

## **CHAPTER 8: JUSTIFICATIONS**

### **INTRODUCTION**

Defenses can be broken down into types. First are defenses specified in the Texas Penal Code (TPC) that apply only to certain specific offenses. For instance, the defense of “Renunciation” (sec. 15.04) applies only to attempts, conspiracies or solicitations. Second are situations where the “defense” consists of the negation of an element of the offense. For instance, consent is not specifically listed as a defense to Sexual Assault (forcible rape), but there can be no forcible rape if there was valid consent. Third is the “defense” that the person did not commit the crime. The most obvious example is the defense of alibi. The defense of “alibi” is not mentioned in the TPC, but is, obviously, a defense nonetheless. Finally, are defenses that apply to most, if not all, offenses. These are found in the “General Part” of the criminal law, and are treated herein (and in your text) in this chapter and the next (ch. 9).

These general defenses are, in turn, broken down into two types, Justifications and Excuses. In these cases, the defendant admits most, if not all, elements of the crime, but argues that despite this, conviction is not legally warranted.

Justifications were created to prevent interference of the criminal law with other important values, such as the value of self-defense, and/or because the net social gain of committing the offense outweighs the harm of committing the offense. Necessity, consent and public duty are examples.

Excuses prevent application of the criminal sanction to persons who are not blameworthy because of either their personal characteristics or their situation. Insanity and duress are examples.

### **TYPES AND BURDENS OF PROOF**

Some defenses in the TPC are labeled “defenses” (ordinary defenses) and others are labeled “affirmative defenses.” Under TPC 2.03 “Defenses,” a reasonable doubt on the issue requires that the defendant be acquitted. Thus, in effect, ordinary defenses must be disproven by the prosecution beyond a reasonable doubt. Affirmative defenses must be proven by the defendant by a preponderance of the evidence (sec. 2.04).

However, these two categories do not exhaust the matters that can be used by a defendant to obtain an acquittal. The TPC also contains “exceptions” and the prosecution must prove beyond a reasonable doubt that the exception does not apply.

There are other defensive matters scattered throughout the TPC. For instance, sec. 36.07 (b) provides that this “section does not prohibit . . .”. Sec. 20.02 (d) provides that “it is no offense . . .”. The language, this “section does not apply to . . .” appears in sec. 25.09 (b). Under sec. 2.03 (e) these are treated as ordinary defenses and must be disproven by the State beyond a reasonable doubt.

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Both due process and the TPC (sec. 2.01) require that the prosecution prove every element of the offense beyond a reasonable doubt. Thus, the prosecution has the burden of proof on any applicable conduct, culpability, act, harm or attendant circumstances in the statute. However, as discussed above, the prosecution may also have to prove beyond a reasonable doubt the non-existence of ordinary defenses and the equivalents of ordinary defenses.

### OVERVIEW OF JUSTIFICATIONS

Chapter 9 of the TPC is entitled “Justifications Excluding Criminal Responsibility.” This chapter is available at

<http://www.capitol.state.tx.us/statutes/docs/PE/content/word/pe.002.00.000009.00.doc>

This ch. contains 17 distinct justifications. They are as follows:

- sec. 9.03. confinement as justifiable force,
- sec. 9.04. threats as justifiable force,
- sec. 9.22. necessity,
- sec. 9.31. self-defense,
- sec. 9.32. deadly force in defense of person,
- sec. 9.33. defense of third person,
- sec. 9.34. protection of life or health,
- sec. 9.41. protection of ones own property,
- sec. 9.42. deadly force to protect property,
- sec. 9.43. protection of third persons property,
- sec. 9.44. use of device to protect property,
- sec. 9.51. arrest and search,
- sec. 9.52. prevention of escape from custody,
- sec. 9.53. maintaining security in correctional facility,
- sec. 9.61. parent-child,
- sec. 9.62. educator-student, and
- sec. 9.63. guardian-incompetent.

All of these ordinary defenses (TPC sec. 9.02). Only a few of these will be covered.

### DEFENSE OF SELF AND OTHERS

Most of the justifications deal with use of force. Before looking at specific sections, a look at some general principles may be helpful.

First, when force is involved, the law of Texas, like that of most, if not all jurisdictions, divides force into two types deadly and non-deadly or ordinary. Under sec. 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.” Under sec. 1.07 (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.”

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Second, because of the potential loss of life, there are more requirements to be met before using deadly as compared to ordinary force. The requirements of ordinary force must first be met and then additional requirements are imposed to justify deadly force.

