

A MAN’S CAR IS HIS CASTLE: THE EXPANSION OF TEXAS’ “CASTLE  
DOCTRINE” ELIMINATING THE DUTY TO RETREAT IN AREAS OUTSIDE  
THE HOME

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## I. INTRODUCTION

On September 1, 2007, the Texas Legislature strengthened the already existing “Castle Doctrine” and eliminated a vast majority of the remaining duty to retreat before using deadly force.<sup>1</sup> The bill was introduced to allow potential victims of violent crime the same protections outside of their home that, prior to the 2007 amendments, were only available while inside their own home.<sup>2</sup> The bill allows the potential victim to concentrate only on protecting himself, without worrying about potential liability for his actions if he should fail to retreat when a “reasonable person” would have retreated. The elimination of the duty to retreat furthers the reasoning of Justice Holmes who opined that, when faced with imminent danger, “[d]etached reflection cannot be demanded in the presence of an uplifted knife.”<sup>3</sup> By strengthening the justifications for certain homicides, Texas is joining other jurisdictions which have recently addressed this issue.<sup>4</sup>

This Comment examines Texas’ new law and its probable impact upon self-defense as a justification for homicide. Part I of this Comment is a brief look at the history and development of the law of self-defense and the duty to retreat. Part II gives an overview of the history of this area of law as it has developed in Texas. Part III of this Comment is a discussion of the pros and cons of the bill, along with the potential impact of this new bill on future cases. Part IV of the Comment discusses how the new law will be applied, as opposed to the prior law, through a series of hypotheticals. Lastly, Part V is a brief conclusion of the topic.

<sup>1</sup>TEX. PEN. CODE ANN. § 9.32 (Vernon Supp. 2007).

<sup>2</sup>SEN. COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 378, 80th Leg., C.S. (2007), available at <http://www.legis.state.tx.us>.

<sup>3</sup>Brown v. United States, 256 U.S. 335, 343 (1921).

<sup>4</sup>See COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, S.B. 378.

## II. HISTORY OF THE LAW

### A. *Self-Defense*

In general, a person is allowed to use force to protect himself, or another, from the use of force by a third person.<sup>5</sup> The doctrine of self-defense arose to prevent punishment for actions which are deemed necessary under the circumstances.<sup>6</sup> Therefore, in order for the actions of the actor<sup>7</sup> to be justified, the amount of force used cannot exceed that which is necessary to prevent the use of force by another person.<sup>8</sup> Self-defense may also justify the use of deadly force when the actor reasonably believes it is necessary to prevent death or serious bodily injury to himself or a third person.<sup>9</sup> The actor's belief is reasonable if an ordinary and prudent person in the same circumstances would hold the same belief.<sup>10</sup> Along with proving that the use of deadly force was reasonably necessary, many jurisdictions also require the actor to prove that he retreated, when reasonable, before resorting to the use of deadly force.<sup>11</sup> When the use of deadly force is necessary and the actor either retreats or cannot safely retreat, his actions do not give rise to criminal or civil liability.<sup>12</sup>

### B. *Duty to Retreat*

A primary issue throughout jurisdictions is whether a person has a duty to retreat before resorting to the use of deadly force. The status of the duty to retreat as a requirement for successfully invoking the self-defense doctrine varies from state to state and has changed over time.<sup>13</sup>

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<sup>5</sup> 6 AM. JUR. 2D *Assault and Battery* § 54 (1999).

<sup>6</sup> *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

<sup>7</sup> The term "actor" is used throughout this Comment when referring to the person who used deadly force and is seeking to justify that use based upon a claim of self-defense.

<sup>8</sup> *See Peterson*, 483 F.2d at 1229.

<sup>9</sup> *See Jade M. Meeker, Justifications*, in 5 TEXAS CRIMINAL PRACTICE GUIDE § 123.02[1] (2007).

<sup>10</sup> *Id.* § 123.02[2].

<sup>11</sup> *See discussion infra* Part I.B.2.

<sup>12</sup> 40 AM. JUR. 2D *Homicide* § 138 (1999).

<sup>13</sup> *Id.* § 164.

The law of retreat originated in the English common law.<sup>14</sup> Under the English common law, before a person could claim his use of deadly force was justified, he had to show that (1) he had retreated to the wall and (2) that he was threatened with death or serious bodily injury.<sup>15</sup> The English imposed the duty to retreat before using deadly force as a means of producing a more civil society by preventing a fatal outcome to most disputes.<sup>16</sup> This English duty to retreat doctrine was rejected in a majority of states across the United States in the late nineteenth-century and early twentieth-century.<sup>17</sup> Although the majority of states abandoned the duty to retreat, a minority of states still adhered to the doctrine.<sup>18</sup> The Supreme Court was soon confronted with this issue. The series of cases decided by

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<sup>14</sup>Michelle Jaffe, *Up in Arms over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 155, 160 (2005) (citing RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 4-5 (1991)).

<sup>15</sup>*Id.*

<sup>16</sup>*See id.*

<sup>17</sup>*Id.*; *Boykin v. People*, 45 P. 419, 422 (Colo. 1896) (“[W]here a defendant is where he has a right to be . . . and is assaulted by the deceased in a way that defendant honestly and in good faith believes, and the circumstances being such as would induce a like belief in a reasonable man, that he is about to receive at the hands of his assailant great bodily harm, or to lose his life, the defendant, if he did not provoke the assault, or is not within some of the exceptions above noted, is not obliged to retreat or flee to save his life, but may stand his ground, and even, in some circumstances, pursue his assailant until the latter has been disarmed or disabled from carrying into effect his unlawful purpose; and this right of the defendant goes even to the extent, if necessary, of taking human life.”); *Runyan v. State*, 57 Ind. 80, 84 (1877) (“The weight of modern authority, in our judgment, establishes the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, *without retreating*, repel force by force, and if, in the exercise of his right to self-defence [sic], his assailant is killed, he is justifiable.”) (emphasis added); *State v. Dixon*, 75 N.C. 275, 1876 WL 2790, at \*4 (1876) (“In this class of cases, where there is no deadly purpose, the doctrine of the books applies, that one cannot justify the killing of the other, though apparently in self-defence [sic], unless he first ‘retreat to the wall.’ In the former class, where the attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground and kill his adversary, if need be.”); *see generally* *State v. Gardner*, 104 N.W. 971 (Minn. 1905) (addressing the issue of whether the doctrine of “retreat to the wall” still has a place in the law at the time, the court reasoned that before the introduction of guns, the duty to retreat made good sense because of the hand-to-hand nature of combat between individuals; however, with the introduction of firearms, this justification for killing in self-defense is no longer universally appropriate.); *Erwin v. State*, 29 Ohio St. 186 (1876) (recognizing that the trial court’s instruction imparting a duty to retreat upon the defendant was erroneous, the court held that the focus should be on whether the acts of the defendant were necessary to save his own life.).

<sup>18</sup>*See* Jaffe, *supra* note 14, at 163.

the Supreme Court helped define the status of the duty to retreat across the country.

### 1. Development of the Bright-Line Rule by the United States Supreme Court

The earliest United States Supreme Court case which addressed the issue was *Beard v. United States*.<sup>19</sup> In *Beard*, the defendant was found guilty of manslaughter but appealed the jury instruction on the law of self-defense.<sup>20</sup> The case involved a dispute between the defendant and the Jones brothers over possession of a cow.<sup>21</sup> The Jones brothers repeatedly came to the Beard farm to try to take the cow.<sup>22</sup> Beard thwarted each attempt and told them he would only relinquish possession of the cow if a court determined that Edward Jones was entitled to the cow.<sup>23</sup> After threatening Beard's life, the Jones brothers once again came to the land to try to take the cow.<sup>24</sup> Beard once again confronted the brothers.<sup>25</sup> During the confrontation, Will Jones began walking briskly at Beard, threatening him and keeping his hand hidden in his pocket.<sup>26</sup> Will walked closer and made a movement to remove his hand from his pocket.<sup>27</sup> Beard feared the pocket contained a gun, and in fact it did.<sup>28</sup> Before Jones could remove his pistol from his pocket Beard struck him in the head with a shotgun.<sup>29</sup> Will Jones later died from this wound.<sup>30</sup> The issue before the Court was whether the trial court erroneously instructed the jury that Beard could not claim self-defense if he could have safely retreated from the situation.<sup>31</sup> The Court held that the trial court had improperly instructed the jury on self defense, stating the following:

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<sup>19</sup> 158 U.S. 550 (1895).

