevent escape after arrest or escape from custody).

24. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. arts. 6.06, 15.24; TEX. PROP. CODE ANN. § 24A.003.

25. *See* Katherine Hawkins, *Unqualified Impunity: When Government Officials Break the Law, They Often Get Away with It*, POGO (Oct. 22, 2020), https://www.pogo.org/analysis/2020/10/unqualified-impunity-when-government-officials-break-the-law-they-often-get-away-with-it/ [https://perma.cc/DDR9-RGDC] (illustrating acts of misconduct that do not rise to the level of criminal activity are subject to internal discipline, rather than criminal charges).

shooting (use of deadly force) might, for example, have been in self-defense[26] or defense of another.[27] Other defenses may also apply. For instance, the officer may have fired while operating under a reasonable mistaken belief about a material fact, thereby negating the officer's culpability for the death.[28] Or the officer's actions may have been prompted by the attempted escape of someone who has committed a dangerous felony.[29] All of this will come into play if the officer is criminally prosecuted for the crime.

Even if our hypothetical officer is not prosecuted under Texas law, a prosecution may be mounted under federal law.[30] Or the officer may be fired or otherwise disciplined for violating an internal policy or rule. Or the officer may be sued for money damages based on a theory of state or federal tort liability.[31]

This Article does not attempt to address all of the possible consequences for an inappropriate use of force by a peace officer. Rather, it considers only Texas state law, and only that law relating to the prosecution of an officer for a criminal offense arising from the use of force. Because policy decisions made by individual departments and agencies are not uniform, it is not feasible to catalog the myriad ways in which all law enforcement entities, even within the state of Texas, limit or allow the use of force. Tort law, the other source of positive law related to harms caused by officers using force, generally follows the criminal law in its substance and departs primarily in questions regarding immunity and procedure.[32] It, too, is not directly the subject of this Article.

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26. PENAL CODE § 9.32.

27. *Id.* § 9.33.

28. *See id.* § 8.02 (discussing a "mistake of fact" defense).

29. *See id.* § 9.51(c) (justification for use of deadly force to prevent escape in limited circumstances).

30. *See* 18 U.S.C. § 241 (stating officers may be prosecuted under the theory of "[c]onspiracy against rights").

31. *See* 42 U.S.C. § 1983 (providing federal protection for "every person" deprived of civil rights).

32. *See generally* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (describing the many similarities and vanishing differences between criminal law and tort law); Joanna C. Schwartz, *Suing Police for Abuse is Nearly Impossible. The Supreme Court Can Fix That.*, Washington Post (June 3, 2020), https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity/ [https://perma.cc/A4HF-6PQQ] (showing how qualified immunity doctrine makes it difficult to prevail in police misconduct tort cases).

I. UNDERSTANDING STATUTORY JUSTIFICATION IN TEXAS

The laws of justification reside in the Texas Penal Code, specifically in Chapter 9.[33] To say an act is "justified" means in a procedural sense only that the person committing the act has a "defense to prosecution."[34] The phrase "defense to prosecution," in turn, establishes the burden assumed by the person asserting the justification.[35] For all Penal Code crimes, a defense to prosecution carries a burden of production, but not a burden of persuasion.[36]

A burden of production means that the accused need only "produce" some evidence that a justification exists.[37]

In fact, however, the defendant need not "produce" anything. Evidence suggesting a justification may come from any source in a trial.[38] It may originate in the testimony of a state's witness, a defense witness, the defendant, or a document.[39] If it is "produced" by any of these, the trial court is required to instruct the jury on the justification suggested by the evidence.[40] Moreover, the evidence need not be believable or substantial.[41] It requires very little to raise the possibility of a justification but, once raised, the prosecution must disprove the application of that justification beyond a

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33. PENAL CODE ch. 9.

34. *Id.* § 9.02.

35. *See id.* § 2.03(d) ("If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.").

36. GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 127–28 (Harrison Co. 3d ed., 2000).

37. *Id.*; *see also* County of Ulster County, N.Y. v. Allen, 442 U.S. 140, 158 n.16 (1979) (distinguishing "burden of production" from "burden of proof").

38. *See* Hayes v. State, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987) (noting it is well settled that an accused is entitled to a defensive jury instruction whether the issue is raised by a defendant's testimony alone or otherwise).

39. *See id.* ("[A]n accused is entitled to an instruction on every defensive issue raised by evidence . . . regardless of whether such evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of this evidence."); *see* Hamel v. State, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996) (recognizing if a defendant raises a defensive issue, he is entitled to a jury instruction regardless of the source or strength of the evidence).

40. *See Hamel*, 916 S.W.2d at 493 (stating a witness is entitled to an instruction on defensive issues if raised by the evidence); Muniz v. State, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (recognizing if evidence of defensive issue is raised by any party, refusal of trial court to submit to jury is abuse of discretion).

41. *See Hamel*, 916 S.W.2d at 493 ("[A]n accused has the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense.").

reasonable doubt.[42] A justification is a powerful shield for the accused.

Justifications apply to the use of "force" and the use of "deadly force."[43] Although the Texas Penal Code does not spell out the meaning of "force," "deadly force" is statutorily defined in Chapter 9.[44] In effect, when the word "force" is used in the chapter, it connotes "non-deadly force,"[45] while the words "deadly force" indicate force that may result in death or serious bodily injury.[46] The organizational scheme of the Penal Code chapter usually first defines the justification for a use of force, then, in the following section, a justification for the use of deadly force. For example, the use of force in self-defense is set forth in Section 9.31,[47] followed in Section 9.32[48] by provisions regarding the justification for the use of deadly force in self-defense.

The practical effect of the justifications in Chapter 9 is to establish statutory defenses to crimes in which any level of force is used. If no justification is prescribed, the result is that the accused does not have access to such a defense, although other defenses outside of Chapter 9 might be

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42. *See* Mendez v. State, 515 S.W.3d 915, 921 (Tex. App.—Houston [1st Dist.] 2017), *aff'd* 545 S.W.3d 548 (Tex. Crim. App. 2018) (reinforcing once an issue of self-defense is raised by evidence, the prosecution must prove elements of offense charged beyond a reasonable doubt, and must prove beyond a reasonable doubt that the defendant did not act in self-defense); *see also* REAMEY, *supra* note 36, at 127–28 (discussing defendant has the burden of producing evidence of defense but the prosecution retains the burden of persuading the factfinder beyond a reasonable doubt).

43. *See generally* TEX. PENAL CODE ANN. §§ 9.31–.32 (describing non-deadly and deadly use of force in self-defense); *id.* §§ 9.41–.42 (describing non-deadly and deadly use of force in defense of property); *id.* § 9.51 (describing non-deadly and deadly use of force by peace officers conducting a search or making an arrest or preventing escape from arrest).

44. *See id.* § 9.01(3) ("'Deadly force' means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.").

45. This distinction is not explicit in the Texas Penal Code. "Force" is not statutorily defined for the Code generally, or for Chapter 9 of the Code specifically. *See id.* §§ 1.07(a), 9.01 (highlighting the lack of any definition for term "force" in both sections). The connotation is drawn from the explicit definition of "deadly force" as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." *Id.* § 9.01(3). By process of elimination and deduction from the separation of justifications stemming from "force" and "deadly force," the conclusion is inescapable that "force" was intended to represent "non-deadly force."

46. *Id.* "Death" does not have a Penal Code definition, but "serious bodily injury" does. *See id.* § 1.07(a)(46) ("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.").

47. *Id.* § 9.31.

48. *Id.* § 9.32(a).

available.[49] When a Texas peace officer uses any level of force against another, *and is prosecuted for doing so*, the first line of defense will lie in Chapter 9. But those defenses are not exclusive.

As noted earlier, prosecution is but one of several options available for the vindication of a violation of rights. An officer might be sued, for example, for committing a constitutional tort or tort under state law.[50] An officer also may be subject to agency discipline. For a variety of reasons, internal discipline is almost certainly the most commonly applied punishment for misconduct involving the use of force,[51] although collective bargaining agreements and civil service laws can make even this response slow and uncertain.[52]

Qualified immunity and indemnification laws or agreements serve to protect officers from civil liability for money damages.[53] What is left—prosecution—tends to be the remedy of last resort, which is employed

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49. For example, the actor could claim the affirmative defense of insanity. *See generally id.* § 8.01 ("It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.").

50. *See generally* 42 U.S.C. § 1983 (proscribing monetary fines and imprisonment for those who violate rights while acting under color of law); *see also* TEX. CIV. PRAC. & REM. CODE § 101.021(2) (proscribing the Texas Tort Claims Act provision, which waives immunity for injuries caused by negligent use of tangible property). A claim of excessive force by the police is a claim of battery, an intentional tort for which the Texas Tort Claims Act confers immunity. *See generally* Watauga v. Gordon, 434 S.W.2d 586, 594 (Tex. 2014) ("The Texas Tort Claims Act waives governmental immunity for certain negligent conduct, but it does not waive immunity for claims arising out of intentional torts, such as battery.").

51. This is likely to be the case because filing a citizen-initiated complaint against an officer is relatively easy and costs nothing. The sheer number of such complaints, while not reliably reported, virtually guarantees that internal discipline occurs more frequently than litigation or prosecution. While internal investigations and internal disciplinary procedures are criticized for being biased and ineffective, they must produce more cases of actual discipline, however slight, than other, more formal processes. *See Shielded from Justice: Police Accountability and Accountability in the United States*, HUM. RTS. WATCH (June 1998), https://www.hrw.org/legacy/reports98/police/uspo06.htm [https://perma.cc/D79C-CHTU] (describing all options of recourse available to victims of rights violations by an officer, including filing an internal complaint).

52. *See* Mark Dunphy, *SAPD Chief McManus Was Grilled at a Public Safety Hearing. Here Are 5 Takeaways*, SAN ANTONIO EXPRESS-NEWS (June 20, 2020, 5:13 PM), https://www.mysanantonio.com/news/local/article/The-San-Antonio-police-chief-was-grilled-at-a-15352925.php [https://perma.cc/K4RU-TQL6] (reporting 70% of officers fired for misconduct were hired back due to collective bargaining- arbitration clauses).

53. *See* Amelia Thomson-DeVeaux et al., *Why It's So Rare for Police Officers to Face Legal Consequences*, FIVETHIRTYEIGHT (Sept. 23, 2020, 4:53 PM), https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/ [https://perma.cc/9TVL-YE6Y] (reporting, since courts have granted qualified immunity to government officials, successful lawsuits against police officers are usually unsuccessful unless there is a clear violation of law).

infrequently.[54] The reasons for this reluctance to prosecute are both obvious and numerous, and easily could be the subject of a separate Article. For the purposes of this discussion, however, consider prosecution and conviction to be a real possibility for an errant peace officer. Justifications and other laws limiting or defining allowable use of force are critical on those rare occasions when prosecution is initiated.