Third, the sections generally impose a requirement that the force or deadly is justified “when and to the degree he reasonably believes” the force or deadly force, “is immediately necessary to protect” the person or property against the use of “unlawful” force by another. Note that one can lawfully use force only to defend against unlawful force. One is never justified in using force against lawful force, such as lawful force by a police officer

Fourth, “reasonable belief” is defined in sec. 1.07 (42): It refers to “a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.” This is an objective standard, independent of what the person subjectively believes. However, to be entitled to the defense the person must also subjectively believe the situation meets the requirements of the paragraph directly above. (See the discussion of “Reasonable Belief” in your text)

### **Ordinary force for Self-defense or Defense of Third Person**

Under sec. 9.31, “Self-defense” the general rule is that

“a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

However, sec. 9.31 (b) specifies exceptions, some of which are specified below:

- (b) The use of force against another is not justified:
  - (1) in response to verbal provocation alone;
  - (2) . . .
  - (3) if the actor consented to the exact force used or attempted by the other;
  - (4) if the actor provoked the other's use or attempted use of unlawful force, unless:
    - (A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and
    - (B) the other nevertheless continues or attempts to use unlawful force against the actor; or

### **Resisting Arrest**

As in most jurisdictions, under TPC sec. 9.31 (b) (2) a person is not authorized “to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful . . .” The only exception to this is found in Subsec. (c);” A person may resist and arrest or search

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- (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search;  
and
- (2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

Recall that the general rule is that only unlawful force can be resisted. It is the peace officer's excessive force that makes it unlawful.

### Deadly Force in Self-Defense

To be authorized to use deadly force in self-defense (sec. 9.32), the person must meet all the requirements of sec. 9.31, and

- (2) if a reasonable person in the actor's situation would not have retreated; and
- (3) when and to the degree he reasonably believes the deadly force is immediately necessary:
  - (A) to protect himself against the other's use or attempted use of unlawful deadly force; or
  - (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

(b) The requirement imposed by Subsection (a)(2) does not apply to an actor who uses force against a person who is at the time of the use of force committing an offense of unlawful entry in the habitation of the actor.

One of the important issues in self-defense cases is the duty to retreat. (See the discussion of "Retreat" in your text.) In Texas, as in probably all other states, there is no retreat requirement before using ordinary force. Texas like most, if not all jurisdictions generally require retreat if it can be reasonably and safely done rather than using deadly force.

The necessity of retreating before using deadly force in one's own home is a controversial topic. Under the "castle doctrine" a person does not have to retreat before using deadly force against a stranger. This rule is recognized in Texas in subsec. (b).

In general, with regard to a protector using force or deadly force to protect a third person, (sec. 9.33) the general rule is that if the person being attacked would have been justified in using force the protector is justified in using force. (This is discussed in your text in the section "Defense of Others.")

### USE OF FORCE TO PROTECT PROPERTY

The use of ordinary force to protect one's own property or that of another are not controversial topics and are covered in TPC sec. 9.41 and 9.43. The use of deadly force to protect land or movable property is

more controversial. Although the requirements are detailed, Texas law is more liberal than that of most states in allowing the use of deadly force to protect land or property.

§ 9.42. DEADLY FORCE TO PROTECT PROPERTY. A person is justified in using deadly force against another to protect land or tangible, movable property:

(1) if he would be justified in using force against the other under Section 9.41[ordinary force]; and

(2) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

## JUSTIFICATIONS FOR LAW ENFORCEMENT AND PUBLIC OFFICIALS

In general, law enforcement has much more authority to use force than the ordinary citizen. Should a law enforcement officer be charged with a crime growing out of use of force, the officer may have the defense in sec. 9.51. Peace officers and correctional employees are justified in using force under sec. 9.52 and 9.53. The portion of sec. 9.51 dealing with deadly force by law enforcement is found below:

(c) A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) [ordinary force] and:

(1) the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; or

(2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.

Except for the requirement of a warning (if one is feasible) before using deadly force, this rule is very similar to the Fourth Amendment rule outlined by the U.S. Supreme Court in *Tennessee v. Garner*,

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(1985). This case is present in your text in the section entitled “Was the officer justified in killing the burglar?”

Any public official can use the Public Duty Defense.

§ 9.21. PUBLIC DUTY. (a) Except as qualified by Subsections (b) and (c), conduct 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.

(b) The other sections of this chapter control when force is used against a person to protect persons (Subchapter C), to protect property (Subchapter D), for law enforcement (Subchapter E), or by virtue of a special relationship (Subchapter F).

(c) The use of deadly force is not justified under this section unless the actor reasonably believes the deadly force is specifically required by statute or unless it occurs in the lawful conduct of war. If deadly force is so justified, there is no duty to retreat before using it.

(d) The justification afforded by this section is available if the actor reasonably believes:

- (1) the court or governmental tribunal has jurisdiction or the process is lawful, even though the court or governmental tribunal lacks jurisdiction or the process is unlawful; or
- (2) his conduct is required or authorized to assist a public servant in the performance of his official duty, even though the servant exceeds his lawful authority.

