From: Robert B. REICH
Sent: Tuesday, July 09, 2013 1:51 PM
To: Owen, Sue (CMG-Austin)

Texas law allows the use of deadly force to prevent someone from stealing one's property. In early June, pursuant to this law, a jury acquitted a man who had shot and killed a prostitute, and the court allowed the decision to stand. The man's defense was that the prostitute had taken his money but had not provided the services he believed he had purchased from her, and that therefore he had a right to use deadly force to prevent the prostitute from stealing what was rightfully his. But the prostitute was not his property. Prostitution is illegal in Texas, and prostitutes are typically prosecuted under laws making it illegal to create a public nuisance after dark. So the only way to make any sense of the acquittal is to conclude that in Texas, at least on occasion, it is legal to shoot people creating a public nuisance after dark.
See http://www.nydailynews.com/news/crime/jilted-john-acquitted-texas-prostitute-death-article-1.1365975

From: Robert B. REICH
Sent: Monday, July 15, 2013 8:00 PM
To: Owen, Sue (CMG-Austin)

I can't read the jury's opinion in this case -- and the judge's apparent acquiescence to how the jury interpreted the law -- in any other way than to conclude that in Texas it's legal to shoot to kill someone who is engaged in a public nuisance. In this case, the defendant's attorney argued that he had a right to shoot her because she was running off with his property. But anyone exercising common sense would understand that this was at most a contractual dispute over what he paid for and what she owed him in return. Moreover, prostitution is normally treated in Texas, as elsewhere, as a public nuisance. So by the weird logic of this case, the defendant shot and killed a woman who was at most a public nuisance, and got away with it. By inference, then, it is legal in Texas to kill someone who is engaged in a public nuisance.

From: Robert B. REICH
Sent: Tuesday, July 16, 2013 7:50 PM
To: Owen, Sue (CMG-Austin)

Defense attorney's point is nonsensical. What if I sold you a used car for $3,000, and you discovered it didn't work? By the defense attorney's logic, you have a legal right to shoot me dead, because I made off with your "property." The property analogy is even more absurd when the sale is illegal. What if I sold you $3,000 worth of cocaine, and you discovered I had sold you only $1,000 worth. By the defense attorney's logic, you have a legal right to shoot me dead, because I made off with your "property" -- even though it's unlawful for me to have the property in question.

What's particularly awful about this case is that the judge allowed the verdict to stand. Judges have the authority to overrule a verdict when judges determine that a jury misinterpreted a law. So the fact that the judge in this case allowed the verdict to stand means that, technically, it is permissible in Texas to shoot a prostitute who doesn't deliver the services she/he promised. But as I've pointed out, prostitution is normally prosecuted as a nuisance. Hence, logically, it is permissible in Texas to shoot someone who commits a public nuisance.

I rest my case.

From: Robert B. REICH
Sent: Tuesday, July 16, 2013 10:38 PM
To: Owen, Sue (CMG-Austin)

The question is: what's the law in Texas with regard to when someone can shoot another person? Deadly force can be used to stop a theft in the nighttime when someone is fleeing and the property owner has no other way to stop the thief. But to call a prostitute's failure to provide the services someone thought they had purchased a "theft in the nighttime," justifying deadly force, is clearly absurd -- even if the prostitute is "fleeing immediately" and even if the purchaser believes he can't get the property back any other way -- because it presumes that the money paid for the prostitute is "property" and the prostitute's failure to perform is a "theft" of that property. Failure to perform a service that's been paid for is not a theft. It may constitute a fraud or a broken contract, but not a theft. Failure to perform a service that is illegal -- kidnapping a baby, bribing a legislator, delivering cocaine, or providing sex for money -- is not a theft.

So how do we make any sense out of the jury's decision? It must be that the jury regarded prostitution as a crime, warranting the use of deadly force. But since prostitution is not a crime warranting the use of deadly force -- it is typically prosecuted under nuisance laws -- one way to view the jury's decision (and the judge's acquiescence to its interpretation of the law) is that it is legal to use deadly force to stop someone from committing a nuisance. If people feel my interpretation is wrong, they must believe that the de facto law in Texas is that anyone who pays a prostitute (or cocaine dealer or baby kidnapper or any other illegal practice) and is dissatisfied with the seller's services can kill the seller if the seller begins running away. My interpretation is as consistent with the jury's decision as the other.

And on that note I'm afraid I really do have to rest my case, because I've got a pile of work to do.

From: <Dix>, George E
Date: Tuesday, July 9, 2013 9:48 AM
(Forwarded to Sue Owen)

I am unaware of any Texas law permitting what Reich says is permitted. We have a broad provision permitting even deadly force to prevent certain crimes (or to prevent escape with property taken after such crimes) "during the nighttime." Tex. Penal Code sec. 9.42. This does authorize deadly force to prevent imminent commission of--among other crimes--criminal mischief during the nighttime." But this is not criminal only if the person using the deadly force reasonably believes the crime cannot be prevented by other means, such as nondeadly force.

Hope this helps.

[[[NOTE from Owen: The next email is about Reich's example of a spraypainter on a highway; I asked Dix first about the main question, then in a followup asked him about Reich's example.]]]

From: Dix, George E
Sent: Tuesday, July 09, 2013 1:49 PM
To: Owen, Sue (CMG-Austin)

Well, it is now a little more complicated. Criminal mischief under section 28.03 of the Penal Code covers damage to property and can be committed by (among other things) making markings on the tangible property of another. Conceivably, then, it would not be a crime in some circumstances to shoot someone to prevent them from completing spray painting.