<sup>20</sup> *Id.* at 551.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 551–53.

<sup>23</sup> *Id.* at 551–52.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 552.

<sup>26</sup> *Id.* at 552–53.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 553.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 554–55.

In our opinion, the court below erred in holding that the accused, while on his premises, outside of his dwelling house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed in upon his person went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused. The defendant was where he had the right to be, when the deceased advanced upon him in a threatening manner, and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life, or do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, were necessary to save his own life, or to protect himself from great bodily injury.<sup>32</sup>

This holding showed that the Supreme Court did not recognize any common law duty to retreat, not only from one's home, but also from the land surrounding that home.

The Supreme Court quickly blurred what seemed to be a bright-line rule created in *Beard*. In *Allen v. United States*, the Court faced the issue of whether a defendant has a duty to retreat before using deadly force when he was not on his own property or defending a legal interest.<sup>33</sup> In *Allen*, Alexander Allen and Phillip Henson got into a fight.<sup>34</sup> Allen ended up shooting and killing Henson with a pistol.<sup>35</sup> The defendant alleged that the court erred in its instruction to the jury on the circumstances required to

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<sup>32</sup> *Id.* at 563–64.

<sup>33</sup> *See generally* 164 U.S. 492 (1896).

<sup>34</sup> *Allen v. United States*, 150 U.S. 551, 552 (1893).

<sup>35</sup> *Id.*

justify the homicide.<sup>36</sup> The instruction of the lower court provided that Allen's use of deadly force would only be justified if he had used all means within his power to save his own life and prevent the intended harm, "such as retreating as far as he can."<sup>37</sup> The Supreme Court held that this instruction was not erroneous because the prior cases which abolished the duty to retreat dealt with defendants who were on their own property.<sup>38</sup> The Court held that the "general duty to retreat" before killing was not affected by those decisions as it relates to defendants who are not upon their own property.<sup>39</sup>

The Supreme Court's stance on the duty to retreat was soon clarified in *Brown v. United States*.<sup>40</sup> In *Brown*, the defendant was convicted of second degree murder.<sup>41</sup> Hermis and Brown, two coworkers, had a history of trouble between them so Brown brought a gun to work for protection.<sup>42</sup> Brown left the pistol lying in his coat near where he was working.<sup>43</sup> On the day of the killing, Hermis and Brown got into another altercation, and Hermis began coming towards Brown.<sup>44</sup> While Hermis struck at him, Brown retreated twenty to twenty-five feet and retrieved the gun from his coat.<sup>45</sup> Upon reaching the gun, he fired four shots, killing Hermis.<sup>46</sup> During the trial, the judge instructed the jury that "in considering the question of self defence [sic], that the party assaulted is always under the obligation to retreat so long as retreat is open to him, provided that he can do so without subjecting himself to the danger of death or great bodily harm."<sup>47</sup> Upon deciding the issue of whether this was a proper instruction, Justice Holmes wrote possibly the most famous words concerning the duty to retreat, when he said that "[d]etached reflection cannot be demanded in

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<sup>36</sup> *Allen*, 164 U.S. at 494-97.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 498.

<sup>39</sup> *Id.*

<sup>40</sup> 256 U.S. 335 (1921).

<sup>41</sup> *Id.* at 341.

<sup>42</sup> *Id.* at 342. The evidence showed that Hermis had threatened Brown and twice assaulted him with a knife. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

the presence of an uplifted knife.”<sup>48</sup> The Supreme Court clarified its stance and held that a defendant does not have a duty to retreat from anywhere he has a legal right to be.<sup>49</sup>

## 2. State Law Concerning the Duty to Retreat

Although the Supreme Court has clarified its view on the duty to retreat, the various states within the United States are free to set their own rules on the issue. The Supreme Court’s stance on self-defense and the duty to retreat remains persuasive authority for state courts faced with these issues. The majority of jurisdictions within the United States align with the Supreme Court’s view and do not impose a duty to retreat before a defendant can use deadly force when the defendant reasonably believes the use of force is necessary to prevent death or serious bodily injury.<sup>50</sup> Even in jurisdictions which impose a duty to retreat before using deadly force, the “castle doctrine” was created as an exception to this duty to retreat.<sup>51</sup> The castle doctrine exception applies when a person, who due to no fault of his own, is assaulted in his own home (or the curtilage of that home).<sup>52</sup> In that situation, the actor is not obligated to retreat from the premises before resorting to the use of deadly force.<sup>53</sup> The use of deadly force within the “castle” must still be reasonable under the circumstances.<sup>54</sup> A number of jurisdictions have created a presumption that the use of deadly force is reasonable when someone unlawfully enters or attempts to enter another’s home.<sup>55</sup>

Although the majority of jurisdictions have no duty to retreat, or a limited duty to retreat, the recent trend among the remaining states is to lessen the duty or to completely remove it.<sup>56</sup> Florida began the trend with the passage of its “Stand Your Ground” law on October 1, 2005.<sup>57</sup> Since

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<sup>48</sup> *Id.* at 343.

<sup>49</sup> *See id.* at 344.

<sup>50</sup> *Weiland v. State*, 732 So. 2d 1044, 1049 n.4 (Fla. 1999).

<sup>51</sup> *Id.* at 1049.

<sup>52</sup> 40 C.J.S. *Homicide* § 212 (2007).

<sup>53</sup> *Id.* § 211.

<sup>54</sup> *See id.*

<sup>55</sup> *See discussion infra* Part III.C.2.

<sup>56</sup> HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007), available at <http://www.legis.state.tx.us>.

<sup>57</sup> FLA. STAT. ANN. §§ 776.012, .013, .031, .032 (West 2007).



that time fourteen other states have passed similar legislation, including Texas.<sup>58</sup>

### III. HISTORY OF THE LAW IN TEXAS

#### A. 1973 Amendments

There have been three changes in Texas law regarding the duty to retreat. Prior to 1974, Texas did not impose a duty to retreat upon its citizens.<sup>59</sup> However, in 1973 the Texas Legislature amended the Texas Penal Code to establish a duty to retreat before using deadly force.<sup>60</sup> The statutory change permitted the use of deadly force only if a reasonable person in the defendant's situation would not have retreated.<sup>61</sup> This change codified the old common law doctrine of "retreat to the wall."<sup>62</sup> The statute required detached reflection by the defendant "in the presence of an uplifted knife."<sup>63</sup> The burden was on the potential victim to determine if a reasonable person in his situation would retreat from his attacker before resorting to the use of force.<sup>64</sup> If the jury determined that he had not acted reasonably the defendant could not rely upon self-defense to justify the

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<sup>58</sup> See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007). The states passing such legislation are Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Oklahoma, South Carolina, and South Dakota. House Research Org., Bill Analysis, Tex. H.B. 284, 80th Leg., C.S. (2007), available at <http://www.legis.state.tx.us>.

<sup>59</sup> *Sternlight v. State*, 540 S.W.2d 704, 705 (Tex. Crim. App. 1976) (considering the history of the duty to retreat in Texas and stating: "Retreat was not necessary to the right of self-defense in this state prior to the new penal code which became effective January 1, 1974. In fact, the statute provided that it was not necessary to retreat.").

