

## A License to Kill? Working to Understand Texas Penal Code Section 9.42 and Deadly Force in Defense of Property\*

### INTRODUCTION

“If I see guns on TV where people are getting killed, I change the channel.”<sup>1</sup> These were the words of Ezekiel Gilbert, shortly after a Texas jury acquitted him of the murder of twenty-three-year-old Craigslist escort Lenora Ivie Frago.<sup>2</sup> The murder charge stemmed from an incident on Christmas Eve 2009 where Gilbert, believing Frago’s \$150 fee included sex, shot Frago after she denied him sex and attempted to leave his property.<sup>3</sup> While the story is more complicated than it first appears<sup>4</sup> and the precise reasoning behind the acquittal remains unclear,<sup>5</sup> the case spawned outrage and a variety of headlines decrying the existence and breadth of Texas Penal Code

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1. Michelle Mondo, *Jury Acquits Escort Shooter*, SAN ANTONIO EXPRESS-NEWS (June 8, 2013), [http://www.mysanantonio.com/news/local\\_news/article/Jury-acquits-escort-shooter-4581027.php](http://www.mysanantonio.com/news/local_news/article/Jury-acquits-escort-shooter-4581027.php).

2. *Id.*

3. *See id.* (describing the events of Christmas Eve 2009).

4. Gilbert testified that he found Frago’s ad, thinking the fee included sex. *Id.* Instead, Gilbert claimed, Frago merely walked around his apartment for twenty minutes and left. *Id.* Gilbert’s defense later argued that Gilbert was not trying to kill Frago and was instead shooting at her car, aiming at and hitting a tire. Bridgette Dunlap, *No, Texas Law Does Not Say You Can Shoot an Escort Who Refuses To Have Sex*, RH REALITY CHECK (June 8, 2013), <http://rhrealitycheck.org/article/2013/06/08/no-texas-law-does-not-say-you-can-shoot-an-escort-who-refuses-to-have-sex/>. A fragment of that bullet, described as “literally the size of your fingernail,” ricocheted and hit Frago. *Id.* After the incident, Frago’s breathing tube was dislodged, resulting in severe brain damage and, eventually, the decision to take her off life support. *See* Paul Venema, *Kelvin Frago Testifies in Gilbert Murder Trial*, KSAT (May 23, 2013), <http://www.ksat.com/content/pns/ksat/news/2013/05/23/kelvin-frago-testifies-in-gilbert-murder-trial0.html>.

5. The article from the *San Antonio Express-News* suggests Gilbert’s lawyers argued that the killing lacked requisite intent while also maintaining that the killing was justified to retrieve stolen property. *See* Mondo, *supra* note 1 (“During closing arguments Tuesday, Gilbert’s defense team conceded the shooting did occur but said the intent wasn’t to kill. Gilbert’s actions were justified, they argued, because he was trying to retrieve stolen property . . .”). As for which theory the jury relied on to acquit Gilbert, there seems to be some debate. *See, e.g.,* Dunlap, *supra* note 4 (arguing that the jury seized on Gilbert’s lack of an intent to kill rather than deciding the killing was justified).

section 9.42.<sup>6</sup> Section 9.42 allows for the use of deadly force in defense of property to prevent the commission of, among other crimes, “theft during the nighttime” and “criminal mischief during the nighttime.”<sup>7</sup> Regardless of the actual role the statutory language played in the verdict,<sup>8</sup> the result generated significant controversy. Indeed, following Gilbert’s acquittal, media outlets quickly labeled the Texas law “insane,”<sup>9</sup> going so far as to declare it “lunacy.”<sup>10</sup> Still others equated the verdict with a license to kill, with headlines ranging from *Texas Says It’s OK To Shoot an Escort if She Won’t Have Sex with You*<sup>11</sup> and *Texas Man Acquitted of Killing Escort for Withholding Sex*<sup>12</sup> to *Texas Law: Kill an Escort with No Penalty*.<sup>13</sup>

These articles and their attendant headlines speak to the dual nature of section 9.42 as both limited in its application and broad in its allowances. Indeed, on one level, these articles miss the point, as they fail to see section 9.42 as the functionally and linguistically limited justification defense that it really is. On the other hand, for all their misconceptions, these articles do highlight a troubling reality: limited though it may be, section 9.42—once reached as a defense—is broader in its allowances than those of any other state.<sup>14</sup> In short, while section 9.42 is limited in the sense that numerous hurdles exist to prevent its usage, it is also broad in that once those initial hurdles

6. See, e.g., Kurt Eichenwald, *Why Ezekiel Gilbert’s Acquittal Proves the Lunacy of Texas’s Gun Laws*, VANITY FAIR (June 7, 2013), <http://www.vanityfair.com/online/eichenwald/2013/05/why-ezekiel-gilbert-s-acquittal-proves-the-lunacy-of-texas-s-gun-laws> (characterizing the verdict as “lunacy”); Maggie Lange, *Texas Says It’s OK To Shoot an Escort if She Won’t Have Sex with You*, GAWKER (June 6, 2013, 11:21 AM), <http://gawker.com/texas-says-its-ok-to-shoot-an-escort-if-she-wont-have-511636423> (discussing the case).

7. TEX. PENAL CODE ANN. § 9.42 (West 2011). This is to say nothing of the statute’s applicability to a situation involving illegal activity, like prostitution.

8. See Dunlap, *supra* note 4 (arguing that the lack of an intent to kill, and not section 9.42, may be the best explanation of the verdict).