It is a federal crime for a person acting under color of state law to deprive a person of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States.[55] The use of excessive force or unjustified force by a peace officer qualifies as the deprivation of a constitutional right, usually the right to be free from unreasonable seizure, guaranteed by the Fourth Amendment to the United States Constitution.[56]

But if prosecution of a peace officer for a state offense is rare; even more rare is prosecution of an officer for a use of force that constitutes a federal crime.[57] Not unlike the principle of complementarity that one finds in the procedures of the International Criminal Court,[58] federal law enforcement agencies are reluctant to investigate officer-involved use-of-force incidents in the first instance. Instead, they defer to their state counterparts to take the lead in such investigations and act only when local authorities fail or refuse.[59]

Similarly, federal prosecutors rarely initiate actions against local officers.[60] They much prefer to wait for state-level prosecution. Even if

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54. *See id.* (illustrating the numerous legal hurdles faced in prosecuting police officers for violence against civilians).

55. 18 U.S.C. § 242.

56. U.S. CONST. amend. IV; *see* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding claims that law enforcement officers used excessive force are "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard").

57. *See* Thomson-DeVeaux et al., *supra* note 53 (reporting the fact that "not all misconduct—including use of excessive or even fatal force—is illegal" makes prosecution so rare); Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 Fordham Urb. L.J. 639, 643–44 (2002) (noting state prosecutors can use a negligence standard when prosecting excessive force by officers whereas district attorneys generally bring charges that require a higher degree of proof).

58. *See generally Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-OTP (2003), https://www.icc-cpi.int/nr/rdonlyres/20bb4494-70f9-4698-8e30-907f631453ed/281984/complementarity.pdf [https://perma.cc/KWT2-T2H5] (highlighting the deference given to States in prosecuting international criminals by the International Criminal Court).

59. *See* Panwala, *supra* note 57, at 643 ("The federal government ordinarily defers to local authorities in the prosecution of police brutality.").

60. *See Police Officers Rarely Charged for Excessive Use of Force in Federal Court*, TRAC REPORTS (June 17, 2020), https://trac.syr.edu/tracreports/crim/615/ [https://perma.cc/B5GU-D4KE] (noting federal prosecutors rarely bring charges under 18 U.S.C. § 242).

local authorities refuse to prosecute, federal authorities will proceed against an officer only if the case is one that has captured strong local or national attention and the public demand for prosecution cannot be ignored.[61] Federal criminal prosecution of officers for wrongful use of force remains a "backstop" to prevent at least some of the worst cases of injustice.

As a consequence of this reluctance by federal investigators and prosecutors to intervene, the few use-of-force prosecutions of Texas peace officers are often for Texas Penal Code offenses.[62] Use-of-force prosecutions of officers typically involve homicide or assaultive offenses, although crimes involving abuse of office may also be appropriate. For the purposes of this Article, the primary focus is on assault and homicide rather than offenses punishing malfeasance or misfeasance.

II. LAW ENFORCEMENT JUSTIFICATIONS

Chapter 9 of the Texas Penal Code is populated with general justifications applicable to everyone.[63] But Subchapter E of the Code sets forth justifications exclusively for peace officers.[64] To characterize those broadly, they apply to the use of force, including deadly force, during an arrest,

61. *See* United States. v. Koon, 833 F. Supp. 769, 786 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994) (describing the sequence of state prosecution, acquittal, federal prosecution, and conviction of officers involved in the beating of Rodney King).

62. *See* Tanya Eiserer, *Officer: Dallas Cop on Trial Protected Other Officers When Shot into Car, Killing Woman*, WFAA NEWS (Feb. 4, 2020, 7:06 PM), https://www.wfaa.com/article/news/crime/dallas-ex-cop-christopher-hess-goes-on-trial-tuesday/287-92f7fe81-a2e6-4d67-bff2-4efd3f186a20 [https://perma.cc/K38U-Z4XG] (reporting a police officer was prosecuted for aggravated assault); Bobby Allyn, *Ex-Dallas Officer Who Killed Man in His Own Apartment Is Found Guilty of Murder*, NPR (Oct. 1, 2019, 11:59 AM), https://www.npr.org/2019/10/01/765788338/ex-dallas-officer-who-killed-neighbor-in-upstairs-apartment-found-guilty-of-murd [https://perma.cc/42WK-DLB7] (covering the story of an officer convicted of murder); Nathan Layne, *Texas Prosecutor Says Probe of Police Shooting of Black Man Will Go to Grand Jury*, U.S. NEWS & WORLD REP. (Oct. 6, 2020), https://www.usnews.com/news/top-news/articles/2020-10-06/texas-police-officer-charged-in-killing-of-black-man [https://perma.cc/ZRP6-SN3C] (stating an officer was charged with murder as a result of investigation by Texas Rangers); Catherine Dominguez, *Former Willis Police Officers Convicted in 'Drive-By Tasing' Trial,* COURIER (Aug. 14, 2019, 8:34 PM), https://www.yourconroenews.com/neighborhood/moco/news/article/Former-Willis-police-officers-convicted-in-14304537.php [https://perma.cc/7NKN-ZVTT] (recounting how officers who tased a man running from them were convicted of falsifying documents). *See also* Ryser v. State, 453 S.W.3d 17, 27 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (reiterating while a peace officer's use of force to effect an arrest may be justified, there are limits to the justifiable use of force).

63. *See generally* TEX. PENAL CODE ANN. ch. 9 (providing justifications for use-of-force excluding criminal responsibility).

64. *See generally id.* ch. 9, sub ch. E (providing specific justifications for use-of-force by law enforcement).

search, or in preventing escape from custody or after arrest.[65] These justifications are of particular importance because they extend beyond the justifications provided for self-defense, defense of property, and defense of others. In effect, they fill a gap for officer conduct by providing a defense for conduct that would be an assault or homicide if committed by anyone else.

As is true for virtually all Chapter 9 justifications, the Texas Penal Code uses "magic words" that define and limit the extent to which a justification for the use of force by police applies.[66] The phrase used repeatedly throughout Chapter 9 is "when and to the degree the actor reasonably believes the [force or deadly force] is immediately necessary[.]"[67] Read carefully, this powerful phrasing captures important constraints that prevent justifications from applying too broadly. "When and to the degree" clearly connotes both an "if and when" component, and a "degree" or quantum component. This language establishes for every justification in which it appears, notice that force may be used only sometimes, *and* that the degree of force used must be modulated by the exigencies of the moment.

An example of the flexibility inherent in the "when and to the degree" formulation may be seen in the following examples. Suppose that a peace officer is threatened by a person with a knife who is standing thirty yards from the officer. A knife may be a deadly weapon, although it is not one per se.[68] Therefore, the officer could be justified in using deadly force to protect herself against the threatened unlawful use of deadly force by the person wielding the knife. But the officer could not simply draw her pistol and shoot the would-be attacker. There is an alternative in this situation because it is not yet necessary to use deadly force, even though deadly force is involved in the threat. In other words, "to the degree" might authorize that *level* of force, but the "when" limitation would not permit it while the distance between the officer and assailant is so great. If the knife-wielding attacker runs at the officer, closing the distance between them, the level of

65. *See generally id.* §§ 9.51–.52 (describing the justifications awarded officers in conduct of their position).

66. *See, e.g., id.* §§ 9.31–.32, 9.41–.42, 9.51–.52 (stating the exact same "magic words" in each section).

67. Examples of this language can be found in TEX. PENAL CODE ANN. §§ 9.31–.32, 9.41–.42, 9.51.

68. *See* Thomas v. State, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991) (stating a knife is not a "deadly weapon" per se); *see also* TEX. PENAL CODE ANN. § 1.07(a)(17)(B) (positing the manner of use or intended use determines whether an object is a "deadly weapon").

risk increases until—at some point—it becomes reasonable for the officer to believe that the use of deadly force is required. In a different scenario, if the attacker is threatening to shoot the officer from the same distance, the degree of force that might be used to meet that threat is the same as for the knife, but the "when" or timing of the use of deadly force changes dramatically.

The simple and obvious point in this example is that the law favors the preservation of life; hardly a surprising conclusion. Is it *possible* that a person could throw a knife at an officer from thirty yards, or thirty feet, and wound or kill the officer? Yes, but the justification provided by law does not sanction the use of deadly force to eliminate *all* risk of harm to the officer. Rather, it expects the officer to accept a certain degree of risk in order to prevent the much higher risk of death or serious bodily injury were the officer to shoot prematurely. It simply would not be *reasonable* for the officer to believe the use of deadly force is "immediately necessary in this situation."

To illustrate the "degree" component of this pivotal phrase, imagine in our example that the assailant is unarmed, but threatens to hit the officer with his fists. This threat implicates both the "when" and the "degree" of the justification. An officer should be entitled to use some level of force much sooner when threatened with a knife than when threatened with fists, but not as soon as would be the case if the officer were threatened with a gun. But the degree of force has also changed in this example (the "degree" component). Ordinarily, being hit with a fist a single time, while potentially injurious, does not put one at risk of death or serious bodily injury. Being shot, on the other hand, decidedly does. So, the officer in the punching example does not have to (get to) use *any* degree of force while the attacker is well beyond reach. It is simply too soon to need to act. And even when the officer does need to act, the officer cannot use force that is disproportional to the threat.

The beauty of this when/degree formulation is that, when properly applied, it accounts for all possible variables in a situation. What if fists are the weapons with which the threat is made but the attacker is far stronger, much larger, and better trained than the person being threatened? In that case, the degree of force that is justified in self-defense is greater than it would be for two combatants who are more evenly matched. It might even be reasonable for a particularly vulnerable person to use deadly force to meet the unlawful use of force that does not involve the use of weapons.

Equally important in the "magic words" employed in Chapter 9 is the phrase "reasonably believes."[69] Those words function as a governor on both the timing and degree of force. A peace officer who is trying to place a suspect in handcuffs generally has no justification for using deadly force against the arrestee who struggles against being restrained. The officer could not "reasonably believe" that "degree" of force was "immediately necessary." Some lesser degree of force may be justified to overcome the level of resistance being offered, but it would not be reasonable to believe that no options short of deadly force were available.

Again, the use of "reasonably believes" in the phrase "when and to the degree the actor reasonably believes" provides a flexibility that allows justification to exist or not exist according to changing circumstances. One might think of "when and to the degree" as a kind of sliding scale that functions on a vertical ("when") and horizontal ("degree") axis. Overlaying that scale is the requirement of reasonableness, an objective determination that prevents subjective perception from being determinative.[70]

The final words that limit the application of Chapter 9 justifications are "immediately necessary."[71] These words highlight and reinforce the use of "when" which begins the "magic words" phrase. The clear meaning of this additional limitation is that *no* force should be used unless, and until, it is required.[72] In this sense, the law prefers both as little force be used as is needed to accomplish a legitimate purpose, and that all force be avoided until "immediately necessary."[73]

Other statutory mechanisms have been used in the past to promote this idea. For example, for many years Texas imposed a duty to retreat before

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69. *See, e.g.*, TEX. PENAL CODE ANN. §§ 9.31(a), 9.32(a)(2), 9.33(2), 9.34(a), 9.34(b), 9.41(a), 9.42(2), 9.43(1), 9.51(a), 9.52–.53 (highlighting the same "magic words" in each section).

70. *See* Ryser v. State, 453 S.W.3d 17, 27 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (asserting an officer using "more force than is reasonably necessary" to effect an arrest is not justified and is subject to criminal prosecution).

71. *See, e.g.*, PENAL CODE §§ 9.31(a), 9.32(a)(2), 9.33(2), 9.34(a), 9.34(b), 9.41(a), 9.42(2), 9.51(a), 9.52.