<sup>60</sup> Act of 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 901 (amended 1995 & 2007) (current version at TEX. PEN. CODE ANN. § 9.32 (Vernon Supp. 2007)) ("A person is justified in using deadly force against another . . . if a reasonable person in the actor's situation would not have retreated . . .").

<sup>61</sup> *Id.*

<sup>62</sup> See *id.*; see also *Sternlight*, 540 S.W.2d at 706.

<sup>63</sup> But see *Brown v. United States*, 256 U.S. 335, 343 (1921) ("Detached reflection cannot be demanded in the presence of an uplifted knife.").

<sup>64</sup> Act of 1973, 63d Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 901 (amended 1995 & 2007) ("A person is justified in using deadly force against another . . . if a reasonable person in the actor's situation would not have retreated . . .").

homicide. The burden was on the defendant to prove his actions were reasonable in every case.<sup>65</sup>

### B. 1995 Amendments

In 1995 the Texas Legislature passed a “castle doctrine” exception to the duty to retreat imposed by the 1973 statute.<sup>66</sup> Section 9.32 (b) of the Texas Penal Code was amended to read: “The requirement imposed by subsection (a)(2)<sup>67</sup> 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.”<sup>68</sup> This exception to the duty to retreat only extended to the defendant’s habitation,<sup>69</sup> not to any area he “has a right to be present.”<sup>70</sup> The actor still had to prove that a reasonable person would have believed that the use of deadly force was necessary to prevent death or serious bodily injury.<sup>71</sup> In 1995 the Texas Penal Code did not contain a presumption that the actor was reasonable in using deadly force against an unlawful intruder, whether the actor was inside his home, car, place of business, or place of employment.<sup>72</sup> Although the 1995 amendments strengthened the protections for citizens using deadly force within their homes<sup>73</sup>, the Texas Legislature found it necessary to expand these protections, following the recent trend in this area of law.<sup>74</sup>

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<sup>65</sup> See *id.* (containing no language granting a presumption of reasonableness to a defendant).

<sup>66</sup> SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 378, 80th Leg., R.S. (2007) available at <http://www.capitol.state.tx.us/tlodocs/80R/analysis/html/SB00378F.htm>.

<sup>67</sup> Act of May 16, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2141–42 (amended 2007) (current version at TEX. PEN. CODE ANN. § 9.32(a)(2) (Vernon Supp. 2007)) (“A person is justified in using deadly force against another . . . if a reasonable person in the actor’s situation would not have retreated . . .”).

<sup>68</sup> *Id.* at 2142 (citing the 1995 amendment to § 9.32(b)).

<sup>69</sup> *Id.* See discussion *supra* Part II.B. The “castle doctrine” exception to the duty to retreat is normally codified as to the actor’s habitation; however, this has been held to include the curtilage of the home also. See 40 C.J.S. *Homicide* § 212 (2007).

<sup>70</sup> TEX. PEN. CODE ANN. § 9.32(c) (Vernon Supp. 2007); *but cf.* Act of May 27, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2142 (amended 2007) (“A person is justified in using deadly force against another . . . if a reasonable person in the actor’s situation would not have retreated . . .”).

<sup>71</sup> SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 378, 80th Leg., R.S. (2007), available at <http://www.capitol.state.tx.us/tlodocs/80R/analysis/html/SB00378F.htm>.

<sup>72</sup> *Id.*

<sup>73</sup> See discussion *supra* Part II.B.2.

<sup>74</sup> See *supra* note 58 (discussing the trend in this area of law among the fifty states).

### C. 2007 Amendments

In 2007 the 80th Texas Legislature passed an amendment to sections 9.01, 9.31, and 9.32 of the Texas Penal Code and section 83.001 of the Texas Civil Practice and Remedies Code.<sup>75</sup> The bill was overwhelmingly supported in both the House and Senate.<sup>76</sup> Governor Perry enthusiastically signed Senate Bill 378 after voicing his support for the Bill and applauding legislators for passing it.<sup>77</sup> Senate Bill 378 made several important changes to self-defense and retreat law in Texas. The first major change to the law is the significant reduction in situations where a person is required to retreat before using deadly force.

#### 1. No Duty to Retreat if the Actor Has a Right to be Present at the Location Where Deadly Force is Used

The pre-2007 statute required an actor to retreat if a reasonable person in the actor's situation would have retreated.<sup>78</sup> The lone exception to this duty to retreat was set forth in subsection (b) which stated that "[t]he requirement [to retreat] 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."<sup>79</sup> This language clearly limited the application of the exception to the duty to retreat to confrontations within the actor's home. The 2007 amendments adopted by the Texas Legislature significantly expand the areas covered by an exception to the duty to retreat. The 2007 Texas Penal Code abolishes the duty to retreat if the defendant can show he: (1) had a right to be present at the location where deadly force was used; (2) did not provoke the person against whom deadly force was used; and (3) was not engaged in

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<sup>75</sup> See SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 378, 80th Leg., R.S. (2007), available at <http://www.capitol.state.tx.us/tlodocs/80R/analysis/html/SB00378F.htm>.

<sup>76</sup> The House passed the measure with a vote of 133 to 13. H.J. of Tex., 80th Leg., R.S. 1008 (2007), available at <http://tlo2.tlc.state.tx.us/hjml/80r/pdf/80RDAY40FINAL.PDF#page=6>. The Senate passed the bill with a vote of 30 to 0. S.J. of Tex., 80th Leg., R.S. 483 (2007), available at <http://tlo2.tlc.state.tx.us/sjml/80r/pdf/80RSJ03-13-F.PDF#page=7>.

<sup>77</sup> Press Release, Tex. Governor Rick Perry, Gov. Perry Signs Law Allowing Texans to Protect Themselves (Mar. 27, 2007), available at <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2007-03-27.0601/view>.

<sup>78</sup> Act of May 16, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2142 ("A person is justified in using deadly force against another . . . if a reasonable person in the actor's situation would not have retreated . . .").

<sup>79</sup> *Id.*

criminal activity at the time deadly force was used.<sup>80</sup> The potential applications of this exception are no longer limited to the actor's habitation. The amendments bring Texas law into conformity with the United States Supreme Court's decision in *Brown v. United States*.<sup>81</sup> However, the defendant's actions are not automatically justified even if he can prove those three elements. Rather, if the defendant is able to establish those elements, it allows the defendant to show that he did not have a duty to retreat before using deadly force as described in the rest of section 9.32.

Once the actor shows that he did not have a duty to retreat, he must still prove his actions were justified so that he should be absolved of any criminal responsibility. Section 9.32 of the Texas Penal Code sets out the requirements for any defendant claiming that his use of deadly force was justified. Under the statute the use of deadly force is justified:

- (1) if the actor would be justified in using force against the other under Section 9.31,<sup>82</sup> and
- (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
  - (A) to protect the actor 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.<sup>83</sup>

## 2. Presumption that the Actor's Belief was Reasonable in Certain Situations

The second major change to section 9.32 comes about in establishing the reasonableness requirement to proving the use of deadly force was justified. Specifically, the change is related to establishing whether the actor reasonably believed that the use of deadly force was necessary. After the 2007 amendments, section 9.32 of the Texas Penal Code includes a

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<sup>80</sup>TEX. PEN. CODE ANN. § 9.32(c) (Vernon Supp. 2007).

<sup>81</sup>See 256 U.S. 335 (1921); see also discussion *supra* Part II.B.1.

<sup>82</sup>TEX. PEN. CODE ANN. § 9.31 (providing that the use of force is statutorily justified in certain situations and statutorily not justified in others).