9. Meagan-Hatcher Mays, *How an Insane Texas Law Made It Legal for a Man to Kill a Prostitute*, JEZEBEL (June 6, 2013, 5:30 PM), <http://jezebel.com/how-an-insane-texas-law-made-it-legal-for-a-man-to-kill-511717880>.

10. Eichenwald, *supra* note 6.

11. Lange, *supra* note 6.

12. Joe Coscarelli, *Texas Man Acquitted of Killing Escort for Withholding Sex*, N.Y. MAG. (June 6, 2013), <http://nymag.com/daily/intelligencer/2013/06/ezekiel-gilbert-texas-acquitted-of-killing-escort.html>.

13. Tommy Andres, *Texas Law: Kill an Escort with No Penalty*, CNN (June 12, 2013), <http://cnradio.cnn.com/2013/06/12/texas-law-kill-an-escort-with-no-penalty/>.

14. See *infra* Part III.

are cleared, its linguistic vagueness—the theft and criminal mischief during the nighttime language—effectively creates a greater potential for deadly force justification.

This Recent Development strives to better understand the dual nature of section 9.42 and ultimately suggests that the motivation behind the law appears to stem from Texas’s tendency to equate property with livelihood. Finally, this piece argues that the time has come to bring section 9.42 more in line with other states’ analogous statutes through the incorporation of a singular reasonableness standard—one that will simultaneously make section 9.42 less of an outlier and allow for the preservation of the uniquely Texan beliefs that undergird section 9.42. In the end, it is not Texas that needs to change, only section 9.42.

Analysis proceeds in five parts. Part I provides the text and a brief history of the law in an attempt to place the justification defense in its proper legal context. Part II aims to understand section 9.42 as a limited exception to the general rule that one cannot use force against another, highlighting, in particular, the functional and linguistic limitations of the statute that function as initial hurdles to the usage of the defense. Part III looks beyond these hurdles and instead strives to understand section 9.42 as a broad exception through a comparison with other states with similar provisions. Part IV acknowledges the contradictory nature of section 9.42 and attempts to reconcile those contradictions, while Part V offers a suggestion—a singular reasonableness standard—for how the law should be changed.

#### I. THE TEXT AND CONTEXT OF SECTION 9.42

Title 2 of the Texas Penal Code is titled, “General Principles of Criminal Responsibility,”<sup>15</sup> and Chapter 9 of that title lists certain justification defenses to prosecution.<sup>16</sup> The defenses themselves are broken down into subchapters, with each focusing on the employment of the justification defense in situations involving protection of

15. TEX. PENAL CODE ANN. tit. 2, ch. 9 (West 2011).

16. See *id.* § 9.02 (“It is a defense to prosecution that the conduct in question is justified under this chapter.”). A justification defense is one in which the actor claims her actions were “fully warranted.” Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1897 (1984).

persons,<sup>17</sup> protection of property,<sup>18</sup> law enforcement,<sup>19</sup> and special relationships.<sup>20</sup> As an example, take section 9.61, which allows for the use of non-deadly force against a child under eighteen when, *inter alia*, the actor is the child's parent.<sup>21</sup> Or take section 9.34, which allows for the use of force—but again, non-deadly force—when such force is used to “prevent the other from committing suicide or inflicting serious bodily injury to himself.”<sup>22</sup> It is within this larger justification framework that section 9.42 falls.

While the examples of sections 9.61 and 9.34 involve usage of *non-deadly* force in the name of raising one's child or protecting a third person, section 9.42 involves the use of *deadly* force to protect one's property. The statute is quite complex and reads:

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; 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

17. PENAL §§ 9.31–.34 (listing self-defense, defense of third persons, and protection of life or health as the instances in which the justification exclusion applies).

18. *Id.* §§ 9.41–.44 (listing protection of one's own property, protection of a third person's property, and use of a device to protect property as the instances in which the justification exclusion applies).

19. *Id.* §§ 9.51–.53 (listing arrest and search, prevention of escape from custody, and maintaining security in a correctional facility as the instances in which the justification exclusion applies).

20. *Id.* §§ 9.61–.63 (listing parent-child, educator-student, and guardian-incompetent relationships as those where the justification exclusion applies).

21. *Id.* § 9.61(a)(1).

22. *Id.* § 9.34(a).

another to a substantial risk of death or serious bodily injury.<sup>23</sup>

The operative language in section 9.42 for the purposes of this analysis comes from subsection (2)(A), which allows an actor to use deadly force to prevent “criminal mischief during the nighttime” and “theft during the nighttime.”<sup>24</sup> The larger context of section 9.42 suggests that, as a justification defense, section 9.42 is an exception to the general rule that one cannot use force against another.<sup>25</sup> Taken one step further, even when force can be used against another, the force used must typically be both reasonable and non-deadly.<sup>26</sup> Thus, section 9.42, in its allowance of deadly force, functions as an exception to the exception. Put another way, section 9.42 allows an actor not only to use force—an otherwise impermissible action<sup>27</sup>—but also to use deadly force, another typically impermissible action.<sup>28</sup> Viewed this way, the question remains whether section 9.42, in its justification of deadly force used to prevent criminal mischief and theft during the nighttime, can be understood to be a limited or broad exception. As will be shown, the answer to that question is both.

## II. UNDERSTANDING SECTION 9.42 AS A LIMITED EXCEPTION

While the uniquely Texan “criminal mischief” and “theft during the nighttime” language is perhaps the hallmark for viewing section 9.42 as a broad statute, the exception—when viewed functionally and linguistically—proves to be more difficult to use than the headlines indicate. From a functional standpoint, homicide statistics could be interpreted to suggest the defense is rarely used, and linguistically, both the structure of the statute itself and the language it uses—i.e., the steps a jury must go through to use the exception—demonstrate

23. *Id.* § 9.42.