72. Consider the case of *Trammell v. State*, in which the defendant had been threatened by his victim who had earlier pointed a knife at the defendant. Because the shooting victim was in his car when the defendant shot him, showed no weapon at the time, and because hours had passed since he had threatened the shooter with a knife, the appellate court found the evidence insufficient to support a finding that the use of deadly force was immediately necessary. Trammell v. State, 287 S.W.3d 336, 341 (Tex. App.—Fort Worth 2009, no pet.).

73. *See* REAMEY, *supra* note 36, at 264 (noting a determination of whether use of force was even necessary is left to the finder of fact).

using deadly force.[74] A retreat requirement functions as an explicit limitation on the timing of the use of force, in that it requires a person to signal by her actions that she desires to break off any encounter rather than stand her ground and fight it out.[75] In effect, the retreat rule incorporates a "clean hands" requirement for those who would claim the justification of self-defense, as does the requirement that a person not provoke the encounter that necessitates the use of force.[76]

As will be explained in greater detail in Section III(A)(1), *infra*, Texas eliminated the retreat requirement but left the "immediately necessary" limitation intact.[77] Since this phrase and the other "magic words" apply to virtually all of the Chapter 9 justifications, Texans now may not be required to retreat, but they are not free to use deadly force unless it is immediately necessary to do so.[78]

Under certain circumstances, the reasonableness of a person's belief that their use of deadly force is immediately necessary may be presumed.[79] But the application of this presumption is limited in important ways that also will be described *infra*.

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74. *See* Morales v. State, 357 S.W.3d 1, 4–5 (Tex. Crim. App. 2011) (highlighting the duty to retreat that previously existed in Texas law was deleted in 2007).

75. *See generally* Beard v. United States, 158 U.S. 550 (1895) (discussing the duty to retreat and its rationale).

76. The equitable principle of "clean hands" is reflected in the duty to retreat as a valuing of human life, a moral imperative. While it is lawful, and perhaps can be seen as moral, to kill or wound in self-defense, the retreat rule reinforces the notion that life is of sufficient value that harming or killing another must be a last resort, and not a first impulse. In this sense, the retreat requirement, not unlike the denial of self-defense to those who provoke a difficulty, demands that those claiming self-defense "deserve" its protection.

77. *See Morales*, 357 S.W.3d at 4–5 (noting the retreat provision was deleted in 2007); *see also* TEX. PENAL CODE ANN. § 9.32(a)(2) (proscribing a person can use deadly force, in part, "when and to the degree the actor reasonably believes the deadly force is immediately necessary"); S.B. 378, 80th Leg., R.S. ch. 1, § 3 (codified at TEX. PENAL CODE ANN. § 9.32(a)) (enacting the new Section 9.32(a) language). A retreat requirement would be reinstated to the Texas self-defense provision for use of deadly force if a bill currently pending in the Texas Legislature is enacted. *See* H.B. 196, 87th Leg., R.S. § 1 (amending Section 9.32(a) of the Texas Penal Code and taking effect in September 2021 if passed).

78. *See* Ryser v. State, 453 S.W.3d 17, 27 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (explaining an officer who uses more force than is reasonably necessary to effect an arrest is not justified and is subject to criminal prosecution).

79. *See* TEX. PENAL CODE ANN. § 9.32(b) (outlining the three elements an actor must meet for the reasonable presumption that deadly force was immediately necessary).

A. *Section 9.51—The Use of Force to Arrest, Search, or Prevent Escape After Arrest*

Subject to the usual "magic words," Section 9.51 of the Texas Penal Code creates a justification for peace officers to use non-deadly force in order to effect an arrest or conduct a search.[80] The officer must reasonably believe the arrest or search is lawful in order to be justified in her use of force.[81] If the search or arrest is made pursuant to a warrant, justification depends on the officer's reasonable belief that the warrant is valid.[82] In addition, an officer must "manifest[] his purpose to arrest or search and identif[y] himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested."[83]

This language would seem to make the availability of the justification turn on a kind of "knock and announce" requirement[84] if the arrest or search is conducted at a residence, workplace, structure, or in other circumstances which would prevent the arrestee or person in charge of the premises to be searched from ascertaining visually that the search or arrest is being made by a peace officer. Such announcement requirements may seek to avoid the need to use force by affording affected persons the opportunity to submit to the officer's apparent authority.

Similarly, peace officers are entitled to enter a "house" to make an arrest by use of force only "after giving notice of . . . authority and purpose" and

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80. *See id.* § 9.51(a) ("A peace officer . . . is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary . . . ."). Section 9.51 would be modified in ways that limit its application if currently-pending H.B. 88 is enacted by the Texas Legislature. *See* Tex. H.B. 88, 87th Leg., R.S. § 20 (2020) (amending Section 9.51 of the Texas Penal Code).

81. *See* PENAL CODE § 9.51(a)(1) (indicating an officer who is making an arrest or search must have the reasonable belief that their actions are lawful).

82. *See id.* (clarifying when an officer is executing an arrest or search pursuant to a warrant, they must reasonably believe the warrant is legally valid).

83. *See id.* § 9.51(a)(2) (detailing the second element which must be met by a peace officer before using force against another).

84. The "knock and announce" rule requires officers executing a search or arrest warrant to announce themselves and their purpose before forcibly entering premises. Such a requirement is part of the Fourth Amendment, as well as Texas criminal procedure law. U.S. CONST. amend. IV; Wilson v. Arkansas, 514 U.S. 927, 930 (1995) (holding the "knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry"); TEX. CODE CRIM. PROC. ANN. art. 15.25–.26.

being refused admittance.[85] Moreover, an officer who is making an arrest under authority of a warrant must announce that fact in all cases.[86]

1. The Contradiction of Article 15.24 and Other "Minimum-Force" Approaches

The Texas Code of Criminal Procedure contains the following provision regarding use of force to effect an arrest:

> In making an arrest, all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused.[87]

This peculiar statute authorizes "all reasonable means" to effect an arrest, presumably including the use of whatever level of force is "reasonable," while it simultaneously limits the use of force to the minimum necessary to accomplish the purpose. Further, the first sentence of the Article clearly applies to "arrest," but the second sentence requiring minimum force applies to "arrest and detention."[88]

Force which is reasonable may well exceed what is necessary. To the extent that an officer's actions fall within that gap, is their conduct to be judged by a reasonableness standard or by the limitation to use no greater force than is required? Whatever the answer, it is unclear that the Code of Criminal Procedure language has any practical impact on a criminal prosecution.

Assuming an officer is prosecuted for aggravated assault for causing an arrestee serious bodily injury, could the defendant officer use the language of the Criminal Procedure Code to argue that, as long as their use of force was reasonable, it was justified? Or, could the prosecution counter any claim of reasonableness by pointing to the language requiring minimum force?

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85. *See* TEX. CODE CRIM. PROC. ANN. art. 15.25 (clarifying the notice requirements to break down a door of a house are subject to felony cases).

86. *See id.* art. 15.26 (instructing peace officers to always inform the accused of the authority in which the arrest is legally made pursuant to a valid warrant).

87. *See id.* art. 15.24 (emphasizing the specific procedure on when officers may use force during an arrest of a suspect).

88. "Detention" is a term of constitutional art describing a temporary investigative seizure of a person based on less than the probable cause required for the more intrusive "arrest." Barnes v. State, 870 S.W.2d 74, 78 (Tex. App.—Houston [1st Dist.] 1993) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 881–82 (1975)) ("[A] temporary detention represents a lesser intrusion on an individual's security and integrity than a formal arrest . . . .").

Article 15.24 creates neither an offense nor a justification. The controlling defensive language lies in Chapter 9 of the Texas Penal Code, which, by its terms, establishes and defines a justification for the use of force (or deadly force) in making an arrest.[89] The assaultive crime with which the officer is charged is created in Chapter 22 of the Penal Code.[90] The role of Article 15.24, which is a criminal procedure provision, is ambiguous. It may be no more than hortatory, without legal effect. Or it may be found to establish a standard—albeit an internally contradictory one—by which an officer's conduct will be judged in a tort action or a disciplinary hearing for excessive use of force.

Ultimately, the reasonableness requirement found in Section 9.51 will be the standard that counts in any prosecution. A jury instruction that the officer was not allowed to use more force than necessary to effect the arrest would undermine the defense created in Chapter 9.[91] This contradiction turns out to be an important one—not so much in current practice but in contemporary discussion of best practices in policing. If the minimum-force standard is favored to deter abusive arrests by the police, any justification or defensive issue that exists within Texas law must be entirely consistent with that standard.

The minimum-force language found in Article 15.24 of the Texas Criminal Procedure Code expresses a standard receiving attention as law enforcement agencies and others focus on reform prompted by publicized uses of violence by the police. One important expression of this standard is found in the American Law Institute's *Principles of the Law, Policing* (Principles).[92] This project of the Institute (ALI) has been ongoing since 2015, but the first component to be approved by the membership of ALI is Chapter 5 on the use of force.[93] Principles adopted by the ALI do not seek,

89. *See* TEX. PENAL CODE ANN. § 9.51 ("A peace officer . . . is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary . . . .").

90. *See id.* § 22.02 (including peace officers in the pool of potential offenders for assault charges).

91. *See* Ryser v. State, 453 S.W.3d 17, 27 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (explaining "an officer us[ing] *more force than is reasonably necessary* [has] exceed[ed] [their] statutory authority and may be subject to criminal liability") (emphasis added). To instruct a jury that an officer using reasonable force to arrest may be criminally responsible because the officer used more than the minimum degree of force necessary to arrest would nullify the justification in Section 9.51, substituting a more stringent standard for the justification than the one established expressly in Chapter 9.

92. *See generally* PRINCIPLES OF THE LAW OF POLICING (Am. L. Inst., Revised Tentative Draft No. 1, 2017) (recommending criminal law rules to governmental agencies and private citizens) [hereinafter POLICING].

93. *See id.* at 1–25 (providing a comprehensive list of how the use of force ought to be practiced in a criminal law setting).

as do the ALI's restatements of the law or model codes, to reflect what the law is or how it should be formulated.[94] Rather, principles state what might be called "best practices."[95] These statements of preferred practice may be adopted by legislatures, administrative rule-making bodies, or law enforcement agencies formulating internal policy.[96]

The overarching principle of the ALI's work on police use of force is stated in Section 5.03:

> § 5.03. Minimum Force Necessary
>
> In instances in which force is used, officers should use the minimum force necessary to perform their duties safely. Agencies should promote this goal through written policies, training, supervision, and reporting and review of use-of-force incidents.[97]

"Force," as that term in used in the *Principles*, encompasses physical contact ranging from light touching to, what in Texas law would be deadly force.[98] It is made clear at the outset that force should only be employed for certain legitimate policing objectives:

> § 5.02. Objectives of the Use of Force
>
> Officers should use physical force only for the purpose of effecting a lawful seizure (including an arrest or detention), carrying out a lawful search, preventing imminent physical harm to themselves or others, or preventing property damage or loss. Agencies should promote this objective through written policies, training, supervision, and reporting and review of use-of-force incidents.[99]

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94. *See id.* at xii ("[I]t is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such.").

95. *See id.* (notating the purpose of the recommendations outlined in ALI's "Principles").

96. *See id.* at xv (affirming the audience for the project is broad and includes legislatures, policing agencies, regulatory bodies, the public, and the courts).