<sup>83</sup>TEX. PEN. CODE ANN. § 9.32(a).

subsection which creates a presumption that the defendant's actions were reasonable if the actor shows he:

(1) knew or had reason to believe that the person against whom deadly force was used:

(A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit an offense described by Subsection (a)(2)(B); [and]

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.<sup>84</sup>

This presumption is an important and distinguishing feature of the statute adopted by the Texas Legislature. This presumption cannot be established in every situation where the 2007 amendments have abolished the duty to retreat. It is limited to the use of force within the actor's habitation, vehicle, place of employment and place of business; whereas the duty to retreat has been withdrawn from every place the actor has a right to be present.<sup>85</sup> Florida was the first state to establish a presumption of reasonableness in certain situations.<sup>86</sup> Texas, along with many other states

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<sup>84</sup> *Id.* § 9.32(b).

<sup>85</sup> Compare *id.* § 9.32(c), with *id.* § 9.32(b)(1)(A)–(B).

<sup>86</sup> See Daniel Michael, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 204 (2006) ("While removing the duty to retreat brings Florida in line with the majority rule, the conclusive presumption sets Florida apart from all other states because it contravenes an ancient and universally adopted principle that restricts the use of deadly force to an actual or threatened harm to persons.").

which have passed similar legislation after Florida, has also included this presumption in the 2007 amendments.<sup>87</sup> The presumption directly conflicts with the principle that before the use of deadly force is justified, there must be an actual or threatened harm to the person.<sup>88</sup> The presumption does so by automatically establishing the reasonable belief that the use of deadly force was necessary, even if it was not present in the situation.<sup>89</sup>

The procedural effect of this presumption in Texas is distinguishable from Florida and many other states which have a statutory presumption of reasonableness in criminal suits. In other states the statutory presumption results in both criminal and civil immunity for the actor.<sup>90</sup> In Texas, the criminal defendant is not immune from trial.<sup>91</sup> Instead the criminal defendant has the burden of production to bring forth evidence showing he is entitled to the presumption.<sup>92</sup> The state still has an opportunity to rebut

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<sup>87</sup>Florida, Texas, Alabama, Kentucky, Louisiana, Mississippi, and Oklahoma all have a presumption of reasonableness in their self-defense laws. See ALA. CODE § 13A-3-23 (LexisNexis Supp. 2007); FLA. STAT. ANN. § 776.013 (West Supp. 2008); KY. REV. STAT. ANN. § 503.055 (LexisNexis Supp. 2007); LA. REV. STAT. ANN. § 14:19 (2007); MISS. CODE. ANN. § 97-3-15 (West Supp. 2007); OKLA. STAT. ANN. tit. 21, § 1289.25 (West Supp. 2008); TEX. PEN. CODE ANN. § 9.32(a) (Vernon Supp. 2007).

<sup>88</sup>See Michael, *supra* note 86, at 204.

<sup>89</sup>*Id.*

<sup>90</sup>See, e.g., STAFF OF S. JUDICIARY COMM., 2005 SESS., S.B. 436 SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, at 1 (Fla. 2005), available at <http://www.flsenate.gov/data/session/2005/Senate/bills/analysis/pdf/2005s0436.ju.pdf> (“[The new bill] permits a person [to use deadly force] without fear of criminal prosecution or civil action for damages, against a person who unlawfully and forcibly enters the person’s dwelling, residence, or occupied vehicle.” (emphasis added)); STAFF OF H. JUDICIARY COMM., 93D SESS., RIGHT TO DEFEND ONE’S SELF AND OTHERS: A SUMMARY OF HOUSE BILLS 5142-5143 AS INTRODUCED 9-7-05, HB 5153 AS INTRODUCED 9-8-05, AND HB 5548 AS INTRODUCED 1-17-06, at 3 (Mich. 2006), available at <http://www.legislature.mi.gov/documents/2005-2006/billanalysis/House/htm/2005-HLA-5142-1.htm> (“A person who used force as permitted above would be justified in using that force and would be immune from criminal prosecution, and from any civil action for the use of that force . . .”). Louisiana legislative history suggests that the individual is immune from both criminal and civil liability. See 2006 La. Sess. Law Serv. 141 (West). Alabama and Kentucky’s criminal statutes expressly state that the actor is immune from criminal liability. ALA. CODE § 13A-3-23(d) (LexisNexis Supp. 2007); KY. REV. STAT. ANN. § 503.085(1) (LexisNexis Supp. 2007).

<sup>91</sup>See generally HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., R.S. (2007), available at <http://www.legis.state.tx.us>; SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 378, 80th Leg., R.S. (2007), available at <http://www.capitol.state.tx.us/>.

<sup>92</sup>SEN. COMM. ON JURISPRUDENCE, Tex. S.B. 378.

this presumption through evidence of its own.<sup>93</sup> The jury must decide whether the facts giving rise to the presumption are present.<sup>94</sup> The prosecutor can rebut this presumption by bringing forth evidence showing that the victim was a lawful entrant or an invitee of the actor.<sup>95</sup> An actor who establishes the defense in criminal prosecution is entitled to immunity from civil suit.<sup>96</sup>

When the presumption is based upon an unlawful entry or removal, its applicability is limited to deadly force used within the actor's habitation, vehicle, place of business or place of employment.<sup>97</sup> The 2007 amendments provide a definition of both "habitation" and "vehicle" to clarify the extent to which the presumption applies.<sup>98</sup> Habitation is defined as "a structure or vehicle that is adapted for the overnight accommodation of persons, and includes: (A) each separately secured or occupied portion of the structure or vehicle; and (B) each structure appurtenant to or connected with the structure or vehicle."<sup>99</sup> Vehicle is also defined in the section as "any device in, on, or by which any person or property is or may be propelled, moved, or drawn in the normal course of commerce or transportation, except such devices as are classified as habitation."<sup>100</sup>

*a.            The Presumption of Reasonableness Probably Does  
                 Not Extend to the Curtilage of the Home*

By defining the term "habitation," the Texas Legislature has opened up the statute to criticism and created a possible ambiguity in determining the extent to which the presumption applies. The majority of jurisdictions which have eliminated the duty to retreat within the home have interpreted "home" or "habitation" to include the curtilage of the habitation.<sup>101</sup> The language of the 2007 amendment does not impose a duty to retreat if the actor is outside his home. The 2007 amendment still allows the actor to

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<sup>93</sup> *Id.*

<sup>94</sup> *Walters v. State*, No. PD-1952-06, 2007 Tex. Crim. App. LEXIS 1701, at \*21 n.35 (Dec. 5, 2007).

<sup>95</sup> HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., R.S. (2007), available at <http://www.hro.house.state.tx.us/frame2.htm>.

<sup>96</sup> See discussion *infra* Part III.C.1.iii.

<sup>97</sup> TEX. PEN. CODE ANN. § 9.32(b)(1)(A)–(B) (Vernon Supp. 2007).

<sup>98</sup> *Id.* § 9.01(4)–(5).

<sup>99</sup> *Id.* § 30.01(1).

<sup>100</sup> *Id.* § 30.01(3) (internal quotations omitted).

<sup>101</sup> See *supra* note 52.

stand his ground if on the curtilage of his home, because the curtilage of his home is a place the actor has a right to be present.<sup>102</sup> The issue will arise when trying to determine if the defendant is entitled to a presumption of reasonableness if he uses deadly force against an unlawful entrant onto the curtilage of his home.