24. *Id.* § 9.42(2)(A).

25. Indeed, the fact that section 9.42 is categorized as a defense indicates that, under normal circumstances, i.e., unjustified circumstances, one could not use deadly or non-deadly force against another person.

26. *See, e.g.*, PENAL § 9.34 (permitting the use of force “but not deadly force” to protect life or health); *id.* § 9.31 (permitting the use of force, with no mention of deadly force, in self-defense circumstances).

27. *See, e.g., id.* § 22.01 (criminalizing assault).

28. This “exception to the exception” seems especially evident in light of section 9.42(1), which requires the actor be justified in her use of force under section 9.41 (use of non-deadly force) before she can be justified under section 9.42. *Id.* § 9.42(1).

the difficulty of its application.<sup>29</sup> Indeed, the statute is riddled with qualifiers, including reasonable belief,<sup>30</sup> “immediately necessary,”<sup>31</sup> “imminent commission,”<sup>32</sup> and “substantial risk of death or serious bodily injury,”<sup>33</sup> all of which function as potential hurdles in its utilization. These functional and linguistic limits demonstrate that, contrary to popular depiction, section 9.42 is something far less than a license to kill.

For all the concern about section 9.42, statistics could be interpreted to suggest this exception and other justification statutes like it are rarely invoked. According to the Texas Department of Public Safety, 2012 saw a total number of 1,144 murders in the state of Texas.<sup>34</sup> Of those 1,144, roughly 9%—or 103—were deemed justifiable under the law.<sup>35</sup> Of those 103, 53—only 4% of the total—involved “felons killed by private citizens.”<sup>36</sup> It is unclear just how many of those invoked section 9.42, as the statistics include homicides committed in self-defense or in defense of others.<sup>37</sup> From one perspective, then, section 9.42 is, in application at least, a limited exception. Then again, one could fairly interpret these figures as indicative of the opposite—section 9.42 and others like it are employed too often. To be sure, analyzing section 9.42 statistically ignores the reality of its application and minimizes to some extent the loss of human life. Thus, in trying to characterize section 9.42 as a limited exception, the need arises for more concrete evidence.

29. The requirements of the statute can and do act as hurdles to successful use of the defense. *See, e.g.*, *Phoenix v. State*, 640 S.W.2d 306, 307 (Tex. Crim. App. 1982) (“Although appellant had a fear of potential damage to the pool hall there is no evidence of an imminent crime or damage to the property.”); *Leach v. State*, 983 S.W.2d 45, 48 (Tex. App. 1998) (denying use of the defense because there was not “any threatened damage to ‘tangible, movable property’ ” (quoting TEX. PENAL CODE ANN. § 9.42 (West 1994))); *Warren v. State*, 764 S.W.2d 906, 910 (Tex. App. 1989) (“No evidence suggests that any of the listed crimes had been or would be imminently committed.”).

30. *See, e.g.*, PENAL § 9.42(2).

31. *Id.*

32. *Id.* § 9.42(2)(A).

33. *Id.* § 9.42(3)(B).

34. TEX. DEP’T OF PUB. SAFETY, CRIME IN TEXAS 2012, at 11 (2012), *available at* <http://www.txdps.state.tx.us/crimereports/12/citCh3.pdf>.

35. *Id.* at 12.

36. *Id.* Presumably, a private citizen is someone other than an officer of the law.

37. *Id.* (“Justifiable homicide is the killing of a felon by a peace officer in the line of duty or the killing (during the commission of a felony) of a felon by a private citizen.”).

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A better means of understanding section 9.42 as a limited exception comes from the structure and language of the statute itself. To be sure, using section 9.42 as a defense is no simple task, as its application requires the actor satisfy three conditions: first, the actor must be justified under section 9.41;<sup>38</sup> second, the actor must have a reasonable belief that force is necessary in light of a listed crime;<sup>39</sup> and third, the actor must have a reasonable belief that deadly force is the only remaining option.<sup>40</sup> Structurally speaking, section 9.42 involves a more complex application of the justification exception than other states,<sup>41</sup> and each requirement suggests that Texas's exception is more limited in its scope than it might first appear.

The first hurdle in the application of section 9.42 is the requirement that one's use of deadly force in defense of property be justified under the previous section, section 9.41.<sup>42</sup> Section 9.41 allows the use of non-deadly force when the actor reasonably believes the force is "immediately necessary to prevent or terminate . . . unlawful interference with the property" or to get the property back.<sup>43</sup> If the actor seeks to recover the property, she must also use the force "immediately or in fresh pursuit after the dispossession" and have a reasonable belief that either "the other had no claim of right" or that the other used force, threat, or fraud against the actor.<sup>44</sup> This language necessarily limits the circumstances in which section 9.42 can be used. In one sense, section 9.41 is not all that different from section 9.42, but its function is comparable to that of a gatekeeper: if an actor is unable to justify the use of *any* force, she will most definitely not be justified in using deadly force.<sup>45</sup> As low as this barrier might be, it remains a barrier nonetheless.

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38. PENAL § 9.42(1).

39. *Id.* § 9.42(2).

40. *Id.* § 9.42(3).

41. *See, e.g.*, IOWA CODE § 704.4 (2014) ("A person is justified in the use of reasonable force to prevent or terminate criminal interference with the person's possession or other right in property.").

42. PENAL § 9.42(1).

43. *Id.* § 9.41(a)–(b).

