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LAW LETTER

How much force is legal?

Protecting Private Property

News abounds concerning the conflict between environmental regulations and private property rights. Citing the Fifth Amendment to the U.S. Constitution, opponents contend that the environmental regulations take private property without just compensation.

While the legal battles rage in the courts and congress, the language of the Fifth Amendment raises another question. How much force can an individual use to protect private property from being taken by others?

Recent events in Houston illustrate the point. In one case, a homeowner shot and killed an intruder pounding on the back door during the night. Later, the facts revealed that the intruder was, in fact, seeking help. In another instance, a homeowner shot and killed a truck driver who was towing away the homeowner's car at night. Later, the facts revealed that the driver was repossessing the homeowner's car because of delinquent payments.

In neither case were charges brought against the homeowners. Each instance focuses on the amount of legal force that can be used to protect private property. Texas statutes are somewhat controversial because they view the circumstances through the eyes of the property owner (actor).

Laypersons may have been misled on the issue. Many believe that their home is their castle. Hence,

more force can be used to protect the home than any other property. While the idea appears to be logical, it has no legal validity. The home receives no special protection under Texas law.

In fact, Texas statutes divide protection into four categories. They include the amount of physical force that can be used to defend:

- the person (self-defense),
- the person's property,
- others (third parties) and
- the other's property.

This article discusses the second category only. The statutes governing the issue are found in the Texas Penal Code (TPC), Sections 9.41, 9.42 and 9.44. The primary problem with the statutes is the lack of general rules. Instead, the statutes are laden with subjective concepts and technical legal terms.

"Protection of One's Own Property," is divided into two parts. The first deals with a person in lawful possession of land or personalty, the second with a person who has been deposed unlawfully of land or personalty. Both describe the amount of *reasonable* force that can be used to protect or reacquire the property (Section 9.41).

"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" (Section 9.41[a]).

"A person unlawfully dispossessed of land or tangible, movable property by another is justified in using force against the other when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property if the actor uses the force immediately or in fresh pursuit after the dispossession and the actor reasonably believes the other (person) had no claim of right when he (the other person) dispossessed the actor, or the other (person) accomplished the dispossession by using force, threat, or fraud against the actor" (Section 9.41[b]).

"Deadly Force to Protect Property" (Section 9.42) builds on the requirements set forth in the previous section. The latter section provides that a person is justified in using *deadly force*—that force known, intended or capable of causing death or serious bodily injury (Section 9.01[3]), against another to protect land or tangible, movable property under three conditions.

1. The actor is justified in using (reasonable) force (Section 9.41).
2. "When and to the degree the actor reasonably believes that deadly force is immediately necessary to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime or criminal mischief during the

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

3. "The actor reasonably believes that the land or property cannot be protected or recovered by any other means, or 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."

The TPC and case law define some of the more important terms and phrases.

- *Reasonable belief* means the belief that would be held by an ordinary and prudent person in the same circumstances as the actor (Section 1.07[42]).
- *Unlawful* means criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege (Section 1.07[48]).
- *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 (Section 1.07[46]).
- *Nighttime* means any time between 30 minutes after sunset and 30 minutes before sunrise (*Whitten v. State*, 16 S.W. 296 [1891]).

Perhaps the rules make more sense by deleting the "reasonably believes," "immediately necessary" and "when and to the degree." By doing so, the following rules evolve.

If a person is in lawful possession of land or personalty, the person may use reasonable force to prevent or stop someone from trespassing on the land or unlawfully interfering with the personalty.

If another person unlawfully seizes the land or personalty, the

property owner may immediately thereafter use reasonable force to reenter the land or, if in fresh pursuit, use reasonable force to recover the personalty. In either instance, however, the property owner must believe the other person had no claim to the property or the other person acquired the property by force, fraud or threat.

The use of deadly force introduces the element of preventing a crime against the person or property or preventing someone from fleeing after committing specific crimes. The statutes distinguish some crimes being committed at night.

The following list contains a brief statutory definition of the crimes taken from the TPC when deadly force may be used **to prevent their imminent commission**:

- **Arson**—starting a fire or causing an explosion with the intent to destroy or damage vegetation, fence, structure, open-space land, building, habitat or vehicle. Exceptions and defenses are enumerated in Section 28.02.
- **Burglary**—entering a habitation or building not open to the public or remaining concealed in a habitation or building with the intent to commit or attempt to commit a felony or theft. Section 30.02 elaborates on the exceptions and qualification of burglary. A *habitation* is a structure or vehicle adapted for overnight accommodations (Section 30.01). A *building* is any enclosed structure intended for use or occupation as a habitation or for trade, manufacture, ornament or use. A *felony* is any offense so designated by law or punishable by death or confinement in the penitentiary (Section 1.07[23]).
- **Robbery**—knowingly, intentionally or recklessly causing bodily injury or knowingly or intentionally threatening or placing another in fear of imminent bodily injury while committing a theft (Section 29.02).
- **Aggravated robbery**—causing serious bodily injury or using

or exhibiting a deadly weapon while committing a robbery. Special rules apply to robbery of a disabled person or someone 65 years or older (Section 29.03).

- **Theft**—appropriating unlawfully the property of another with the intent to deprive the owner of the property. The appropriation is unlawful when the owner has not consented or when the property is known to have been stolen. Section 31.03 contains several pages describing and defining theft. *Consent* is defined in Section 1.07(11) as assent in fact, whether express or apparent.
- **Criminal mischief**—knowingly or intentionally damaging or destroying, tampering with or marking, inscribing slogans, drawing or painting on tangible property of another (Section 28.03).

The list of crimes when deadly force may be used **to prevent the culprit from fleeing with the property** immediately after the commission is quite similar to the one just given. The only difference is that arson and criminal mischief are dropped.

The third and final qualification for the use of deadly force is the property owner's reasonable belief that the land or personalty can not be protected by any other means. Or, the property owner reasonably believes that if deadly force is not used, the property owner or someone else will be exposed to a substantial risk of death or serious injury.

Finally, Section 9.44, entitled "Use of Device to Protect Property," provides: "The justification afforded by Sections 9.41 (and 9.42) of this code applies to the use of a device to protect land or tangible, movable property if:

- "1. the device is not designed to cause, or known by the actor to create a substantial risk of causing, death, or serious bodily injury; and
- "2. use of the device is reasonable under all the circumstances as the actor reasonably

believes them to be when he installs the device."

Apparently, devices may be used to protect land or personalty if immediately necessary to prevent a trespass or unlawful interference

and no serious bodily harm will be caused.

Using self-help measures to protect or recover property is not recommended. It exposes the property owner not only to possible

physical harm but also to criminal prosecution if too much force is used. However, property owners should be aware of their right to protect their property under the proper circumstances.

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