Because the Texas Legislature has only recently amended the statute, there is no case law interpreting its meaning. The rules of statutory construction provide the ability to make a reasonable projection of how the statute will be applied. When interpreting a statute the role of the court is to effectuate the purpose or intent of the legislators who enacted the language.<sup>103</sup> The court attempts to discern the legislative intent by first examining the literal text of the statute in question.<sup>104</sup> The court attempts to discern a fair and objective meaning of the statute which follows the legislators' intent at the time the statute was enacted.<sup>105</sup> The Texas Legislature included a reference to the definitional section of the statute to show its intended meaning of the terms "habitation" and "vehicle."<sup>106</sup> A habitation is defined as "any structure or vehicle that is adapted for the overnight accommodation of persons, and includes: (A) each separately secured or occupied portion of the structure or vehicle; and (B) each structure appurtenant to or connected with the structure or vehicle."<sup>107</sup> The definition refers only to a "structure" or a "vehicle adapted for . . . overnight accommodation" without making any reference to the land or curtilage surrounding the structure or vehicle.<sup>108</sup> The definition further clarifies what is meant by structure or vehicle in subsections (a) and (b) which specifically includes any separate portion of the structure or vehicle, as well as appurtenant structures to the structure or vehicle.<sup>109</sup> By making reference at the beginning of Chapter 9 of the Texas Penal Code to the definition of "habitation," the legislature clearly intended for that definition to apply anywhere the term was used within Chapter 9. Subsection (b) of section 9.32 of the Texas Penal Code incorporates that definition by using the term

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<sup>102</sup> See TEX. PEN. CODE ANN. § 9.32(c) (doing away with the duty to retreat when the actor is in any location where he has a right to be present).

<sup>103</sup> Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> TEX. PEN. CODE ANN. § 9.01.

<sup>107</sup> *Id.* § 30.01(1).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*



“habitation” when stating the situation in which the presumption of reasonableness applies.<sup>110</sup> The likely result is that, when a defendant tries to invoke the presumption of reasonableness, he must show that he was within the actual structure of the house and not merely on the curtilage.

*b. Immunity From Civil Liability for Actions Which are Justified Under the Texas Penal Code*

The last major change created by the 2007 amendment is the provision granting civil immunity.<sup>111</sup> Under this new section, an actor is immune from potential civil liability when his use of force is justified under Chapter 9 of the Texas Penal Code.<sup>112</sup> The civil immunity provision includes, but is not limited to, the self-defense justification contained in section 9.32 of the Texas Penal Code. Proponents of this bill support it because it allows the potential victim to concentrate on protecting himself and his family instead of thinking about potential civil liability for his actions.<sup>113</sup>

#### IV. IMPACT OF THE 2007 AMENDMENTS

The potential impact of these so-called “Stand Your Ground” laws has been a hot topic of debate across the United States.<sup>114</sup> The heart of the controversy stems from the differences in opinion between groups which value the protection of human life and those which strongly support a person’s right to self-defense.<sup>115</sup>

##### A. *Supporters of the Law*

The supporters of the 2007 amendments agree with Justice Holmes that “detached reflection cannot be demanded in the presence of an uplifted knife.”<sup>116</sup> The supporters argue that the burden of making a split-second

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<sup>110</sup> *Id.* § 9.32(b).

<sup>111</sup> SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 378, 80th Leg., R.S. (2007).

<sup>112</sup> TEX CIV. PRAC. & REM. CODE ANN. § 83.001 (Vernon 2005 & Supp. 2007).

<sup>113</sup> HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., R.S. (2007), available at <http://www.hro.house.state.tx.us/frame2.htm>.

<sup>114</sup> *See id.*; Michael, *supra* note 86, at 203–04 (discussing the arguments of both supporters and opponents of Florida’s Stand Your Ground Legislation); *see also supra* Part II.B.

<sup>115</sup> *See generally* HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., R.S. (2007), available at <http://www.hro.house.state.tx.us/frame2.htm>.

<sup>116</sup> *Id.*

decision on whether to use deadly force should not be on the victim, but instead should be placed upon the aggressor.<sup>117</sup> The presumption that the use of deadly force was reasonable under certain circumstances shifts that burden away from the potential victim to the aggressor, where it should be.<sup>118</sup> In addition to the protection from criminal liability, the amendments protect the victim from civil liability and allow the actor to concentrate on protecting both himself and his family, instead of trying to determine whether his actions could lead to civil liability.<sup>119</sup> The proponents' views express their affinity for the rights of citizens to engage in self-defense without fear of future repercussions for actions based upon a threat of death or serious bodily injury.<sup>120</sup>

### *B. Opponents of the Law*

The opponents of the current amendments seek a balance between a person's right to self-defense and the value of human life.<sup>121</sup> Critics of the bill say that, prior to the 2007 amendments, the law sufficiently allowed victims the right to use self-defense, so long as a reasonable person in their situation would not have retreated before resorting to the use of deadly force.<sup>122</sup> The critics adamantly support imposing a duty to retreat in any situation where retreat is reasonable because doing so avoids violence and works to preserve human life.<sup>123</sup> In their view, the 2007 amendments will likely create mayhem in the streets.<sup>124</sup> The critics want to encourage the preservation of human life and feel that these "Shoot First" laws encourage

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<sup>117</sup> *Id.*

<sup>118</sup> TEX. PEN. CODE ANN. § 9.32(b) (Vernon Supp. 2007).

<sup>119</sup> HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., R.S. (2007), available at <http://www.hro.house.state.tx.us/frame2.htm>.

<sup>120</sup> Richard Willing, *States Allow Deadly Self Defense*, USA TODAY, Mar. 23, 2006, available at [http://www.usatoday.com/news/nation/2006-03-20-states-self-defense\\_x.htm](http://www.usatoday.com/news/nation/2006-03-20-states-self-defense_x.htm) ("The NRA and other supporters say the bills are needed in many states that require people under attack in public places to withdraw from the situation, rather than retaliate, unless they can show their lives are in danger. 'For someone attacked by criminals to be victimized a second time by a second-guessing legal system is wrong[.]'").

<sup>121</sup> HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007), available at <http://www.hro.house.state.tx.us/frame2.htm>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

confrontations to turn deadly.<sup>125</sup> Some opponents also fear that the new law will encourage more crime and allow gang-members and other criminals to justify their actions based upon self-defense.<sup>126</sup>

### *C. Response to these Critics*

The critics of the 2007 amendments are trying to protect laudable values. However, many of these fears are unwarranted. The 2007 amendments do not promote violence or create an excuse for mayhem in the streets. The critics' fear of violence and mayhem is based upon the new presumption that actions are reasonable if the actor is faced with an unlawful invasion of his habitation, vehicle, place of employment, or place of business.<sup>127</sup> This presumption does not create an unadulterated right to use deadly force. The presumption only applies if the action takes place within the four areas described in the statute.<sup>128</sup> Also, the prosecution or plaintiff is able to rebut this presumption by producing evidence showing that the defendant is not factually entitled to the presumption.<sup>129</sup>

Critics also fear that the passage of these amendments will encourage the use of deadly force by criminals who later claim the force was justified self-defense.<sup>130</sup> These fears are also unwarranted. The statute expressly addresses this concern by stating that a person who is otherwise engaged in criminal activity is not entitled to the presumption of reasonableness.<sup>131</sup> Criminals and gang members would therefore be unable to carry their burden of providing evidence establishing that they were entitled to the defense. Even in situations where the defendant produces some evidence, the state has the opportunity to rebut this presumption by showing that the defendant was engaged in criminal activity. Therefore, because Texas does not grant criminal immunity to these actors, the state has the ability to

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<sup>125</sup>Willing, *supra* note 120 (quoting Zach Ragbourn, a member and spokesman for the Brady group, who says that the proposals "are more accurately called 'Shoot First' law. They allow a person who just feels something bad is going to happen to open fire in public.").

<sup>126</sup>HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>127</sup>HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>128</sup>*See* TEX. PEN. CODE ANN. § 9.32(b) (Vernon 2007).