44. *Id.* § 9.41(b)(1)–(2).

45. *See, e.g.*, *Stockman v. State*, No. 09-99-539 CR, 2001 WL 227360, at \*1 n.1 (Tex. App. Mar. 7, 2001) ("Moreover, section 9.42—which authorizes 'deadly force' to protect land or property in some circumstances, such as to prevent imminent commission of criminal mischief—initially requires a showing of justification for using force under section 9.41 before one is entitled to any defense under section 9.42.").

Following this gateway limitation are two more hurdles: a reasonable belief that the use of deadly force is necessary in light of a listed crime<sup>46</sup> and a reasonable belief that deadly force is the only option available to the actor.<sup>47</sup> These two hurdles employ a range of linguistic limitations designed to further limit the statute's applicability, including the requirement that the actor have a "reasonable belief" that the use of force is "immediately necessary."<sup>48</sup>

The first linguistic limitation requires that the actor have a reasonable belief underpinning her decision-making process. The reasonableness requirement appears twice in this capacity within section 9.42—once to ensure the perception of immediate necessity was reasonable<sup>49</sup> and once to ensure the belief that no other options were available was reasonable.<sup>50</sup> A familiar term, a reasonable belief is defined elsewhere in the Texas Penal Code to mean "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor,"<sup>51</sup> and the jury, in making a reasonableness determination under the statute, is required to define reasonableness from the defendant's standpoint.<sup>52</sup> The reasonable belief requirements within section 9.42 inherently limit its applicability to those actors whose beliefs were reasonable in light of all the circumstances.

Another example of a linguistic limitation within the statute is the immediacy requirement.<sup>53</sup> The immediacy requirement, like the reasonableness requirement, can be found in other areas of the statute, particularly as it relates to the listed crimes.<sup>54</sup> As far as understanding what is meant by the immediacy requirement, the 1879 penal code proves more insightful than the current penal code.

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46. PENAL § 9.42(2).

47. *Id.* § 9.42(3).

48. *Id.* § 9.42(2).

49. *Id.* § 9.42(2) (limiting the application to "when and to the degree he reasonably believes the deadly force is immediately necessary").

50. *Id.* § 9.42(3)(A)–(B) (requiring a reasonable belief that the property cannot be recovered any other way or that not using deadly force would result in the substantial risk of death or serious bodily injury).

51. *Id.* § 1.07(a)(42).

52. *Ex Parte Drinkert*, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991) (en banc) ("The law of self-defense and defense of property requires the jury to view the reasonableness of the defendant's actions solely from the defendant's standpoint.").

53. *See, e.g.*, PENAL § 9.42(2) (requiring a reasonable belief that deadly force is "immediately necessary").

54. *Id.* § 9.42(2)(A)–(B).



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Article 570 of the 1879 Texas Penal Code limited the justification of homicide in defense of property to situations in which the homicide occurred prior to, during, and shortly after—the latter defined to mean “within reach of gunshot from such place or building”—the listed crime.<sup>55</sup> Although not as explicit, the cases involving the current code reflect this time limitation as well.<sup>56</sup> Indeed, immediacy under the statute effectively limits when one can use deadly force—removing from protection deadly force used in retaliation rather than defense.<sup>57</sup> Thus, the statute limits the use of deadly force to those instances in which it is employed while the crime is occurring or shortly thereafter.

The final example of a linguistic limitation within the statute is that of necessity.<sup>58</sup> Present in both sections 9.42(2)<sup>59</sup> and 9.42(3),<sup>60</sup> the necessity requirement ensures that deadly force is used in defense of property only when it is the only remaining option.<sup>61</sup> If another means of resolving the situation is reasonably available, the exception fails.<sup>62</sup> In one sense, this requirement follows the 1879 penal code, which required that the actor make “every other effort . . . to repel the aggression before he will be justified in killing.”<sup>63</sup> Through the necessity requirement, section 9.42’s applicability is narrowed even further.

A structural and linguistic reading of Texas Penal Code section 9.42 suggests that using the justification defense it offers is not as easy

55. 1879 Tex. Crim. Stat. 570.

56. See, e.g., *Jackson v. State*, 753 S.W.2d 706, 710 (Tex. Crim. App. 1988) (“This conduct, however, was already a completed fact *prior* to appellant’s use of deadly force. Additionally, nothing in the record supports a conclusion that more criminal mischief was contemplated or in imminent danger of being committed.” (emphasis added)).

57. See, e.g., *Laws v. State*, 10 S.W. 220, 221 (Tex. Ct. App. 1888) (“If the killing was upon malice, and not to prevent a theft, or the consequences of a theft, it would not be justified under the statute, although a theft by night was actually being committed by deceased at the time he was killed.”).

58. See, e.g., TEX. PENAL CODE ANN. § 9.42(2) (West 2011) (requiring a reasonable belief that the deadly force was necessary).

59. *Id.*

60. *Id.* § 9.42(3)(A) (requiring that the use of deadly force be a last resort).

61. *Id.*

62. See, e.g., *Turner v. State*, 87 S.W.2d 736, 738 (Tex. Crim. App. 1935) (per curiam) (“The intention of the statute, as we construe the same, means that the defendant would not be justified in taking the life of deceased without first exhausting all other available means at his command at the time in his effort to retain possession of his property and to eject the trespasser.”).

63. 1879 Tex. Crim. Stat. 575(4).

as some headlines make it appear. Indeed, the current statute sets up numerous initial hurdles to its application. More specifically, with section 9.41 acting as an initial gateway and the requirements of reasonableness, immediacy, and necessity serving to greatly narrow its applicability, section 9.42 is revealed to be a difficult defense to use and, ultimately, a much more limited exception than it might initially seem.