97. *Id.* § 5.03 (explaining when minimum force should be used to perform the job duties in a safe and necessary manner). A bill introduced in the 87th Regular Session of the Texas Legislature would limit the justification for use of force to arrest in ways that at least approach the "minimum force" standard without expressly requiring that no more than minimal force be used. *See* Tex. H.B. 88, 87th Leg., R.S. § 20 (2020) (amending Section 9.51 of the Texas Penal Code).

98. *See id.* § 5.02, cmt. a (defining the term "force").

99. *Id.* § 5.02 (detailing when an officer should use force when making an arrest or search).

The principle that minimum force should be used is reinforced, and even extended, by a stated principle that effort should be made to de-escalate confrontations in order to avoid the use of force altogether:

> § 5.04. De-escalation and Force Avoidance
>
> Agencies should require, through written policy, that officers actively seek to avoid using force whenever possible and appropriate by employing techniques such as de-escalation. Agencies should reinforce this Principle through written policies, training, supervision, and reporting and review of use-of-force incidents.[100]

This position, coupled with the general admonition that no more force should be used than is necessary, contrasts with Texas Penal Code Section 9.51, which justifies the use of force an officer reasonably believes to be immediately necessary in effecting an arrest or making a search.[101] In Texas, an officer may use non-deadly force to arrest or search in situations where force may be unnecessary, as long as the officer has a reasonable belief that it was necessary. Moreover, the officer need not attempt to de-escalate the threat of force or "avoid using force whenever possible and appropriate."[102]

In taking this approach, Texas green lights the use of force if it is reasonable in degree and the officer reasonably believes it is immediately necessary.[103] An officer could claim their actions were justified even if less

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100. *Id.* § 5.04.

101. The "minimum force" position is consistent, however, with at least the second sentence of Article 15.24 of the Texas Code of Criminal Procedure, a provision that does not create an offense for the use of force that exceeds the minimum necessary. TEX. CODE CRIM. PROC. ANN. art. 15.24.

102. *Principles of Law: Use of Force*, POLICING PROJECT, https://www.policingproject.org/ali-use-of-force [https://perma.cc/2TDX-VKTA]. Texas law currently contains no requirement that an officer attempt to de-escalate a situation to avoid the use of force. Individual agencies in Texas sometimes do require officers to use de-escalation techniques. *See, e.g.*, CITY OF SAN ANTONIO POLICE DEP'T, GENERAL MANUAL § 501.05(F) (2020) (requiring officers to de-escalate quantum of force when reasonable, and to attempt to avoid use of force by de-escalation). A bill titled the "George Floyd Act" was filed by Rep. Senfronia Thompson in the 87th session of the Texas Legislature that would have added to the criminal procedure code a provision requiring de-escalation. *See* Tex. H.B. 833, 87th Leg., R.S. (2020) (adding Article 2.33 to Texas Code of Criminal Procedure). Had it been enacted, the enforcement of this provision would almost certainly have faced challenges based on vagueness, as well as the uncertainty of the legal effect of a provision in the criminal procedure code that creates no crime, but only requires individual agencies to create policies establishing de-escalation requirements. The bill, an ambitious attempt at police reform, eventually died in committee.

103. *See* TEX. PENAL CODE ANN. § 9.51 (instructing when exactly an officer of the law can use force against another individual in which the force will be legally justified).

force, or no force at all, might have sufficed. And the officer's claimed justification would not be defeated by their lack of effort to avoid force.

2. The Further Contradiction of Articles 6.06 and 6.07

In addition to Article 15.24, the Texas Code of Criminal Procedure speaks to the degree of force to be used in specific circumstances in other provisions.[104] Article 6.06 creates a general legal duty for peace officers to prevent any offense against the person or property of another that is committed in their presence or view.[105] In the course of this required intervention, "[t]he peace officer must use the amount of force necessary to prevent the commission of the offense, and *no greater*."[106]

This limiting language, not unlike that found in Article 15.24, seemingly restricts the use of force to the minimum necessary. Article 6.07 of the Texas Criminal Procedure Code, the provision immediately following Article 6.06's limitation on force, immediately contradicts the preceding statute by giving peace officers engaged in the prevention of offenses about to be committed in their presence or view the right to "use *all force* necessary."[107] While not plainly stated, the statute seems intended to apply to protect persons from harm.

As with Article 15.24, it is difficult to know what practical effect this statutory language has upon a prosecution of a peace officer for using excessive force. An officer who reads these various Texas use of force provisions carefully would find the following legislative instructions on the degree of force that may be used:

1. A peace officer may use "all reasonable means" to make an arrest;[108]
2. A peace officer may use "[n]o greater force . . . than is necessary to secure the arrest and detention of the accused;"[109]

104. *See* TEX. CODE CRIM. PROC. ANN. art. 6.06–.07 (explaining an officer may use necessary force to prevent a crime from occurring but cannot exceed their authority when using said force).

105. *See id.* art. 6.06 ("Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, including the person or property of his spouse, or injure himself, it is his duty to prevent it . . . .").

106. *Id.* (emphasis added).

107. *Id.* art. 6.07 (emphasis added) ("[Peace officers] may use all force necessary to repel the aggression.").

108. *See id.* art. 15.24 ("In making an arrest, all reasonable means are permitted to be used to effect it.").

109. *See id.* (detailing the degree of force to which an officer can use when making an arrest).

3. A peace officer must act to prevent an offense against a person or property that is about to occur in his or her presence or view by the use of "no greater" force than is necessary to prevent the offense;[110]
4. A peace officer acting to prevent an offense against a person that is about to occur in his or her presence or view may "use all force necessary" to prevent harm to the person;[111]
5. A peace officer is justified (has a defense to prosecution) in using the degree of non-deadly force she reasonably believes is immediately necessary to effect an arrest or conduct a search;[112] but
6. A peace officer is only justified in using deadly force to arrest when the officer reasonably believes the deadly force is immediately necessary and the officer "reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; or [the officer] reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the [officer] or another if the arrest is delayed."[113]

If accountability for abusive use of force is what matters most and if there is a realistic possibility that accountability will be sought through criminal prosecution, the justifications found in Chapter 9 are the defenses that have the potential to exonerate an officer who uses excessive or unlawful force. In other words, the legislative admonition to use no greater force than necessary in arresting a suspect is of no practical consequence. A reasonable belief that the force used by the officer was immediately necessary will save the defendant from criminal responsibility, even if a lesser degree of force would have been effective under the circumstances.

B. *Justifications for the Use of Deadly Force in Policing Texas*

Section 9.51 of the Texas Penal Code also provides a limited justification for the use of deadly force to arrest or prevent escape after arrest. Not so

110. *See id.* art. 6.06 ("The peace officer must use the amount of force necessary to prevent the commission of the offense, and no greater.").

111. *See id.* art. 6.07 ("[Peace officers] may use all force necessary to repel the aggression.").

112. *See* TEX. PENAL CODE ANN. § 9.51(a) ("A peace officer . . . is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary . . . .").

113. *See id.* § 9.51(c) (outlining when an officer can legally use deadly force in making an arrest or search).

many years ago, police officers routinely were authorized to use deadly force to apprehend fleeing felons.[114] Even without knowing more about the contours of this rule, the "fleeing felon" rule was facially problematic.

Whereas felonies once carried the connotation of very serious criminality punished in the harshest ways, including by death,[115] the proliferation of crimes denominated as felonies have created offenses that are not violent or dangerous or even particularly harmful to property. Only one capital felony exists in Texas, so the notion that all or most felonies carry the death penalty is simply wrong. Without further consideration, it is obvious that the use of deadly force to apprehend perpetrators of non-violent crimes is excessive.[116] Even for the most serious felonies, an officer who kills a suspect to apprehend them or prevent their escape has, as an agent of the state, executed a person who has not been tried, convicted, or sentenced.[117]

In 1985, the Supreme Court of the United States rejected the categorical use of deadly force to arrest a fleeing felon.[118] Prior to that decision in *Tennessee v. Garner*,[119] Texas had already abandoned the "fleeing felon" rule in favor of the later adopted approach in *Garner*.[120] Section 9.51 of the Texas Penal Code creates a justification for the use of deadly force to make an arrest, or to prevent escape after arrest, if the use of non-deadly force would have been justified, and either the crime for which the arrest is being made involved the use or attempted use of deadly force, or the officer reasonably believed that the person to be arrested would cause death or serious bodily injury if the arrest was delayed.[121]

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114. *See* Tennessee v. Garner, 471 U.S. 1, 12–13 (1985) (detailing the history of an officer's decision to use force under the Fourth Amendment).

115. *See id.* at 13–14 (referencing how all felonies were once punishable by death, while today almost all are not).

116. *See id.* at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.").

117. *Cf. id.* at 10 ("The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that . . . mechanism will not be set in motion.").

118. *See id.* at 11 (holding "the use of deadly force to [apprehend] . . . all felony suspects, whatever the circumstances, is constitutionally unreasonable").

119. Tennessee v. Garner, 471 U.S. 1 (1985).

120. The Texas Court of Criminal Appeals held, long before the adoption of the current penal code provision, that a peace officer is not warranted in killing a person who is resisting arrest or fleeing from the officer unless the killing is done in self-defense. Grohoske v. State, 61 S.W.2d 847, 848 (Tex. Crim. App. 1933).

121. TEX. PENAL CODE ANN. § art. 9.51(c); *see also Garner*, 471 U.S. at 11–12 (holding a Tennessee statute which permits officers to use deadly force to against suspects, who may threaten the

The justification in Section 9.51 overlaps to some extent with that found in Section 9.52 of the Texas Penal Code. While Section 9.51 applies to the use of deadly force "to make an arrest, or to prevent escape after arrest,"[122] Section 9.52 pertains to force used "to prevent the escape of an arrested person from custody."[123] The language used in these two statutory provisions may have been intended to distinguish between the status of a person who has been arrested but not yet placed in "custody," and a person who is incarcerated or otherwise in a custodial setting. If so, the distinction is undefined and unclear.

A person who has been arrested is "seized" for purposes of the Fourth Amendment and is said to have been taken into "custody."[124] All incarcerated persons have been arrested, so the Section 9.51 justification for use of force or deadly force to prevent escape applies. Also applicable are the limitations on the use of deadly force mandated by *Tennessee v. Garner*.[125]

Section 9.52 of the Penal Code ("Prevention of Escape from Custody") provides:

> The use of force to prevent the escape of an arrested person from custody is justifiable when the force could have been employed to effect the arrest under which the person is in custody, except that a guard employed by a correctional facility or a peace officer is justified in using any force, including deadly force, that he reasonably believes to be immediately necessary to prevent the escape of a person from the correctional facility.[126]

This statute is rife with contradictions of state and constitutional standards. Most obvious is the abandonment of the usual limitations imposed on justifications in Texas law, including the "when and to the degree"

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officer or others with serious bodily injury, passed constitutional muster); Kacz v. State, 287 S.W.3d 497, 504–07 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (holding the officer's belief that a fleeing suspect would cause serious bodily injury or death to another if allowed to escape was not reasonable).

122. PENAL CODE § 9.51(c).

123. *Id.* § 9.52.