<sup>129</sup>HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>130</sup>HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>131</sup>TEX. PEN. CODE ANN. § 9.32(c) ("A person . . . who is not engaged in criminal activity at the time the deadly force is used is not required to retreat . . .").

produce evidence that the person was engaged in criminal activity and therefore was not justified to use deadly force.<sup>132</sup>

Critics also say that these amendments were unnecessary because the pre-2007 law provided a good balance between the right to self-defense and the preservation of human life.<sup>133</sup> The 1995 amendments accomplished this by allowing people to resist deadly force with deadly force if it was reasonable under the circumstances.<sup>134</sup> When the actor was unable to safely retreat, the use of deadly force was reasonable.<sup>135</sup> The problem with the rule is that it placed a heavy burden upon the actor to make a split-second determination of whether the use of deadly force was reasonable.<sup>136</sup> A lapse in judgment in that split-second could result in criminal or civil liability, if he used deadly force and was later determined to not be justified.<sup>137</sup> If the actor erred on the side of not using deadly force, the result could be death or serious injury for him or his family.<sup>138</sup>

The new law properly allows the defendant to engage in self-preservation without imparting an unfair burden on an actor who took necessary measures to protect himself or his family. The law lessens these unfair burdens in two ways. First, the law creates the presumption that in those situations expressed in subsection (b) the defendant's actions were reasonable.<sup>139</sup> Second, the changes to the Texas Civil Practice and Remedies Code provide immunity from civil actions brought by the person

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<sup>132</sup> See discussion *supra* Part III.C.

<sup>133</sup> HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>134</sup> Act of May 16, 1995, 74th Leg., R.S., ch., 235, § 1, 1995 Tex. Gen. Laws 2141 (amended 2007) (current version at TEX. PEN. CODE ANN. § 9.32(a)(2) (Vernon Supp. 2007)).

<sup>135</sup> HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007); see also TEX. PEN. CODE ANN. § 9.32.

<sup>136</sup> Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J. L. & PUB. POL'Y 504, 533 (2007) ("[When] a person is attacked . . . he has only a split second to react and to determine the best way to preserve his life. The old common law forced these victims to use that split second to analyze the circumstances, weigh the value of his own human life against that of his attacker, and determine the reasonableness and prudence of retreat.").

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* ("The bright lines drawn by the Stand Your Ground law eliminate these fine-grained decisions and permit those attacked to defend themselves based on easily understood and easily applied rules. While bright lines may seem a blunt instrument to use in the context of justified homicide, the fact remains that '[t]he morgue is full of people who hoped for the best from their attackers and were dead wrong.'" (internal citations omitted)).

<sup>139</sup> TEX. PEN. CODE ANN. § 9.32(b).

against whom force was used (if not deadly force, obviously) and also from actions brought by the families of the person against whom deadly force was used.<sup>140</sup>

These two changes protect the defendant from two distinct harms. First, the presumption of reasonableness protects the person who made a split-second decision to use deadly force from a prosecutor who has months to look back on the situation and, with detached reflection, compare the defendant's response to a "reasonable" response.<sup>141</sup> The defendant does not have the luxury of taking his time to make a decision; his choice is nearly instantaneous. Without this presumption, the prosecutor has a distinct advantage of closely scrutinizing every action of the defendant to show why his use of force or failure to retreat was unreasonable.

The defendant is also protected from expensive civil litigation due to the expansion of the defense to civil suits. In Texas, citizens who killed intruders were normally required to at least face a grand jury, and sometimes a trial on the issue.<sup>142</sup> As shown above, in situations where self-defense applies the defendant's actions are justified and deemed to be the lesser of two evils.<sup>143</sup> Under the prior law, the "reward" for this justified killing was the threat of civil suit. These civil trials were a lose-lose situation for defendants. First, even if the defendant was determined to be innocent in the civil trial, proving this innocence often required enormous legal expenses.<sup>144</sup> Second, there was also the possibility that, although the use of force was justified, the actor would be found liable in the civil trial and be faced with legal expenses and a potentially substantial monetary award to the plaintiff. Granting civil immunity to people who meet the statutory requirements of section 9.32 prevents these unlawful intruders, attackers, or their families, from profiting from their crimes through a monetary award in a civil suit.<sup>145</sup>

Examining the following hypotheticals, which illustrate the new law's application, may calm the fears of critics.

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<sup>140</sup>TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (Vernon 2007).

<sup>141</sup>Daniel Michael, Recent Development, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199, 203 (2006).

<sup>142</sup>HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>143</sup>See discussion *supra* Part II.A.

<sup>144</sup>HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>145</sup>*Id.*

## V. HYPOTHETICALS

The following hypotheticals illustrate the application of Texas's self-defense and duty to retreat laws. The facts of the hypotheticals vary to show how the pre-2007 statute was interpreted based upon the facts and circumstances and then give the likely outcome post-2007. The hypotheticals are designed to illustrate the potential differences in outcome and procedures for cases based on incidents that occurred after September 1, 2007.<sup>146</sup>

A. *No Change in Outcome Under 2007 Amendments (Guilty Actor)*

Tony Rommo is sitting at home with his girlfriend Carrie Overwood watching the E! True Hollywood Story of the Unibomber one afternoon when they hear a knock on the door. Tony gets up, walks to the door and looks out the peephole to see who it is. He sees a man standing on the porch dressed in all brown, holding a package in his hands. Tony, his imagination running wild from watching the television show, gets scared and thinks that the man at the door is holding a bomb. Tony runs to the closet, grabs his Remington .12 gauge shotgun and aims for the door. As the impatient UPS man on the other side of the door begins knocking Tony squeezes the trigger, killing the delivery man.

Pre-2007 Law: In this case Tony would likely be charged with murder.<sup>147</sup> If a murder charge was brought, Tony's best legal theory for arguing his innocence would be to claim that the use of deadly force was self-defense. Tony will face several problems with this argument. First, the pre-2007 law stated a person was only justified in using deadly force if a reasonable person in his situation would not have retreated.<sup>148</sup> Tony was already in his home when confronted by the UPS man. There was also a locked door between the UPS man and Tony. In this situation the jury would likely find that a reasonable person would have retreated away from the door instead of firing a shot at the man. Tony also cannot utilize the castle doctrine as an exception to the duty to retreat. The duty to retreat

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<sup>146</sup>TEX. PEN. CODE ANN. § 9.32 (Vernon Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (Vernon 2007). The amendments to the Texas Penal Code and the Texas Civil Practice and Remedies Code became effective on Sept. 1, 2007.

<sup>147</sup>See TEX. PEN. CODE ANN. § 19.02(b)(1) ("A person commits [murder] if he intentionally or knowingly causes the death of an individual[.]").

<sup>148</sup>See Act of May 27, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141 (amended 2007) (current version at TEX. PEN. CODE ANN. § 9.32(a)(2) (Vernon Supp. 2007)).

does not apply when the person against whom force was used was committing an offense of unlawful entry in the habitation of the actor.<sup>149</sup> The UPS man had not unlawfully entered Tony's home; he was standing outside the door and was not attempting to forcibly enter the home. Therefore the castle doctrine does not apply because there was no actual or attempted unlawful entry by the UPS man.

The last problem Tony faces is the reasonableness of the use of deadly force. Even if we assume that a reasonable person in Tony's situation would not have retreated, Tony still has to prove that his belief that deadly force was immediately necessary was reasonable in the circumstances.<sup>150</sup> The use of deadly force would only be necessary if it was used to protect himself against the other's use or attempted use of unlawful deadly force; or to prevent the imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.<sup>151</sup> Tony could try to argue that his belief was reasonable because it appeared that the man at the door was attempting to use deadly force by detonating a bomb when he answered the door, and therefore the use of deadly force was necessary to protect himself. The belief still has to be shown to be reasonable. Tony had been watching television about the Unabomber<sup>152</sup> and apparently had an overactive imagination. His paranoia led to the unfortunate death of the UPS man. In Tony's mind he was acting reasonably, but it is doubtful that a jury would determine this was rational behavior. One would be hard-pressed to find an adult in the United States who did not recognize the distinct brown uniform of United Parcel Services employees. Reasonable people do not associate the UPS man with a fear of imminent death or serious bodily harm. Therefore, a reasonable person in Tony's situation would not have shot the UPS man; a reasonable person would have opened the door and signed for the package.