### III. UNDERSTANDING SECTION 9.42 AS A BROAD EXCEPTION

The various mechanisms in place to limit section 9.42's applicability support the contention that the statute is a limited exception, but for those who would argue the Texas statute goes too far, the focus lies beyond these initial hurdles.<sup>64</sup> Put another way, section 9.42 can be seen as a broad exception when the focus is less on its operation and more on the circumstances when it can be applied once the limitations are satisfied. The operative language for this sort of understanding of section 9.42 remains "theft during the nighttime" and "criminal mischief during the nighttime."<sup>65</sup> Unlike the other crimes listed within the statute, these descriptions are incredibly vague and are capable of encompassing a wide range of activities.<sup>66</sup> Nowhere is this breadth more evident than in a comparison of Texas's statute with those of other states—a comparison that leads to the conclusion that Texas stands alone in its allowances.

To make this contrast clear, the analysis of other states' statutes regarding the use of deadly force to defend property begins with states that do not allow deadly force in defense of property at all. The comparison then moves to states that could allow deadly force in such a situation, but make the entire question one of reasonableness or

64. See, e.g., Lange, *supra* note 6 (characterizing the law as allowing a person in Texas to shoot an escort).

65. TEX. PENAL CODE ANN. § 9.42(2)(A) (West 2011).

66. Indeed, "criminal mischief" includes intentionally or knowingly and without the effective consent of the owner:

- (1) [] damag[ing] or destroy[ing] the tangible property of the owner;
- (2) [] tamper[ing] with the tangible property of the owner and caus[ing] pecuniary loss or substantial inconvenience to the owner or a third person; or
- (3) [] mak[ing] markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.

*Id.* § 28.03.

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necessity. Finally, the comparison shifts to states that, like Texas, allow deadly force in specific, listed instances.

*A. States That Do Not Allow the Use of Deadly Force in Defense of Property*

A number of states specifically prohibit the use of deadly force to defend property. Perhaps the most explicit is Wisconsin, which provides:

A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with the person's property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.<sup>67</sup>

This statute stands in stark contrast to section 9.42 in its rejection as reasonable the use of deadly force to defend property.

Other states are less explicit. Colorado, for example, contains the criminal mischief language found in section 9.42,<sup>68</sup> but places a "reasonable and appropriate physical force" limitation on actors.<sup>69</sup> Deadly force is allowed, but "only in defense of himself or another."<sup>70</sup> As another example, Alabama, in its defense of property statute, only justifies the actions of those who use force "other than deadly physical force."<sup>71</sup> In states like Wisconsin, Colorado, and Alabama, it seems the focus remains on prioritizing the value of human life over property.

*B. States That Allow Deadly Force, but Focus on Reasonableness or Necessity*

Still other states have chosen not to explicitly prohibit the use of deadly force in defense of property, with the result being that the

67. WIS. STAT. § 939.49 (2011–12).

68. TEX. PENAL CODE ANN. § 9.42(2)(A) (West 2011).

69. COLO. REV. STAT. § 18-1-706 (2013).

70. *Id.*

71. ALA. CODE § 13A-3-26 (LexisNexis 2005).

focus of these tests turn entirely on reasonableness or necessity. Take, for example, Kansas:

A person who is lawfully in possession of property other than a dwelling, place of work or occupied vehicle is justified in the use of force against another for the purpose of preventing or terminating an unlawful interference with such property. Only such use of force as a reasonable person would deem necessary to prevent or terminate the interference may intentionally be used.<sup>72</sup>

Limited though the use of deadly force might be in Kansas—by both reasonableness and necessity—the use of deadly force in defense of property is not expressly prohibited, a trait found in other states with similar statutes.

Two of these other states that do not expressly prohibit the use of deadly force in defense of property include Iowa and Washington. In Iowa, the only limitation placed on the use of *any* force used in defense of property is that it be reasonable.<sup>73</sup> In Washington, the only limit is that the force used—deadly or non-deadly—be “not more than is necessary.”<sup>74</sup> Both states, like Kansas, do not expressly prohibit deadly force. The question in these states then becomes whether force—deadly or otherwise—is reasonable or not more than necessary, a determination that is flexible without being overbroad. Unhampered by specific instances, fact finders in states like Kansas, Iowa, and Washington are free to determine the reasonableness of deadly force on an individual, case-by-case basis.

*C. States That List Specific Instances Where Deadly Force in Defense of Property Is Justified*

The final grouping includes states that, like Texas, list out specific instances in which the use of deadly force in defense of property is justified. Comparing Texas to other states makes clear just how far afield, and thus how broad of an exception, section 9.42 really is. A prototypical statute of this variety can be found in Illinois:

72. KAN. STAT. ANN. § 21-5225 (Supp. 2011).

73. IOWA CODE § 704.4 (2014) (“A person is justified in the use of reasonable force to prevent or terminate criminal interference with the person’s possession or other right in property.”).