124. *See* California v. Hodari D., 499 U.S. 621, 624 (1991) (reaffirming the Fourth Amendment's protection against unreasonable seizures includes seizure of the person and the mere application of physical force to a suspect is sufficient to constitute an arrest); Gustafson v. Florida, 414 U.S. 260, 266 (1973) (holding the suspect was "arrested" for the purpose of taking him into "custody").

125. *See* Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) (holding that not all applications of deadly force to apprehend a fleeing felon are facially unconstitutional).

126. PENAL CODE § 9.52.

language.[127] While Section 9.51 allows the use of *non-deadly* force only to the degree an officer reasonably believes it to be immediately necessary to prevent escape after arrest,[128] and much more strictly limits the use of deadly force for that purpose,[129] once a person is in "custody"[130] in a "correctional facility,"[131] that same officer is free of the constraints that would have applied to the use of deadly force while the arrestee was in custody (under arrest).[132]

The most striking and serious problem with Section 9.52, of course, is that it violates the constitutional norms explicated in *Tennessee v. Garner*.[133] The clear language of the statute permits a correctional officer or peace officer to use deadly force if, for example, the officer reasonably believes she will not be able to apprehend an escapee otherwise.[134] No regard is paid to whether the person escaping has been convicted of a crime, whether any alleged crime involved violence, or whether the escapee poses a danger to others if apprehension is delayed.[135] In short, the justification afforded by Section 9.52, like the discredited "fleeing felon" rule, sweeps too broadly. In doing so, it runs afoul of the U.S. Constitution. No reported case in Texas has addressed this concern, presumably because none has been decided since *Tennessee v. Garner*.

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127. Sections of Chapter 9 of the Texas Penal Code justifying force in self-defense, defense of others, defense of property, and in making an arrest or conducting a search include the "when and to the degree" limitation. *See, e.g.*, *id.* §§ 9.31–.32, 9.41–.42, 9.51 (applying the limitation of "when and to the degree" to certain instances of when force is justified against others).

128. *See id.* § 9.51(a) ("A peace officer . . . is justified in using force against another when and to the degree the [officer] 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 . . . .").

129. *See id.* § 9.51(c)(1) ("[I]f the use of force would have been justified under Subsection (a) and: (1) the actor reasonably believes the conduct . . . included the use . . . of deadly force . . . .").

130. "Custody means [to be] under arrest by a peace officer[,] . . . under restraint" pursuant to a court order, "or under restraint by an agent or employee of a [contract confinement] facility." *Id.* § 38.01(1)(A–B); *see also id.* § 9.01(1) (designating the statutory definition of "custody").

131. A "correctional facility" is "a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense." *See id.* § 1.07(a)(14) (defining the term "correctional facility" by statute).

132. *See id.* § 9.52 (detailing when an officer or a correctional guard is justified in using deadly force against a prisoner who is in custody).

133. *See* Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.").

134. *See* PENAL CODE § 9.52 (providing for when deadly force is justified by a correctional officer to use against an escapee).

135. The statutory definition of "correctional facility" includes "a place . . . for the confinement of person[s] arrested for, charged with, or convicted of a criminal offense." *Id.* § 1.07(a)(14).

Section 9.52 also is inconsistent with Section 5.05 of the American Law Institute's (ALI) *Principles of the Law, Policing.*[136] A portion of that principle provides that, "deadly force should not be used except in response to an immediate threat of serious physical harm or death to officers, or a significant threat of serious physical harm or death to others . . . ."[137] This best practice standard would not allow the use of "any force, including deadly force" to prevent escape from a correctional facility. The use of deadly force is reserved in principle 5.05 for self-defense or defense of others, and Texas law provides justifications for those usages in statutes independent of Section 9.52.[138]

Policy-wise, it is difficult to fathom why this extraordinary grant of authority to use deadly force to prevent escape from custody should be justified. In Texas, "correctional facilities" include municipal and county jails.[139] These jails typically house misdemeanants and persons awaiting trial, some of whom have not been formally charged by information or indictment.[140] Granted, the jail population also includes persons convicted of crime and serving sentences, as well as prisoners who have felony convictions and are waiting to be transferred to state prisons.[141] The problem with Section 9.52 is that it makes no attempt to differentiate between felons and misdemeanants or the convicted and the merely suspected. It treats all prisoners as sufficiently dangerous to merit the use of deadly force in their apprehension, without regard for the nature of the crime for which the prisoners are being held. If, for instance, an out-of-shape, slow-moving deputy were to see a prisoner in a city jail who had been taken into custody for public intoxication running from the jail, the deputy might reasonably conclude that it was immediately necessary to shoot the fleeing prisoner in order to prevent his escape because the deputy could not

136. *See* POLICING, *supra* note 92, at § 5.05 (limiting the situations in which an officer may be justified in using deadly force).

137. *See id.* (creating a limited exception of when officers may use deadly force against a suspect).

138. *See* PENAL CODE § 9.42 (providing for use of deadly force in defense of property); *Id.* § 9.51(c) (providing for use of deadly force to arrest or apprehend).

139. *Id.* § 1.07(a)(14)(A).

140. *See* Richard M. Aborn & Ashley D. Cannon, *Prisons: In Jail, but Not Sentenced*, AMERICAS Q. (Jan. 16, 2013), https://www.americasquarterly.org/fulltextarticle/prisons-in-jail-but-not-sentenced/ [https://perma.cc/Q48C-VJXB] ("Each year, millions of people across the world find themselves in jail without being convicted of anything—often for months at a time—as they await trial.").

141. *See* Yami Virgin, *Hundreds of Inmates Waiting for Prison, Facility Transfer Costing You $60 a Day, Each*, FOX 29 NEWS (May 26, 2020), https://foxsanantonio.com/news/yami-investigates/hundreds-wait-to-go-to-a-state-prison-or-treatment-facility [https://perma.cc/Y9WM-HR62] (reporting the number of Bexar County inmates and how this affects local taxpayer money).

apprehend him otherwise. The literal language of Section 9.52 would justify that deputy's actions.

III. JUSTIFICATIONS FOR LAW ENFORCEMENT *AND* CIVILIAN USE OF FORCE

Justifications for the use of force by law enforcement officers comprise a relatively small part of the justification universe in Texas.[142] Chapter 9 of the Texas Penal Code includes justifications for necessity,[143] public duty,[144] self-defense,[145] defense of others,[146] defense of property,[147] and assorted other provisions related to justification.[148] In addition to the justifications for use of force to arrest, search, or prevent escape, Texas peace officers may avail themselves of any of the other justifications described in Chapter 9.

Circumstances dictate which one, or ones, of these defenses will be available and effective in defending against a prosecution for wrongful use of force by the police. Often, more than one of the justifications shields the officer from criminal responsibility. For example, if an officer discovers during a traffic stop that a felony arrest warrant is outstanding for the detained motorist, the officer will initiate an arrest procedure, often without

142. Justification exists in Texas for public duty, necessity, self-defense, defense of third person, defense of one's own property, defense of third person's property, and for other uses of force unrelated to law enforcement. *See generally* PENAL CODE ch. 9 (outlining the circumstances of when a force is legally justified).

143. *See id.* § 9.22(1) ("Conduct is justified if . . . the actor reasonably believes the conduct is immediately necessary to avoid imminent harm . . . .").

144. *See id.* § 9.21(a) ("[C]onduct is justified if the actor reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other governmental tribunal, or in the execution of legal process.").

145. *See id.* § 9.31(a) ("[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.").

146. *See id.* § 9.33 ("A person is justified in using force or deadly force against another to protect a third person . . . .").

147. *See id.* § 9.41(a) ("A person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.").

148. *See id.* § 9.61 (parent-child) (providing for when a parent is justified in using force against their own child); *id.* § 9.62 (educator-student) (creating a justification for educators who may be required to use force against a student); *id.* § 9.63 (guardian-incompetent) (providing a justification for guardians who may need to use force against an incompetent individual).

announcing their purpose immediately.[149] After the officer has ordered the motorist out of the vehicle, the officer will give a series of commands designed to ensure the officer's safety.[150] Should the wanted motorist reach into a pocket or otherwise move furtively in a way that is contrary to the officer's commands, the officer may form a belief that the motorist has a weapon that threatens the officer. Officers have been known to shoot in such situations, or use lesser degrees of force, later claiming that their belief that the motorist was about to use deadly force warranted a reasonable belief that the officer's use of force was necessary.[151]

Setting aside important questions about the reasonableness of the officer's actions in this hypothetical situation, if the officer is prosecuted for assault, aggravated assault, manslaughter, or murder, the defense might suggest through trial evidence that the officer's actions were justified by Penal Code Section 9.51(a) (use of non-deadly force to arrest),[152] Section 9.51(c) (use of deadly force to arrest),[153] or Sections 9.31[154] and 9.32[155] (use of non-deadly or deadly force in self-defense). If another

149. An officer need not declare a suspect to be under arrest for the seizure to constitute an arrest for Fourth Amendment purposes. *See* Dunaway v. New York, 442 U.S. 200, 212–13 (1979) (holding the suspect who was involuntarily transported to police station for questioning without being told he was under arrest was nevertheless arrested for Fourth Amendment purposes).

150. *See* Reid J. Schar. *What Constitutes a "Lawful Order"*, HILL (Sept. 17, 2015), https://thehill.com/blogs/congress-blog/judicial/253939-what-constitutes-a-lawful-order [https://perma.cc/3E9G-3F6B] (suggesting the purpose of an officer's orders during a traffic stop is ensuring safety).

151. *See Battle Creek Police Officer Shoots Passenger During a Traffic Stop*, WWMT CHANNEL 3 NEWS (Oct. 20, 2020), https://wwmt.com/news/local/battle-creek-police-officer-shoots-passenger-during-a-traffic-stop [https://perma.cc/NU7N-SF7L] (reporting a passenger reached for gun on floor of vehicle during a traffic stop and was shot by officer); Aaron Martinez, *Man Shot by Officer During Traffic Stop Faces Charges*, EL PASO TIMES (Apr. 20, 2017), https://www.elpasotimes.com/story/news/crime/2017/04/20/drugs-gun-found-car-officer-involved-shooting/100692974/ [https://perma.cc/6TCY-APWU] (reporting passenger who reached for a gun was shot by officer during traffic stop); *Arlington Police Officer Fatally Shoots Driver During Traffic Stop*, NBCDFW CHANNEL 5 NEWS (Sept. 1, 2018), https://www.nbcdfw.com/news/local/arlington-traffic-stop-ends-in-shooting-police/268141/ [https://perma.cc/V68N-VT42] (reporting an officer shot and killed driver of vehicle who rolled up window on officer's arm and started to drive away during traffic stop); J. Weston Phippen, *Jury Acquits Officer Who Shot Philando Castile*, ATLANTIC (June 16, 2017), https://www.theatlantic.com/news/archive/2017/06/jury-acquits-philando-castile/530709/ [https://perma.cc/RA5G-SCLE] (reporting an officer claimed suspect reached for a gun during traffic stop).

152. TEX. PENAL CODE ANN. § 9.51(a).

153. *Id.* § 9.51(c).

154. *Id.* § 9.31(a).

155. *Id.* § 9.32(a).

person is present during this confrontation, the use of deadly force also may be based on Section 9.33[156] (defense of a third person).