Post-2007 Law: The outcome under the post-2007 law would be the same: a murder conviction. The case would again come down to the reasonableness of Tony's actions. Under the new law, there is no duty to retreat because Tony was in a place he had a right to be present.<sup>153</sup> The

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<sup>149</sup> See TEX. PEN. CODE ANN. § 9.32(b).

<sup>150</sup> See § 9.32(a)(2).

<sup>151</sup> *Id.*

<sup>152</sup> The Unabomber was well known for his gray hoodie sweatshirt and for his unique style of murder, where he sent packages containing bombs to unsuspecting individuals. See generally <http://www.cnn.com/SPECIALS/1997/unabomb/>.

<sup>153</sup> See TEX. PEN. CODE ANN. § 9.32(c).

statute allows Tony to try and prove reasonableness in two ways. He can try to prove the elements necessary to have a presumption of reasonableness of his actions,<sup>154</sup> or, absent this presumption, he can still show that his actions were otherwise reasonable. Tony will not be able to establish the presumption in his favor. The UPS man was not attempting to use any unlawful force to enter the home; he merely knocked at the door to notify the occupants of his delivery. The facts also show that the UPS man was not committing or attempting to commit one of the listed offenses.<sup>155</sup> Therefore, Tony is not entitled to the presumption that his actions were reasonable. Without this presumption the inquiry into the actions is the same as it was under pre-2007 law, which just looked at the conduct to determine if the belief was reasonable. Tony's belief that he was faced with the threatened use of deadly force was not reasonable under the circumstances, so Tony would still be guilty of the crime. The statutory amendments were not created to give a person inside his home the unfettered right to kill; the actions and belief of the actor must still be reasonable under the circumstances.

Under both laws Tony would also be subject to a civil suit based upon the wrongful death of the UPS man.<sup>156</sup>

*B. No Change in Outcome Under the 2007 Amendments (Justified Homicide)*

Tony Rommo and his wife Carrie Overwood, along with their three kids, are sound asleep in their beautiful North Texas home. As the clock strikes 3 a.m., Tony is suddenly awakened by the sound of a downstairs window shattering. Tony nudges Carrie awake and the two of them sit quietly, listening as the hurried sound of running footsteps gets louder and louder. All at once a beast of a man in all black bursts through the door screaming "I'm going to kill you! You are dead!" The intruder rushes at Tony, brandishing a knife. Tony elusively slides away from the rush and grabs the gun in his nightstand. As the intruder turns to charge again, Tony takes aim and shoots the intruder, killing him instantly.

Pre-2007 Law: Under the pre-2007 law, Tony did not have a duty to retreat from his attacker before using deadly force because the attacker was

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<sup>154</sup> See *id.* § 9.32(b).

<sup>155</sup> See *id.* § 9.32(a)(2)(B) (listing "aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery").

<sup>156</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (Vernon Supp. 2007).



committing an unlawful entry into Tony's habitation.<sup>157</sup> Tony would still have to justify the use of deadly force in the situation. Tony would have the burden of proving that he reasonably believed that the use of deadly force was necessary to protect himself from the intruder's attempted use of deadly force, and to prevent the intruder from committing murder.<sup>158</sup> Based on the facts a reasonable person would have believed that the use of deadly force was necessary. The intruder broke into the habitation in the middle of the night, screamed a death threat at Tony, and charged at him with a deadly weapon. A reasonable person would perceive the combination of those actions to mean that the intruder was trying to inflict death or serious bodily injury. Therefore, Tony's actions would likely be justified, but the issue must still be decided by the jury to determine from the evidence if the justification applied.

Even if the court determines that Tony's actions were justified the family of the dead intruder could pursue a civil claim.<sup>159</sup>

Post-2007 Law: Under the new law, Tony would have an easier time proving that his actions were justified. Just as under the pre-2007 law, Tony did not have a duty to retreat because he was in his home, a location at which he has a right to be present.<sup>160</sup> Tony is entitled to the presumption that the use of deadly force was immediately necessary because he had reason to believe that the deceased had unlawfully and forcibly entered his habitation.<sup>161</sup> Tony had this reason to believe the deceased unlawfully and forcibly entered the house because he heard the window break, he did not invite anyone to the house, and it was in the middle of the night. Based on this presumption, Tony does not have to prove to the jury that his actions were reasonable. The jury will be instructed that the actions were reasonable, unless the State offers evidence which rebuts this presumption.

Under the new law, Tony would not face civil suit.<sup>162</sup> His actions would be justified under Chapter 9 of the Penal Code, resulting in immunity from any potential civil suit.<sup>163</sup>

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<sup>157</sup> See Act of May 27, 1995, 74th Leg., R.S., ch. 235, § 1, sec. 9.32(b), 1995 Tex. Gen. Laws 2141 (amended 2007) (current version at TEX. PEN. CODE ANN. § 9.32 (b)(1)(A)).

<sup>158</sup> See *id.* § 9.32(a)(2).

<sup>159</sup> See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>160</sup> See TEX. PEN. CODE ANN. § 9.32(c).

<sup>161</sup> See *id.* § 9.32(b)(1)(A).

<sup>162</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (Vernon Supp. 2007).

<sup>163</sup> *Id.*

*C. Different Result Under the 2007 Amendments*<sup>164</sup>

Tony Rommo was asleep in his home. At 4 a.m. he was awakened by his wife, Carrie Overwood, who was yelling at him that someone was trying to break into the house. Tony heard a man kicking and banging at the door. Tony grabbed his handgun and went to the door where the unidentified man was located. Tony yelled at the man to stop, but the banging and screaming continued. In an attempt to scare the intruder off Tony fired a round from his handgun at the top of the door, not realizing the man's stature. Tony's shot struck the intruder in the head, killing him.

Pre-2007 Law: Under the pre-2007 law, Tony faces potential liability for killing the unidentified man. Under this law Tony would only be justified in using deadly force if: (1) he would be justified in using force under section 9.31 of the Texas Penal Code; (2) a reasonable person in Tony's situation would not have retreated; and (3) he reasonably believed that the use of deadly force was necessary to protect himself against the man's attempted use of deadly force.<sup>165</sup> The focus of this scenario is whether Tony had a duty to retreat before he resorted to the use of deadly force. The pre-2007 law included the exception to the general duty to retreat when the deadly force was used against a person committing an offense of unlawful entry in the actor's habitation.<sup>166</sup> The problem for Tony is that the stranger did not ever commit an unlawful entry into his home. Before the exception to the duty to retreat is invoked, the stranger would have had to gain entry into the home. Because the stranger was still outside the home, there was still a duty to retreat if a reasonable person would have retreated.<sup>167</sup> Under these facts, the jury would determine if Tony's actions were reasonable. Tony would likely have to face a grand jury and possibly trial to determine the reasonableness of his actions. The

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<sup>164</sup>The following hypothetical is based on the facts of a recent incident involving a local Dallas musician, Carter Albrecht. Mr. Albrecht was killed on September 3, 2007, just two days after the new law came into effect. The timing of the killing will likely allow the homeowner to avoid any criminal or civil prosecution for the killing. For a brief overview of Mr. Albrecht's life and the incidents leading to his death, see generally Tanya Eiserer, *Carter Albrecht, Musician with Sorta, New Bohemians, Killed*, DALLAS MORNING NEWS, September 4, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/090407glalbrecht.9abfe1fe.html>.

<sup>165</sup>See Act of May 27, 1995, 74th Leg., R.S., ch. 235, § 1, sec. 9.32(a), 1995 Tex. Gen. Laws 2141 (amended 2007) (current version at TEX. PEN. CODE ANN. § 9.32(a)(2)).

<sup>166</sup>*Id.* § 9.32(b).