74. WASH. REV. CODE § 9A.16.020 (2013).

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A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's . . . criminal interference with . . . personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.<sup>75</sup>

The term “forcible felony” is less vague than it may first appear, as the Illinois Criminal Statutes define a forcible felony to include robbery, burglary, and arson<sup>76</sup>—offenses that also appear in section 9.42 of the Texas Penal Code.<sup>77</sup> Notably, however, Illinois lacks any reference to the much broader “criminal mischief” language found in the Texas Penal Code.<sup>78</sup>

Other states list similar instances or offenses as justifying the use of deadly force in defense of property. For example, Kentucky lists robbery, burglary, and arson in its statute.<sup>79</sup> Nevada, meanwhile, takes a broader approach, allowing the use of deadly force in defense of property when used against one who “intends or endeavors, by violence or surprise, to commit a felony.”<sup>80</sup> While these states—Nevada in particular—retain some breadth in their lists, even felonies and forcible felonies are more easily defined and less expansive than the theft and criminal mischief language present in section 9.42.<sup>81</sup>

So while states like Illinois (deadly force allowed “to prevent the commission of a forcible felony”),<sup>82</sup> Kentucky (allowing deadly force to prevent home dispossession, arson, and “burglary, robbery, or other felony involving the use of force”),<sup>83</sup> and Nevada (deadly force allowed “against one who manifestly intends or endeavors, by

75. 720 ILL. COMP. STAT. ANN. 5 / 7-3 (West 2002 & Supp. 2012).

76. *Id.* 5 / 2-8.

77. TEX. PENAL CODE ANN. § 9.42(2)(A) (West 2011).

78. *Id.*; 720 ILL. COMP. STAT. ANN. 5 / 7-3 (West 2002 & Supp. 2012).

79. KY. REV. STAT. ANN. § 503.080(2)(a)–(c) (LexisNexis 2008).

80. NEV. REV. STAT. ANN. § 200.120(1) (LexisNexis 2012).

81. Illinois's statutes, for example, provide examples of “forcible felonies.” 720 ILL. COMP. STAT. ANN. 5 / 7-3 (West 2002 & Supp. 2012).

82. *Id.*

83. KY. REV. STAT. ANN. § 503.080(2)(a)–(c) (LexisNexis 2008).

violence or surprise, to commit a felony”)<sup>84</sup> follow Texas in listing specific instances in which use of deadly force in defense of property is justified, those specific instances are limited to preventing felonies. Thus, section 9.42’s criminal mischief language—language that could encompass behavior far below that of a felony<sup>85</sup>—stands truly alone in its breadth.

When section 9.42 is compared to similar statutes in other states, it is clear that Texas’s statute is considerably broader in its allowance of deadly force in defense of property than even those that can be called similar. In this way, section 9.42 can be understood to be a broad exception. In light of Part II, section 9.42, depending on one’s point of view, can be seen as both broad in its coverage and narrow in its application. This conflicting, dual nature demands explanation.

#### IV. EXPLAINING SECTION 9.42

When asked if he could explain the motivation behind section 9.42, one professor stated simply, “This is Texas.”<sup>86</sup> While such an answer may, at least at first, play into certain cultural and legal stereotypes of the Lone Star State, an analysis of the prior versions of the Texas Penal Code suggests the basis of section 9.42’s breadth as an exception to the general prohibition on the use of deadly force—in particular, the “theft in the nighttime” and “criminal mischief in the nighttime” language—reflects a societal conception of self that includes one’s livelihood.

It would be nothing new to argue that a state’s or society’s laws reflects its ideals. Indeed, “criminal law is perhaps the most important formal institution through which a community defines itself.”<sup>87</sup> By extension, the “substantive conduct that a community chooses to punish”<sup>88</sup>—or, in this case, deem justified—serves to “reflect important values that help the community define itself and its moral vision.”<sup>89</sup> That a law is in some form or another an extension of the

84. NEV. REV. STAT. ANN. § 200.120(1) (LexisNexis 2012).

85. See *supra* note 66.

86. Email from Geary Reamey, Professor, St. Mary’s Univ. Sch. of Law, to author (Feb. 18, 2014, 1:55 PM EST) (on file with the North Carolina Law Review).

87. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 784 (2006).

88. *Id.*

89. *Id.*; see also Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1437 (2005) (“In fact, peoples’ beliefs about what the law is in their state did not track so much the

citizens' collective conscience seems especially true for section 9.42, as noted in one study that sought to test whether citizens were aware of their states' laws.<sup>90</sup> While most people are unaware of the laws of their own state, "Texans do, in fact, know or guess that their state law does not punish a person for [using deadly force in defense of property]."<sup>91</sup> This hyper-awareness may suggest that section 9.42 reflects the values of Texans, but pinning down those values is more difficult.

By defining one of its more controversial terms, "criminal mischief in the nighttime," one can get a sense of what section 9.42 was intended to protect against and, by extension, gain some understanding of the motivation behind the statute. Under the current Texas Penal Code, "criminal mischief" occurs when an individual, without the consent of the owner:

- (1) [] intentionally or knowingly damages or destroys the tangible property of the owner;
- (2) [] intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or
- (3) [] intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner.<sup>92</sup>

This definition, though, proves unhelpful in understanding why, for example, a Texan might feel it necessary to use deadly force to prevent his tractor from being covered in graffiti.<sup>93</sup> An analysis of a much older version of the Penal Code provides a better answer.

As will be discussed, section 9.42 has changed little substantively over the course of its 135-year history, meaning historical versions of the statute provide insight into the modern statute, and indeed, the roots of section 9.42 can be traced to the Texas Penal Code of 1879.<sup>94</sup> This code made no references to non-deadly or deadly force, but the

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majority rule as they tracked peoples' own moral intuitions about what they thought the rule ought to be.").

90. See John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 182 (2001).

91. *Id.* at 175.