Of course, the evidence adduced at trial will determine whether any, some, or all of these defenses are available to the officer. But if any evidence supports any of these justifications, the jury must be instructed, upon request, that if it has even a reasonable doubt about the applicability of the justification then defendant must be acquitted.[157] The legal standards for these justifications differ, notwithstanding the virtually universal use of the "magic words" that recur throughout Chapter 9, giving the jury even more ways with which to acquit the officer.

A. *Self-defense*

Like other penal code justifications, self-defense is divided into two parts: Section 9.31 (non-deadly force in defense of self),[158] and Section 9.32 (deadly force in defense of self).[159] The first element of Section 9.32, is that the requirements of Section 9.31 be satisfied if deadly force is used.[160]

Although satisfaction of Section 9.31 is a prerequisite to justification for the use of deadly force in self-defense, both sections contain the "magic words" that run throughout Chapter 9.[161] Section 9.31 initially limits the use of non-deadly force to those situations in which the actor reasonably believes such force to be immediately necessary.[162] The statute goes on to exclude the justification for the use of force:

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156. *Id.* § 9.33.

157. *See* Posey v. State, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998) (holding the trial court has no duty to instruct *sua sponte* on unrequested defensive issues); Bennett v. State, 235 S.W.3d 241, 243 (Tex. Crim. App. 2007) (holding the trial court did not err in failing to instruct on defense of third person where instruction was not requested); Woodfox v. State, 742 S.W.2d 408, 409–10 (Tex. Crim. App. 1987) (holding jury instruction on any defensive theory raised by the evidence from any source, whether credible or not, must be given if requested); Brown v. State, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997).

158. *See generally* PENAL CODE § 9.31(a) (outlining the required elements of self-defense).

159. *See generally id.* § 9.32(a) (outlining the required elements of using deadly force in self-defense).

160. *Id.* § 9.32(a)(1).

161. *See id.* § 9.31(a) ("[A] person is justified in using force against another *when and to the degree the actor reasonably believes the force is immediately necessary* . . . .") (emphasis added); *id.* § 9.32(a) ("A person is justified in using deadly force against another . . . *when and to the degree the actor believes the deadly force is immediately necessary* . . . .") (emphasis added).

162. *Id.* § 9.31(a).

1. "in response to verbal provocation alone;"[163]
2. "to resist an arrest or search . . . being made by a peace officer . . . ;"[164]
3. "if the actor consented to the exact force used or attempted by the other person;"[165]
4. "if the actor provoked the . . . use or attempted use of unlawful force . . . ;"[166] or
5. if the actor confronts another concerning their "differences" while the individual is carrying or possessing a weapon in violation of sections 46.02 (Unlawful Carrying a Weapon) or 46.05 (Prohibited Weapons).[167]

While any of these disqualifiers, other than the second one, might deprive a peace officer of access to self-defense, they do not usually do so. It is more likely that the determination of self-defense will turn on whether the officer reasonably believed that the degree of force used was immediately necessary.

1. "Immediately Necessary" and the Presumption Problem

In 2007, Texas adopted language promoted by the National Rifle Association (NRA) modifying the self-defense law.[168] Previously, Texas law required that the actor "retreat," if it was reasonable to do so, before

163. *Id.* § (b)(1).

164. *Id.* § (b)(2).

165. *Id.* § (b)(3).

166. *Id.* § (b)(4). An actor who provokes an encounter may revive his right to self-defense by abandoning the encounter or "clearly communicat[ing] to the other his intent to do so" if he reasonably believes he cannot abandon the encounter safely. *Id.* § (b)(4)(A).

167. *Id.* § (b)(5).

168. *See* Lianne Hart, *Texas May OK Shooting First in Self-Defense*, L.A. TIMES (Feb. 18, 2007, 12:00 AM.), https://www.latimes.com/archives/la-xpm-2007-feb-18-na-guns18-story.html [https://perma.cc/E729-PSQE] (highlighting the National Rifle Association's supports adoption of "stand your ground" laws throughout the United States, including Texas); Alain Stephens, *Four Things You Should Know About Self-Defense Law in Texas*, HOUS. PUB. MEDIA (July 9, 2018), https://www.houstonpublicmedia.org/articles/news/2018/07/09/294925/four-things-you-should-know-about-self-defense-law-in-texas/ [https://perma.cc/V39U-QFDD] (discussing the 2007 amendment of the Texas self-defense law removing the retreat requirement altogether); Michael B. Charlton, *Texas Criminal Law, in* 6 TEX. PRAC. SERIES, at § 7.05 (2020) (describing the elimination of the duty to retreat by the Texas Legislature in 2007).

deadly force could be used if it was reasonable to retreat.[169] The retreat requirement was eliminated, and as part of that legislative package a presumption was inserted into both the non-deadly and deadly force justifications for self-defense.[170] This presumption is peculiar and perhaps unique in Texas law. Unlike other presumptions found in statutes and the common law of Texas, it runs in favor of the defendant.[171] Other presumptions favor the prosecution.[172]

Because the "immediately necessary" presumption is a defensive device, it cannot be faulted, as other presumptions can, for violating due process by shifting or lessening the State's burden of persuasion.[173] Consequently, it is virtually immune from attack by the prosecution, although a defendant may complain that the trial judge failed to properly instruct the jury on the presumption,[174] thereby potentially diminishing its beneficial effect.

To better understand just how defendant-friendly this presumption is, consider how it is to be applied. Unlike presumptions favoring the prosecution, the presumption must be submitted to the jury if the facts

169. *See* Hart, *supra* note 168 (highlighting the National Rifle Association's supports adoption of "stand your ground" laws throughout the United States, including Texas); Stephens, *supra* note 168 (discussing the 2007 amendment of the Texas self-defense law removing the retreat requirement altogether); Charlton, *supra* note 168, at § 7.05 (describing the elimination of the duty to retreat by the Texas Legislature in 2007). More on the "retreat rule" can be found *infra* in the subsection discussing the use of deadly force in self-defense.

170. *See generally* TEX. PENAL CODE ANN. § 9.31(a) (incorporating the presumption of reasonableness for the actor's belief that the force was immediately necessary); *id.* § 9.32(b) (incorporating the presumption of reasonableness for the actor's belief that deadly force was immediately necessary).

171. The presumption goes to the "actor's belief that the force was immediately necessary," an element that, if raised by the evidence, must be disproven by the prosecution beyond a reasonable doubt. *Id.* § 9.31(a); *see id.* § 9.32(b) (outlining when the "actor's belief . . . that the deadly force was immediately necessary" is presumed reasonable).

172. *See id.* § 22.05(c) (stating prosecution-friendly presumption of recklessness and danger when a defendant points a firearm toward another); *id.* § 31.03(c)(3)(A)–(C) (asserting prosecution-friendly presumption of knowledge that property is stolen if pawn shop owner fails to keep certain records).

173. *See generally* REAMEY, *supra* note 36, at 360–63 (stating that where a "presumption may not be rebutted . . . it . . . violates a defendant's right to due process by lowering the burden of proof required by the State"); Mullaney v. Wilbur, 421 U.S. 684 (1975) (asserting a presumption that lessens the prosecution's burden of proof as to an element of the crime is unconstitutional).

174. *See* Villarreal v. State, 393 S.W.3d 867, 875 (Tex. App.—San Antonio 2012) (holding the trial court erred in failing to instruct the jury on presumption of reasonableness in self-defense case), *rev'd on other grounds*, 453 S.W.3d 429 (Tex. Crim. App. 2015) (holding the harm in failing to instruct the jury was not egregious).

giving rise to it are supported by sufficient evidence.[175] And the jury must be instructed that it is *required* to find the presumed facts—i.e., that it was reasonable to believe the force was "immediately necessary"—unless the prosecution can prove *beyond a reasonable doubt* that the facts giving rise to the presumption *do not exist*.[176]

This procedural use of the self-defense presumption would be unconstitutional if the inferential device ran in favor of the prosecution.[177] By requiring the jury to find the presumed fact, that the use of force was immediately necessary, the statute makes the presumption irrebuttable, or at least shifts the burden of persuasion. It relieves the defendant from one of the "elements" of self-defense: the reasonableness of the belief that force was immediately necessary. This can be done because it does not violate the defendant's due process right to proof beyond a reasonable doubt, but rather disadvantages the State by increasing the likelihood that the jury will find that the defendant acted in self-defense.

It seems likely that this provision and the elimination of the "retreat" requirement were intended to further protect the citizen or homeowner from conviction for using force against an intruder or other person bent on committing one of the several serious offenses that activate the presumption. It seems much less likely that these relaxed rules for self-defense were meant to benefit errant police officers using excessive force. But that is exactly what they do.

The net effect of the alterations to the self-defense justification is to lessen the need for the person using force to "calculate" whether that force

175. *See Villarreal*, 393 S.W.3d at 874 (asserting a defendant is entitled to instruction on presumption of reasonableness if evidence from any source raises the issue, regardless of whether the evidence is credible or conflicts with or contradicts other evidence), *rev'd on other grounds*, 453 S.W.3d 429 (Tex. Crim. App. 2015) (holding the harm in failing to instruct the jury was not egregious).

176. *See* TEX. PENAL CODE ANN. § 2.05(b)(1) ("[I]f there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact.").

177. Requiring the jury to infer reasonableness, which is an element of self-defense, would make the presumption irrebuttable. The presumption, therefore, would be regarded as conclusive and violative of due process. *See* Sandstrom v. Montana, 442 U.S. 510, 522 (1979) (quoting Morissette v. United States, 342 U.S. 246, 274–75 (1952)) (asserting conclusive presumption interferes with the presumption of innocence); REAMEY, *supra* note 36, at 360–62 ("The permissive presumption does not require the jury to find the presumed fact but only permits such a finding and does not, therefore, shift the burden of production or persuasion to the defendant.").

is needed immediately, or whether a lesser degree of force would suffice.[178] In doing this, Texas self-defense law encourages the use of greater force and encourages the use of that force sooner than might be necessary.

To illustrate the practical effect this change has on the application of self-defense, reconsider the hypothetical situation posed earlier. Suppose that a police officer, or anyone else, is being approached and threatened by a knife-wielding person thirty yards away from the officer. The "magic words" formulation denies the officer the right to shoot the would-be assailant until the danger is imminent. Conversely, the presumption would require the jury to find the officer's belief that deadly force was immediately necessary to be reasonable because the attacker was attempting to commit murder, even if the attacker was still too far from the officer to be a realistic threat. Viewing self-defense in this way places no value on the life of the person attempting or committing one of the specified offenses and places all value on the life of the person who is being threatened, even if that life is not presently in jeopardy.

This rationale directly contradicts the reasoning of *Tennessee v. Garner*. While it is true that the need to apprehend a fleeing felon is less than the need to defend innocent life, the degree to which force is necessary to defend oneself varies according to all of the circumstances in play when the force is employed. It is always preferable to spare the life of one who is committing a violent crime, but it is not always possible to do so. Logic dictates that, as the "magic words" in Texas law suggest, no force should be used until it is necessary, and even then, no more than the least amount of force that will be effective should be used. To the extent that the "immediately necessary" presumption in sections 9.31 and 9.32 extends the self-defense justification to virtually any use of force against a person committing certain violent crimes, the law categorically permits the use of deadly force without consulting the necessity inherent in the situation.[179] And the determination of whether one of those crimes is being committed is left to the person acting in self-defense, not to a judge or jury.