An example of this would be executing an arrest or search warrant or other lawful process (eviction) when the premises has “No Trespassing” signs. If the officer were charged with criminal trespass, the officer could use this defense.

## NECESSITY

The TPC contains a necessity or “choice of evils” defense:

§ 9.22. NECESSITY. Conduct is justified if:

- (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
- (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

An interesting issue as to the applicability of the necessity defense came in the case of *Vasquez v. State*, 830 S.W.2d 948 (Tex.Crim.App. 1992). He was convicted of being a convicted felon in possession of a firearm. On appeal to the CCA Vasquez argued that the facts of his case warranted the jury being

instructed on the defense of necessity. The CCA agreed that, if believed, the defendant's testimony could warrant finding the defense of necessity. The court wrote:

The legislature has not [specifically] excluded the justification of necessity as a defense to the offense of possession of a firearm by a felon. *See* V.T.C.A. Penal Code, § 46.05. . . . Indeed, this Court has held that necessity is a defense available to a defendant charged with the lesser included offense of unlawfully carrying a weapon. *Johnson v. State*, 650 S.W.2d 414 (Tex.Cr.App.1983); *Armstrong v. State*, 653 S.W.2d 810 (Tex.Cr.App.1983); and *Hazel v. State*, 534 S.W.2d 698 (Tex.Cr.App.1976).

The facts of this case do raise the issue of necessity. Appellant testified that he had been a "building tender" in the Texas Department of Corrections while he was in prison in the period prior to the Ruiz litigation. Further, he stated that as a result of his being a building tender while incarcerated, he was still in danger of being killed by ex-members of prison gangs even though he no longer resided within the prison walls. Specifically, appellant testified that shortly before the events in this case, he was in Ben Taub Hospital, recovering from a ruptured disk he had sustained as a result of having been kicked in the back by a released prison gang member. He claimed that he was kidnapped from Ben Taub Hospital by ex-members of a prison gang, and was being held captive at the time of this offense. He stated that he escaped from his kidnappers when the man guarding him was distracted so that appellant was able to grab a gun and escape. Subsequent to taking the gun, appellant walked through a convenience store parking lot. He was observed by a bystander who informed a police officer that there was a man with a gun at the convenience store. Appellant was subsequently arrested. While sitting in the arresting officer's patrol car appellant told the officer that "someone" was "out to get him." He also told the officer that two men with machine guns were at the convenience store and would shoot him if they saw him. a 830 S.W.2d at 950

See also *Spakes v. State* 913 S.W.2d. 597 (Tex Crim. App. 1996) involving the offense of escape, and *Bowen v. State* 162 S.W.3d 226 (Tex.Crim. App. 2005), involving the offense of resisting arrest. <http://www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=13069>

## REVIEW QUESTIONS

1. Which of the following is not a justification under Texas law?
  - a. insanity
  - b. self-defense
  - c. defense of others
  - d. public duty
  - e. necessity
  
2. A fireman breaks into a home to put out a suspected fire. The fireman is later charged with criminal trespass. The fireman's most appropriate defense is
  - a. public duty
  - b. defense of others.
  - c. self-defense

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- d. duress
  - e. entrapment
3. Under Texas law
- a. deadly force may never be used to protect land or property.
  - b. retreat is always required before using ordinary force.
  - c. the home gets no special protection under the law of justification.
  - d. police officers have no special protection in the law of justification.
  - e. police officers do not have to retreat before using otherwise lawful deadly force.
4. Under Texas law, a person may
- a. not resist a lawful or unlawful arrest.
  - b. resist only an unlawful arrest.
  - c. resist only a lawful arrest.
  - d. not resist a lawful or unlawful arrest only in the case of misdemeanor arrests.
  - e. may not resist unlawful arrests with a warrant, but may resist unlawful warrantless arrests.
5. Under Texas law, if an issue of a possible justification is raised, the
- a. defendant must prove it beyond a reasonable doubt.
  - b. State must disprove it beyond a reasonable doubt.
  - c. defendant must prove it by a preponderance of the evidence.
  - d. State must disprove it by a preponderance of the evidence.
  - e. State must prove it by a preponderance of the evidence.
6. The \_\_\_\_\_ defense is sometimes referred to as the choice of evils defense.
- a. self-defense
  - b. duress
  - c. insanity
  - d. entrapment
  - e. necessity

## REFERENCES AND RESOURCES

Belbow, B. A. (1999). *A Guide to Criminal Law for Texas*. Belmont, CA: West/Wadsworth, ch. 7

Teague, M.O. & Helft, B. P. (2006). *Texas Criminal Practice Guide*. San Francisco: Matthew Bender, vol. 5 ch. 123

Texas Jurisprudence 3rd (2006). *Criminal Law*, sec. 1868-1954



**ANSWER KEY, CH. 8, JUSTIFICATIONS**

1. a
2. a
3. e
4. a
5. b
6. e