92. TEX. PENAL CODE ANN. § 28.03 (West 2011).

93. Graffiti would almost certainly fall under "criminal mischief." See *id.* § 28.03(3).

94. See *infra* notes 95–102 and accompanying text.

closest provision to a general discussion of force provided that violence against a person “does not amount to an assault or battery”<sup>95</sup> when used in defense against “unlawful violence offered to his . . . property.”<sup>96</sup> If force was used in such a situation, it was limited to the “degree of force . . . which is necessary to effect such purpose.”<sup>97</sup>

For deadly force, the closest provisions allowed homicide to be “permitted by law when inflicted for the purpose of preventing the offense of murder, rape, robbery, maiming, disfiguring, castration, arson, burglary, and theft at night,”<sup>98</sup> or interestingly, “when inflicted upon a person or persons who are found armed with deadly weapons and in disguise in the night time on premises not his or their own.”<sup>99</sup> In addition to these listed crimes, the 1879 Penal Code required that:

1. It must reasonably appear by the acts or by words, coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named.
2. The killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense.
3. It must take place before the offense committed by the party killed is actually completed . . . .<sup>100</sup>

Furthermore, the actor must have made “every other effort . . . to repel the aggression.”<sup>101</sup> Lastly, in the event the homicide occurs in a case of theft at night, “the homicide is justifiable at any time while the offender is . . . at the place where the theft is committed, or is within reach of gunshot from such place or building.”<sup>102</sup>

The 1895, 1911, and 1925 revisions to the Texas Penal Code saw only numerical, rather than substantive, changes to the justification.<sup>103</sup>

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95. 1879 Tex. Crim. Stat. 490.

96. *Id.* 490(6).

97. *Id.* 491.

98. *Id.* 570.

99. *Id.*

100. *Id.* 570(1)–(3).

101. *Id.* 575(4).

102. *Id.* 570(8).

103. *See id.* 570; 1895 Tex. Crim. Stat. 675; 1911 Tex. Crim. Stat. 1105; 1925 Tex. Crim. Stat. 1222.



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It was not until 1973 that section 9.42 took its current form,<sup>104</sup> one that was substantively preserved after another round of revisions in 1993.<sup>105</sup>

Making a comparison between the modern and previous penal codes results in a few observations, the first being the similarity of the conditions required for the exception to apply. In short, the codes differ very little in this respect, as both require a reasonable belief that the deadly force is necessary,<sup>106</sup> that the deadly force be used during or shortly after the commission of the crime,<sup>107</sup> that the use of force other than deadly force would expose the actor to substantial risk of harm,<sup>108</sup> and that the property cannot be protected by any other means.<sup>109</sup> Viewed this way, the two codes are incredibly similar and differ in language only.

Yet it would be a mistake to say the entirety of section 9.42 is no different than its predecessors. Certainly there are linguistic differences, but perhaps the most evident difference comes from the list of offenses in each statute that justify the use of deadly force. The 1879 version of the penal code includes offenses section 9.42 does not, including maiming, castration, and rape, but these differences are simply the product of a modern reorganization—in short, the 1879

104. See Act of May 23, 1973, ch. 399, § 9.42, 1973 Tex. Gen. Laws 883, 902–03 (codified at TEX. PENAL CODE ANN. § 9.42 (West 1974)).

105. See Act of May 31, 1993, ch. 900, § 9.42, 1993 Tex. Gen. Laws 3586, 3599 (codified at TEX. PENAL CODE ANN. (West 1994)) (removing the words “of this code” from § 9.42(1)).

106. Compare TEX. PENAL CODE ANN. § 9.42(2) (West 2011) (stating that the use of deadly force to protect property or land is justified when a person “reasonably believes the deadly force is immediately necessary”), with 1879 Tex. Crim. Stat. 570(1) (permitting the use of deadly force in defense of property when it “reasonably appear[s]” that a person intended to commit a listed offense).

107. Compare TEX. PENAL CODE ANN. § 9.42(2)(A)–(B) (West 2011) (using the phrase “imminent commission”), with 1879 Tex. Crim. Stat. 570(2) (requiring the homicide to be committed while the “person killed was in the act of committing the offense”).

108. Compare TEX. PENAL CODE ANN. § 9.42(3)(B) (West 2011) (stating that use of deadly force in defense of property is justified when it is necessary to prevent “substantial risk of death or serious bodily injury”), with 1879 Tex. Crim. Stat. 572 (permitting the use of deadly force in defense of property when “the life and person of the injured party is in peril”).

109. Compare TEX. PENAL CODE ANN. § 9.42(3)(A) (West 2011) (stating that the use of deadly force in defense of property is justified when “the land or property cannot be protected or recovered by any other means”), with 1879 Tex. Crim. Stat. 575(4) (permitting the use of deadly force in defense of property when “every other effort in [one’s] power” has been made).

version combines offenses against persons and property while the modern version separates the two.<sup>110</sup> Indeed, given that Chapter 11 of the 1879 code deals with justifiable homicide in defense of person and property—in contrast with section 9.42, which deals exclusively with defense of property—it makes sense for section 9.42 to not include offenses against persons. There remains, however, a key difference left unexplained by organizational preference—that is, the inclusion in section 9.42 of “criminal mischief during the nighttime.”<sup>111</sup>

This inclusion of “criminal mischief during the nighttime” is the only major substantive change from 1879 to 1993, and understanding what criminal mischief entails under Texas law is one way of explaining the motivation behind section 9.42. Fortunately, the 1879 Penal Code dedicates an entire chapter to what it labels as “Malicious Mischief.”<sup>112</sup>