178. *See* Denise M. Drake, *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 ST. MARY'S L.J. 573, 599–600 (2008) (comparing justifications that self-defense decisions must be made in a split-second without time for reflection versus taking the time to fully examine the situation).

179. *Cf.* Tennessee v. Garner, 471 U.S. 1, 11 (1985) ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.").

2. Deadly Force in Self-defense

Much of what applies to self-defense deadly force use originates in non-deadly use of force. Because section 9.31 is a prerequisite to the justification created by section 9.32,[180] certain basic principles of self-defense form a kind of foundation for the use of any level of force.[181] There are, however, additional principles unique to the use of deadly force in defense of self.

One of these principles, adopted as part of the 2007 modifications to the law of self-defense, is that a person or officer need not "retreat" before using deadly force.[182] The logic behind the retreat requirement previously found in Texas law is that life should be spared whenever possible.[183] Alternatively, to borrow a phrase from *Monty Python*, it is better to "run away"[184] than to stubbornly refuse to give ground until the use of deadly force becomes necessary.

The absence of a retreat requirement allows a person to "stand his ground" rather than requiring that they avoid a deadly confrontation.[185] Moreover, a jury "may not consider whether the actor failed to retreat" if the actor did not provoke the difficulty and was not engaged in criminal activity at the time deadly force was used.[186]

What is the consequence of this face-saving "stand your ground" position? The hypothetical police officer who faces someone coming toward her or him with a knife need not move back in an attempt to maintain a safe distance and avoid the use of deadly force. Instead, the

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180. PENAL CODE § 9.32(a)(1).

181. *See id.* § 9.31(b) (prohibiting self-defense in response to verbal provocation; to resist arrest or search being made by a person known to be a peace officer; or if the actor consented to the force used against him or her).

182. *Id.* § 9.32(c). A bill introduced in the 87th Regular Session of the Texas Legislature would have modified section 9.32 to reinstate the retreat requirement. *See* H.B. 196, 87th Leg., R.S. § 1 (2021) (proposing the amendment of section 9.32 of the Texas Penal Code to require retreat when safe). The bill died in committee.

183. *See* Catherine L. Carpenter, *Of the Enemy Within, The Castle Doctrine, and Self-Defense,* 86 MARQ. L. REV. 653, 656 (2003) (citations omitted) ("Proponents of the duty to retreat . . . argue that it is the supreme value of life that demands flight of those who are unlawfully attacked. What may appear to be cowardice in the face of aggression is actually the imposition of a legal requirement intended to calm the fires and prevent the loss of life.").

184. MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures Limited 1975).

185. *See* PENAL CODE § 9.32(c) (stating Texas does not require retreat even where is might be reasonable to do so); Charlton, *supra* note 168, at § 7.05 (noting the abolishment of the duty to retreat in Texas in 2007).

186. PENAL CODE § 9.32(d).

officer can hold her position until shooting becomes "immediately necessary."

Removal of the retreat requirement, combined with the presumption of reasonable belief in necessity, has the net effect of readily justifying the unnecessary use of deadly force in self-defense. Not only does the officer not need to postpone using deadly force, but the officer also does not need to avoid using that force before it is required.

In addition to allowing an officer to defend himself or herself, Texas law permits the use of deadly force to prevent the "imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery."[187] Although all of these felonies involve the use or threatened use of force, and often deadly force, only murder necessarily includes death.[188] In order to prevent the imminent death of another, an officer need not rely on the self-defense provision in Section 9.32 but may instead be justified in using deadly force in defense of a third person, a justification created in Section 9.33 of the penal code.[189]

As serious as the enumerated felonies in Section 9.32 are, none—save murder—necessarily involves the loss of life. Nevertheless, Texas law grants an officer a defense to prosecution for taking a life to prevent the commission of one of these offenses.[190] The "magic words" limitation applies but is subject to the necessity presumption,[191] effectively making the defense more readily available to the officer. It is noteworthy that none of these crimes carries the death penalty, even if the actor is convicted by judge and jury.[192]

If an officer provokes the confrontation that escalates to the need to act in self-defense, the justification is denied.[193] This limitation, applied

187. *Id.* § 9.32(a)(2)(B).

188. *Compare id.* § 20.04 (describing the offense of aggravated kidnapping which does not require death), *with id.* § 22.011 (describing the offense of sexual assault which does not require death), *and id.* § 22.021 (describing the offense of aggravated sexual assault which does not require death), *and id.* § 29.02 (describing the offense of robbery which does not require death), *and id.* § 29.03 (describing the offense of aggravated robbery which does not require death), *with id.* § 19.02 (describing the offense of murder which requires death).

189. *See generally id.* § 9.33. Defense of a third person is discussed in more detail in the next subsection.

190. *Id.* § 9.32(a)(2)(B).

191. *See id.* § 9.32(b) (stating the situations that lead to a presumption of immediate necessity).

192. Capital murder is the only offense in Texas punishable by death. Murder, in its basic form, is not a capital crime. Capital murder convictions often do not result in the death penalty, but may be punished by life imprisonment without parole. *See id.* § 12.31(a).

193. *Id.* § 9.31(b)(4).

rigorously, might deny an officer access to self-defense in an appropriate case. Because provocation is not defined, however, this potential disqualifier rarely seems to have that effect.

3. Using Deadly and Non-deadly Force to Defend Others

The self-defense provision—inaptly named when force is used in defense of another—sometimes applies to prevent the commission of listed offenses.[194] In preventing at least one of those offenses—murder—deadly force used to prevent the offense may also protect the intended victim. Defense of third persons is more generally available to protect actors than the crime prevention variation of self-defense. Defense of third persons also may permit the use of deadly force.[195]

Laws creating justifications for the defense of third persons usually fall within one of two categories: (1) "alter-ego" defenses, and (2) "reasonable belief" defenses.[196] Traditionally, one who came to the aid of another enjoyed whatever justification for using force (or deadly force) that the person being aided would have enjoyed.[197] In other words, the aider stepped into the shoes of the person being aided. If that victim could have used deadly force in self-defense to ward off the attacker, the person coming to the supposed victim's aid also would be justified in using deadly force.[198]

The obvious problem with this approach is that the person who acts in good faith to defend someone appearing to be victimized by an attacker might misperceive the aided person's status. One acting with the best intentions might easily and inadvertently assist the person who initiated the assault, robbery, or attempted sexual offense. Since the Good Samaritan "stepped into the shoes" of the person she was aiding, the aider could have no more or less justification than the supposed victim.[199] If that "victim" actually had no justification to use any degree of force, the person offering assistance, whatever her beliefs or intentions, also would not be justified in using force.[200] Needless to say, this formulation of third-party defense law

194. PENAL CODE § 9.32(a)(2)(B).

195. *Id.* § 9.33.

196. *See generally* 40 C.J.S. *Homicide* § 166 (2021) (describing the circumstances and requirements of the defense of defense of another); REAMEY, *supra* note 36, at 272–73 (describing the defenses of third persons under reasonable belief).

197. REAMEY, *supra* note 36, at 272–73.

198. *Id.*

199. *Id.*

200. *Id.*

strongly discouraged persons from aiding others without being certain of the factual circumstances and the law surrounding the encounter.

The alternative, adopted by Texas as part of its incorporation of the Model Penal Code, focuses instead on the reasonableness of the belief of the person offering aid that the person being assisted was in the legal right, and the person against whom force was offered (the apparent attacker) was not justified.[201] Because the justification for aiding a third-party turns on reasonable belief, the aider who misperceives the situation, but does so reasonably, remains justified notwithstanding the actual legal status of the "attacker" and "victim."[202]

This arrangement is embodied in Section 9.33 of the Texas Penal Code.[203] The key language of that provision provides that the justification turns on "the circumstances as the actor reasonably believes them to be."[204] If those circumstances would justify an officer to use force in aid of another, and if that force is immediately necessary, the officer may use the degree of force in aid that she would be entitled to use under Section 9.31 (non-deadly force in self-defense) or 9.32 (deadly force in self-defense).[205] So, an officer in Texas may use deadly force in self-defense, to prevent the imminent commission of certain enumerated felonies, and to protect third parties the officer reasonably believes would be entitled to use that degree of force to protect themselves.[206]

4. Other Force Provisions in Chapter 9

Other justifications in Chapter 9 have occasional applicability when peace officers use force, or even deadly force. One of these is a rather peculiar statute permitting the use of deadly force to preserve another's life "in an emergency."[207] At first blush, this language appears to provide a defense

201. *Id.*

202. *Id.*

203. *See* TEX. PENAL CODE ANN. § 9.33(1) ("A person is justified in using force or deadly force against another to protect a third person if under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect.").

204. *Id.*

205. *Id.*

206. Note that the necessity presumption does not apply directly to Section 9.33, although it is part of both Section 9.31 and 9.32. Also noteworthy is the inapplicability of any retreat requirement before using force in aid of a third party. For logical reasons, this was true even before the retreat rule was removed from Texas law in 2007. Hughes v. State, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986).

207. PENAL CODE § 9.34(b).

for killing a person to preserve that person's life, but that clearly is not the case. An officer, or a civilian actor, may use deadly force—force that does not necessarily cause death, despite its name—to save another. Consider the action of an officer who finds an accident victim pinned to a train track with an engine fast approaching, or a driver whose arm is trapped in a horrific traffic accident and cannot escape a burning vehicle. The officer might need to use "deadly force" in order to free the victim and "preserve the other's life" in these situations. That officer would be justified in doing so by Section 9.34 of the Texas Penal Code.[208]

Unlike most states, Texas grants possessors of property the right to use force or, in some cases, deadly force to protect that property.[209] Unless they are themselves the possessors, peace officers do not share those justifications. They do, however, have the same right as civilians to use force or deadly force to protect land or tangible property of another in limited circumstances.[210] To access this justification, the officer would have to have been justified in using the degree of force to protect the property that would have been justified if it had been his property,[211] and the unlawful property interference must have constituted attempted or consummated theft or criminal mischief to the third person's property.[212]

An officer might also use force or deadly force to protect another's property if the officer has been asked to protect it or if the officer has a legal duty to do so.[213] The legal duty option is problematic since Texas peace officers operate under very few legal duties regarding property protection.[214] The Texas Property Code does create a duty for a peace officer to "accompany and assist" a property owner in executing a forcible entry and detainer order.[215] In that specific circumstances, a peace officer is authorized to "use reasonable force in providing assistance,"[216] but the statute does not elaborate on the degree of force that may be used, or

208. *Id.*; REAMEY, *supra* note 36, at 273.

209. PENAL CODE §§ 9.41–.42.

210. *Id.* § 9.43.

211. *Id.* In other words, the officer would have to be justified under sections 9.41 and 9.42 before she could resort to the justification for protection of another's property. Since only the possessor of the property is entitled to claim the justification of those sections, for purposes of defense of a third party's property, the officer stands in the shoes of the property possessor. *Id.*

212. *Id.* § 9.43(1).

213. *Id.* § 9.43(2)(A)–(B).

214. *See* TEX. CODE CRIM. PROC. art. 2.13 (discussing general duties of peace officers).

215. TEX. PROP. CODE ANN. § 24A.003(a) (West 2019).

216. *Id.* § 24A.003(d).

whether that force is meant to be used against the person in possession of the property or in forcibly entering the property, or both.