Probably the justification/defense of deadly force to protect property in Section 9.42 applies if and only if-
1) the shooter is in lawful possession of the property;
2) the shooter reasonably believes the commission of criminal mischief by spray painting is imminent; and
3) the shooter reasonably believes the property to be spray painted cannot be protected by other means (or that using those other means would expose the shooter to a substantial risk of death or serious injury).

The first requirement--lawful possession of the threatened property does not apply if the shooter reasonably believes the threatened harm constitutes theft or criminal mischief. Section 9.43. In that situation, the shooter can act to protect property of a third person. The shooter, then, would not have to own the overpass targeted by the spray-painter.

Procedurally, if the evidence raises an issue as to whether a criminal defendant's actions come within the "justification" of deadly force to protect property, the prosecution must prove the defendant does <u>not</u> come within the justification. A defendant must raise the matter but if s/he does, the State must disprove it.

But I stress this is not an example of a rule that in Texas one can "shoot someone who's committing a 'public nuisance' under the cover of dark." It is an example of a Texas rule providing broadly (and probably unwisely) that one can use even deadly force to protect property from loss or damage. This rule (in section 9.42) also applies to other crimes against property, including arson, robbery, and burglary. It applies in addition to theft in the nighttime.

Please keep in mind that even if the law does not make it a crime to shoot a spray-painter, shooting such a person is almost certainly neither a good idea or the morally-appropriate thing to do.

From: Dix, George E
Sent: Tuesday, July 16, 2013 6:02 PM
To: Owen, Sue (CMG-Austin)

Hi Sue-

Reich, in my view, is simply wrong. I'm not sure what he means by "the judge's apparent acquiescence to how the jury interpreted the law" in the *Ezekiel* case--the jury can acquit on an extralegal theory and there is nothing the judge can do about it. The judge in *Ezekiel* set out the applicable law in the jury charge, which I have not seen. My guess is that in *Ezekiel* the judge instructed the jury on section 9.42 law and not on the law Reich seems to think the jury applied.

Reich argues that *Ezekiel* cannot reflect an application of section 9.42 law because the facts could not possibly be construed as showing theft: "But anyone exercising common sense would understand that this was at most a contractual dispute over what he paid for and what she owed him in return."

In fact, anyone with a basic knowledge of theft law would understand that this could have been theft rather than "just" a contractual dispute. It could be theft under section 31.02 of the Penal Code if the deceased promised to provide sex for the payment and at that time did not intend to provide that sex if she was paid. Theft can be committed by using certain kinds of deception to persuade the victim to hand property over to the potential thief, as long as the potential thief has the intent to deprive the victim of the property. Under Section 31.01(1)(E), theft can be committed by deception consisting of promising performance that one does not intend to perform.

Keep in mind the burden of proof--the State in *Ezekiel* had to show beyond a reasonable doubt that the defendant did not reasonably believe the force was necessary to keep the victim from escaping with the property Ezekiel reasonably believed had been taken from him by theft. The jury might not have been convinced this actually was theft, but also convinced the State did not prove, beyond a reasonable doubt, that it was not theft.

So, I think *Ezekiel* either (a) reflects application of section 9.42 law as we talked about it; or (b) was an instance of a jury exercising its power to acquit despite the law. My own purely personal guess is that the case reflects some of each.

Juries can acquit despite the law in all jurisdictions. Such acquittals, even if they occur and show a pattern, do not reflect "the law" in any meaningful sense. In fact, this is often called "jury nullification," because when it occurs it nullifies--rather than reflects or establishes--the law.

In the unlikely event that the *Ezekiel* jury did acquit because the jurors thought the deceased was committing a public nuisance and it should be legal to kill such people to prevent such nuisances, the case stands alone. It cannot be regarded as reflecting or establishing "the law."

Hope this helps.

George

From: Dix, George E
Sent: Wednesday, July 17, 2013 8:07 AM
To: Owen, Sue (CMG-Austin)

Just wanted to stress one thing: Reich is correct that no basis for seeing theft would exist if the facts showed only that Frago and Ezekiel entered into a contract for Frago to provide sex for money, Ezekiel gave her money, and she declined to provide sex. This would be, in Reich's terminology, "at most a contractual dispute over

what he paid for and what she owed him in return."

Theft would occur only when (and if) when Frago promised sex (and by that promise obtained the money from Ezekiel) she essentially misrepresented her intention at that time to keep the promise. In other words, she obtained the money by a promise she made with the intent to not keep it. What would make this criminal and not merely a civil contract dispute is the misrepresentation by which Frago obtained the money.

The pattern described by Barrera would certainly support a defense argument that when Frago made the promise by which she obtained money from Ezekiel, she did not intend to keep that promise.

George

From: Clay Abbott
Sent: Wednesday, July 17, 2013 9:31 AM
To: Owen, Sue (CMG-Austin)

Defense of property would oxide theft AND CRIMINAL MISCHIEF(destruction of property like graffiti) . Some kinds of destruction of property are public nuisance. But that term is not in self defense law. Killing prostitutes to stop prostitution is not self defense/defense of property. Killing anyone to stop robbery is. Killing some one because they might commit theft, no. Killing someone to stop a theft if the other conditions are met, maybe.