The chapter presents a strong connection between property and livelihood and may serve as the chief explanation for why section 9.42 includes the “criminal mischief” language. For example, and in contrast with the modern definition of criminal mischief, “malicious mischief” in 1879 included maiming a domesticated animal,<sup>113</sup> stealing crops,<sup>114</sup> stealing a horse,<sup>115</sup> destroying another’s fences,<sup>116</sup> removing buoys,<sup>117</sup> sinking another’s boat,<sup>118</sup> and removing another’s minerals.<sup>119</sup> These offenses, even more so than the modern concept of mischief, relate directly to one’s livelihood, suggesting that the motivation for such broad language in section 9.42 stems from a desire to protect property that corresponds with making a living. Replacing a stolen horse or losing part of a harvest meant more than just a minor inconvenience—it meant facing potential personal and financial

110. *See generally* TEX. PENAL CODE ANN. tit. 5 (West 2011) (covering “Offenses Against the Person”); 1879 Tex. Crim. Stat. tit. 17, ch. 3 (covering “Malicious Mischief”); .

111. TEX. PENAL CODE ANN. § 9.42(2)(A) (West 2011).

112. 1879 Tex. Crim. Stat. tit. 17, ch. 3.

113. *See id.* 679.

114. *See id.* 682.

115. *See id.* 680(a).

116. *See id.* 684.

117. *See id.* 681.

118. *See id.* 676.

119. *See id.* 687.

hardship.<sup>120</sup> In this context and with these ideals as the foundation of Texan society, section 9.42's inclusion of "theft in the nighttime" and "criminal mischief in the nighttime" as justifications for the use of deadly force is more readily understandable.

#### V. CALLING FOR CHANGE

The outrage over cases like that of Ezekiel Gilbert suggests that even the narrow exception section 9.42 provides is not enough to keep the statute from being applied inappropriately. And even if the basis for section 9.42's breadth is understandable, the continued inclusion of these broad provisions is a mistake, even if the societal conflation of livelihood with self continues. To be sure, the modern Texas Penal Code does include certain offense enhancements—misdemeanor to a felony, for example—for mischief targeted at cattle or sheep enclosures,<sup>121</sup> an indication that this perception of livelihood as identity is still maintained on some level. Yet these enhancements are few in number,<sup>122</sup> suggesting much of this concern has faded over time. And in an age equipped with insurance and farm subsidies, the consequences of property loss are greatly diminished, meaning that preservation of the current statutory language results in an outdated valuation system that equates property with human life.

This is not to say Texas needs to adjust its values—quite the opposite. The examples of other states like Iowa or Kansas suggest a viable alternative to merely listing offenses that can incorporate those values within the law—namely, the inclusion of a singular reasonableness and necessity standard for the use of deadly force in defense of property. Such a framework allows states to be flexible in their application—to reflect their respective societies' ideals—without being overbroad. So long as the force used was reasonable based on a reasonable belief of necessity, the offense underlying the use of the force need not be considered.

To be sure, changing the standard would hardly represent a departure from what current Texas juries are asked to do. Indeed,

120. See, e.g., TEX. AGRIC. EXTENSION SERV., REPORT ON THE TEXAS HORSE INDUSTRY 5 (1998) ("Horses are part of the social fabric of Texas . . . . [T]hey make important contributions to the livelihood and well-being of people.").

121. TEX. PENAL CODE ANN. § 28.03(b)(4)(C)(i) (West 2011).

122. See *id.* § 28.03(b)(4)–(7) (listing only four instances where criminal mischief is elevated to a felony).

Texas juries are already asked to do the same analysis within section 9.42 in subsections (2) and (3),<sup>123</sup> in deciding whether the actor had a reasonable belief that the force used was necessary<sup>124</sup> and reasonably perceived that no other option was available.<sup>125</sup> Thus, asking the jury to decide whether the force used was reasonable and based on a reasonable belief would be merely an extension of what a Texas jury currently is asked to do.

Such a standard would also move Texas away from its own unique and well-settled predilections. Yet this argument ignores what a reasonableness standard calls for: “a belief that would be held by an ordinary and prudent man in the same circumstances as the actor.”<sup>126</sup> This definition allows a jury of Texans to apply its own idea of reasonableness—in effect preserving the Texan relationship between life and property on a case-by-case basis. A jury would be freed from the listed offenses—allowing justification should every other element be satisfied—and provided the opportunity to apply societal values to a particular situation. Thus, using deadly force to save one’s livestock might be considered reasonable, but using it to retrieve \$150 may not be. Such a system may not necessarily bring about a change in results—that all depends on Texans’ own judgment—but it would enable Texas to maintain its value system while being less of an outlier in what its laws justify.

#### CONCLUSION

The death of Lenora Frago and the subsequent acquittal of Ezekiel Gilbert brought Texas Penal Code section 9.42 squarely under a media microscope. The coverage of the statute highlighted the justification’s dual nature as both a narrow exception to the prohibition of the use of unlawful force courtesy of its structure, function, and language, and an overly broad exception as a result of its list of offenses that include theft and criminal mischief in the nighttime. Given Texas’s apparent tendency to equate one’s property with one’s livelihood and very sense of self, however, the existence of this contradiction is readily understandable. Yet as society has moved away from this idea, section 9.42 has not. This means a change to the

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123. *See id.* § 9.42(2)–(3).

124. *Id.* § 9.42(2).

125. *Id.* § 9.42(3).

126. *Id.* § 1.07(a)(42).

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law is long overdue, perhaps in the form of a simplified reasonableness and necessity standard like that of Kansas or Iowa. Regardless of whether change ever occurs, though, section 9.42 is anything but a license to kill.

BARTON T. LEE\*\*

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