To make clear—or to make as clear as possible—how these property provisions apply to the use of force, consider an officer who sees a suspected burglar exiting a home or building and carrying off what appears to be stolen property. Suppose the officer uses deadly force to keep the burglar from carrying away the stolen goods. In that case, the officer might claim a justification for using that force to protect the property of another (i.e., it might be reasonable to believe the force is immediately necessary to protect the property from what is reasonably believed to be theft),[217] but not to apprehend or arrest the fleeing felon.[218] *Tennessee v. Garner*[219] and Section 9.51 of the Texas Penal Code[220] (use of force to effect an arrest) would not allow deadly force to be used to arrest or seize the suspect; indeed, it would be unconstitutional for the officer to use such force in that circumstance.[221] Protection of a third person's property, on the other hand, does permit the use of deadly force, and that justification is not limited in application to peace officers.[222] It would not be correct, however, to interpret Section 9.51 as always allowing deadly force to be used to protect property of another. In fact, the restrictions on the use of deadly force in defense of property, whether the property is one's own or that of another, are quite limiting. They include the "magic words" found in self-defense provisions[223] as well as other "reasonable" beliefs[224] that, taken together, make the justification unavailable in most situations. That Texas allows deadly force to be used to protect property at all is quite remarkable. But it would be misleading to say without elaboration or qualification that Texas law allows deadly force to be used to protect property.

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217. TEX. PENAL CODE ANN. § 9.43(1).

218. *Id.* § 9.51(c).

219. Tennessee v. Garner, 471 U.S. 1 (1985).

220. PENAL CODE § 9.51(c).

221. *Garner*, 471 U.S. at 11–12 ("The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.").

222. PENAL CODE § 9.43.

223. *Id.* §§ 9.41(a), 9.42(2); *see id.* § 9.43 (requiring compliance with Section 9.41 or 9.42 as a prerequisite to its application).

224. *See id.* § 9.43 (requiring compliance with Section 9.41 or 9.42 as a prerequisite to its application).

IV. COHESIVE, COHERENT, COMPREHENSIBLE, AND CONSISTENT

It is evident that Texas use-of-force law suffers from a lack of coherency. Unavoidable as it may be, it sows confusion to simultaneously treat peace officers as requiring special rules on the use of force and, at the same time, to allow them to access the justifications available to every other person who uses force, particularly when the justifications designed for civilian use are not well suited for trained professionals.

Peace officers *are* different. Their duties of arrest and search sometimes, but not always, require a degree of force. It is desirable, as reflected in the ALI's *Principles of the Law: Policing* project, to limit the use of force to the minimal amount necessary to achieve legitimate policing goals.[225] Texas law confusingly adopts this limitation in one statute,[226] only to contradict it in another.[227] While it may seem the "magic words" used throughout Chapter 9 of the Texas Penal Code go a long way toward producing a requirement that minimal force be used, the effect of the "magic words" phrasing has been diluted, at least in the self-defense provisions, by the abandonment of the retreat requirement and the introduction of a presumption that greatly broadens the self-defense justification for some felonies.[228]

How, then, might these contradictions be resolved so Texas peace officers are guided by a standard that is reasonable and usable? Reform of the use-of-force laws applicable to police must reflect an understanding that three sets of needs must be in balance: (1) the security needs of officers; (2) the security needs of civilians; and (3) the operational needs of law enforcement.

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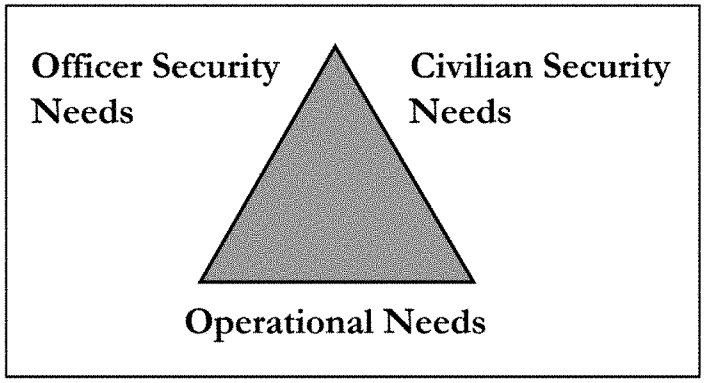
225. POLICING, *supra* note 92, at § 5.03.

226. *See* TEX. CODE CRIM. PROC. art. 15.24 (providing no greater force than necessary may be used to arrest).

227. *See* PENAL CODE § 9.51 (stating force may be used to arrest "when and to the degree" the officer reasonably believes it to be immediately necessary).

228. *See id.* §§ 9.32(a)(2)(B), 9.32(b)(1)(C).

These sometimes competing interests might be thought of as legs of a stool or sides of a triangle:



Any legislative scheme intended to strike an appropriate balance between these three needs must seek to account for the constituencies they represent and the value each set of needs contributes to the whole. For example, police officers must enjoy a measure of protection from unjust prosecution and conviction when they use force in self-defense. At the same time, the civilian population likely to be on the receiving-end of this application of force must be protected by laws that restrain officers from using unlimited or excessive force. And society must enjoy the security of effective law enforcement who can and will employ necessary and sufficient means to ensure community safety and well-being.

The contradictory and confusing mix of Texas laws governing the use of force by law enforcement ill-serves all three of these interests. Police officers (and civilians) are over-protected by expansive self-defense justifications. At the same time, due to legal contradictions and complexities, officers often suffer from an inability to readily discern whether, and to what extent, force may be used against others in carrying out legitimate policing functions like arrest. Civilians are typically the victims of this uncertainty, especially when officers wrongly conclude more force may be used than the law actually allows.[229] And when too much or

229. This "better safe than sorry" approach to the use of force is reflected in the frequently repeated aphorism that it's "better to be judged by twelve than carried by six." The rarity of prosecutions and the likelihood of acquittal in those few cases brought to trial against an officer may lead officers to conclude that the odds favor the use of overwhelming force regardless of the limits imposed by law. This effect is enhanced by fear and an imperfect understanding of the policies and laws regulating use of force.

too little force is applied in a given situation, operational success suffers, usually to the detriment of the community being policed, as well as to the reputation and effectiveness of policing agencies.

The laws governing the use of force by officers must be considered together, and not separately, in order to better balance the needs of all law enforcement constituencies and interests in Texas. From an officer's perspective, the most pressing need is to create a cohesive, coherent, comprehensible, and consistent body of law. Hortatory statements in statutes regarding the use of force that suggest a standard differing from other statutory language must be removed unless that language is entirely consistent with, and serves to reinforce, statutes that create justifications for the use of force. Article 15.24 of the Texas Code of Criminal Procedure, for example, simply cannot coexist with Section 9.51 of the Texas Penal Code.[230]

If the standard for self-defense by officers is to differ from that governing self-defense by civilians, presumably by being less forgiving for officers, that difference must be explicit. Better yet, the self-defense standards for officers and civilians should remain the same, but should be reconsidered with an appreciation that it is often officers who will rely on them. The loosening of the threshold for self-defense that occurred in 2007 was no doubt intended to protect homeowners, business owners, and other potential victims of crime from prosecution for using force that probably was not necessary, or for using force that was excessive in degree. As well-intended as this change may have been, it has had the perverse effect of allowing peace officers to claim a justification in situations that many people would consider unjustifiable. That judgment by reasonable people, perhaps reasonable people serving as a jury, is made for them by a law that allows officers to shoot before it is necessary, and to shoot rather than explore less deadly alternatives.

This expansive version of self-defense inhibits prosecuting officers in circumstances that will sometimes be seen by the public as undeserving of leniency. The reality is law enforcement officers and civilian members of

230. *Compare* TEX. CODE CRIM. PROC. ANN. art. 15.24 ("In making an arrest, all *reasonable means are permitted* to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused.") (emphasis added), *with* TEX. PENAL CODE ANN. § 9.51(a) ("A peace officer, or a person acting in a peace officer's presence and at his direction, is justified in using force against another when and to the degree *the actor 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 . . . .") (emphasis added).

the public differ in terms of training, proficiency with weapons, and their ability to deal with stressful and confrontational situations. This difference could be addressed by establishing two sets of standards for self-defense, one of which retains the current standard for civilians and one of which makes self-defense somewhat less accessible for trained officers acting in the line of duty. Far better, however, would be a return to a uniform standard that discourages the premature use of force no matter the circumstance and better protects the sanctity of life to which the Supreme Court alluded in *Tennessee v. Garner*.[231]

The use of force to prevent an escape from custody also must be revised. In its current form, Section 9.52 is largely unconstitutional. In order to establish a uniform standard, treating escape from custody (Section 9.52) in the same way as "escape after arrest" (Section 9.51) would provide an appropriate curb on the use of force while explicitly addressing an operational need.

Using deadly force to protect or recover property seems per se excessive, although Texas law continues to allow a justification in certain circumstances.[232] Setting aside whether this use of deadly force is ever appropriate, it should be clear it is always inappropriate for a peace officer to use deadly force to protect or recover the property of another, something that is now allowed by Texas Penal Code Section 9.43.[233]

Justifications for essential policing functions—arrest and search—must continue to be limited by state law. While Section 9.51 of the penal code currently does this by use of the reasonableness standard coupled with the "magic words" formulation found throughout the Code, consideration should be given to adoption of a minimum-force limitation. Although the difference between what is minimally necessary and what is reasonable may be slight, the minimum-force formulation expresses in a more easily understood manner the goal that should animate all decisions about the use of force.

Texas law has long curtailed the use of deadly force in making an arrest,[234] but any reform that encompasses police use of force must address

231. *See* Tennessee v. Garner, 471 U.S. 1, 21 (1985) ("While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force.").

232. *See* PENAL CODE § 9.42; *see id.* § 9.42(2) (potentially, while limited in its reach, extending to prevention of the commission of minor misdemeanors, like criminal mischief in the nighttime and theft in the nighttime).

233. *Id.* § 9.43.

234. *Id.* § 9.51(c).

whether, and under what circumstances, deadly force may be used to apprehend persons suspected of committing criminal acts. The existing provision, Section 9.51(c),[235] appears to satisfy the standards of *Tennessee v. Garner*, but it nevertheless may allow deadly force in circumstances that endanger innocent civilians and do little to achieve security for the community.[236]

Law enforcement agencies are free, of course, to set higher standards for the use of force. They might allow no more than the minimum force absolutely necessary under the circumstances, or they might restrict the use of deadly force to self-defense and the defense of others. But these local regulations ultimately will affect only an officer's employment. They will not provide a basis for prosecution.

If prosecution of errant officers is ever to be a feasible alternative, one that is seen as a real option and one that acts as a real deterrent to excessive force, Texas's use of force laws must be revamped and adjusted to provide an optimal balance between sometimes competing needs. Those laws must address the needs of officers to be safe, the needs of the community to be free from excessive force, and the needs of society to enjoy the security and safety that effective policing provides.

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235. *Id.*

236. *See Garner*, 471 U.S. at 10–13 (discussing the reasonableness standard for use of deadly force). Not all those who have committed crimes need to be caught immediately. High-speed chases on crowded streets and highways and firing shots in densely populated urban areas carry risks that far outstrip the benefits of apprehending most criminals, even those who have committed felonies. Given the proliferation of acts denominated by legislatures as criminal, arrests often involve victimless or non-violent crimes.