<sup>167</sup>*Id.*

family of the deceased would also have a cause of action against Tony for wrongful death in a civil suit.<sup>168</sup> Tony would likely have his fate in the hands of a jury to determine whether his actions were reasonable. If the determination is that he should have retreated because he was inside the house and had the ability to withdraw from the situation and contact police or take action short of using deadly force, Tony may incur criminal liability. He also faces the possibility of a harsh monetary penalty for his actions in the civil suit.

Post-2007 Law: Under the new "Stand Your Ground" laws, it is likely Tony will not face criminal or civil charges.<sup>169</sup> The new law states that if Tony was in a place where he had a right to be present (his home), did not provoke the stranger (Tony was asleep when the incident started), and was not engaged in criminal activity at the time he shot the stranger (just standing in his house), then he has no duty to retreat from the danger. The law still requires that the use of deadly force be reasonable, but the determination of reasonable force may be presumed in certain situations.<sup>170</sup> The presumption of reasonableness would apply to Tony because he "knew . . . that the person against whom the deadly force was used . . . was attempting to enter [his home] unlawfully and with force."<sup>171</sup> The killing is now presumed a justified killing under the law. Tony is once again immune from civil suit because his use of deadly force was justified under Chapter 9 of the Texas Penal Code.<sup>172</sup>

#### *D. Impact of the 2007 Amendments to Areas Outside the Habitation*

Tony Rommo and Carrie Overwood were sitting in his pretty little souped-up four-wheel drive in an empty parking lot after attending the Dallas Cowboys game. The two of them sat in the running vehicle discussing the Cowboys' victory and the stellar play of the team's quarterback. Suddenly, a masked man appeared with a knife, yelling at the

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<sup>168</sup> See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

<sup>169</sup> Although the statute does not grant immunity from prosecution, it is likely that the prosecutor, in exercising his discretion, would not bring formal charges. See Editorial, *Looking for Answers: Some Tragedies, There's No Making Sense Of*, DALLAS MORNING NEWS, September 10, 2007, available at [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-shooting\\_10edi.ART.State.Edition1.4274d9e.html](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-shooting_10edi.ART.State.Edition1.4274d9e.html).

<sup>170</sup> TEX. PEN. CODE ANN. § 9.32(b)-(c).

<sup>171</sup> *Id.* § 9.32(b)(1)(A).

<sup>172</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (Vernon 2007).

two of them to get out of the car as he frantically pulled at the door handle of the locked truck. Tony, the lawful owner of a concealed handgun, reached under the driver's seat where he was sitting and grabbed the gun. He fired the gun and killed the masked man.

Pre-2007 law: Under the pre-2007 version of the self-defense statute, Tony's use of deadly force is not justified. The pre-2007 Penal Code imposed a duty to retreat if a reasonable person in the actor's situation would have retreated.<sup>173</sup> The only exception to this rule was restricted to an unlawful entry into the habitation of the actor.<sup>174</sup> Tony and Carrie were sitting in his vehicle; therefore, the exception to the duty to retreat would not apply because it did not extend to areas outside the home. Tony's liability would then come down to whether a reasonable person in Tony's situation would not have retreated. The facts of this situation weigh heavily in favor of a reasonable person retreating from the altercation before using deadly force. Tony and Carrie were sitting in a locked car, in an empty parking lot, and the masked man was wielding only a knife. Retreating in this situation would not have put the two of them at risk of death or serious bodily injury. As the facts stated, the car was already running, so it would have been a simple escape for Tony if he simply put the truck in drive and took off. The fact that the man carried only a knife shows that simply putting a short distance between himself and the attempted robber would have been sufficient to escape the danger of the situation. Due to the ease of escape and the limited potential of the attempted robber to actually cause death or serious bodily injury, Tony had a duty to retreat. His failure to retreat from the situation, instead resorting to the use of deadly force, leaves him without justification for the killing. Tony may also face civil liability for his actions.<sup>175</sup>

Post-2007 law: The result of this situation would be different under the new Penal Code sections. The law now allows Tony to resort to deadly force regardless of the ease of retreat, so long as Tony was in a place where he had a right to be (in his truck), did not provoke the attempted robber (the man appeared without provocation), and was not engaged in criminal activity at the time of the use of deadly force (just innocently sitting in his

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<sup>173</sup> See Act of May 27, 1995, 74th Leg., R.S., ch. 235, § 1, sec. 9.32(a)(2), 1995 Tex. Gen. Laws 2141 (amended 2007) (current version at TEX. PEN. CODE ANN. § 9.32(a)(2)).

<sup>174</sup> See *id.* § 9.32(b).

<sup>175</sup> See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 284, 80th Leg., C.S. (2007).

truck).<sup>176</sup> Once again, this use of deadly force still has to be reasonable in the situation. In this situation, Tony has multiple options for showing that he is entitled to the presumption that his actions were reasonable. The actions of Tony would be reasonable if he knew that the person against whom the deadly force was used: (1) was attempting to enter unlawfully and with force, his occupied vehicle; or (2) was attempting to remove unlawfully and with force, the actor (Tony) from his vehicle; or (3) was committing or attempting to commit aggravated robbery.<sup>177</sup> In this case, all three of these circumstances are present. The masked man grabbed at the door handle of the truck and yelled at Tony and Carrie to get out of the truck. Grabbing at the handle of the truck showed that he was unlawfully attempting to enter the vehicle. These same actions show that the man was attempting to remove Tony and Carrie from the vehicle. He yelled at them to get out of the vehicle and displayed a knife, showing the intent to have them get out of the truck. The man also met the elements necessary to show that he was attempting to commit aggravated robbery because he was attempting to steal the vehicle and displaying the knife, a deadly weapon.<sup>178</sup> Because of these actions by the masked man, Tony is entitled to the presumption that his use of deadly force was reasonable in the situation. Because Tony's acts were justified under Section 9.32(a)(2) the defense carries over to any potential civil suit.<sup>179</sup> This situation shows how the broad applicability of the new "Stand Your Ground" law will drastically affect the determination of liability in a particular case.

## VI. CONCLUSION

Due to the fact that these changes were so recently enacted, the actual application of this statute will not be known for some time. The new Texas law follows the trend started by Florida in 2006. For a better understanding of how these "Stand Your Ground" laws will be applied, it may be necessary to study cases from other jurisdictions which have been applying these types of laws for a sufficient time to give insight into how the Texas courts are likely to decide issues which will arise in the future.

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<sup>176</sup> See TEX. PEN. CODE ANN. § 9.32(c).

<sup>177</sup> See TEX. PEN. CODE ANN. § 9.32.

<sup>178</sup> TEX. PEN. CODE ANN. § 29.03 (Vernon 2003); TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon Supp. 2007); *Miller v. State*, 177 S.W.3d 1, 4 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (finding knife used during robbery to be a deadly weapon).

<sup>179</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (Vernon Supp. 2007).

Opponents of the bill expressed concerns that this law would lead to mayhem in the streets and a “Wild West mentality.”<sup>180</sup> However, looking at Florida as a guide, it seems that the mentality of citizens has remained relatively unchanged.<sup>181</sup> The purpose of expanding the castle doctrine and eliminating the duty to retreat was to provide fairness to citizens by avoiding a situation where “[d]etached reflection . . . in the presence of an uplifted knife” was required.<sup>182</sup> This law allows people to worry about self-preservation and protection of family and property without having to be concerned with future liability, thus providing greater protection to the party with the greatest need for that protection, the victims of potentially life-threatening situations. While the 2007 amendments provide greater protection to citizens forced to make instantaneous decisions to use deadly force, the reasonableness requirement prevents abuse and over-application of the expanded castle doctrine.

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<sup>180</sup> See Catalfamo, *supra* note 136, at 543.

<sup>181</sup> *Id.* at 543–44 n.178.

<sup>182</sup> *Id.* at 544–45.