

LEGISLATIVE BILL 895

Approved by the Governor March 1, 1972

Introduced by John W. DeCamp, 40th District; Ernest Chambers, 11th District

AN ACT relating to law; to provide for justification for use of force under certain conditions; to define terms; to provide severability; and to declare an emergency.
Be it enacted by the people of the State of Nebraska,

Section 1. As used in this act, unless the context otherwise requires:

(1) Unlawful force shall mean force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status; not amounting to a privilege to use the force;

(2) Assent shall mean consent, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily harm;

(3) Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, shall not constitute deadly force;

(4) Actor shall mean any person who uses force in such a manner as to attempt to invoke the privileges and immunities afforded him by this act; and

(5) Dwelling shall mean any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging.

Sec. 2. (1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

(a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

(b) Neither this act nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Sec. 3. (1) Except as provided in subsection (2) of this section, conduct is justifiable when it is required or authorized by:

(a) The law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties;

(b) The law governing the execution of legal process;

(c) The judgment or order of a competent court or tribunal;

(d) The law governing the armed services or the lawful conduct of war; or

(e) Any other provision of law imposing a public duty.

(2) Sections 4 to 11 of this act shall apply to:

(a) The use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(b) The use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(3) The justification afforded by subsection (1) of this section shall apply:

(a) When the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) When the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

Sec. 4. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.

(3) The use of such force is not justifiable under this section to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(a) The actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest;

(b) The actor has been unlawfully dispossessed of the property and is making a reentry or recapture justified by section 6 of this act; or

(c) The actor believes that such force is necessary to protect himself against death or serious bodily harm.

(4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:

(a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(1) The actor shall not be obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(2) A public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape shall not be obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(5) Except as required by subsections (3) and (4) of this section, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do, or abstaining from any lawful action.

(6) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can do so, unless the person confined has been arrested on a charge of crime.

Sec. 5. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) The actor would be justified under section 4 of this act in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect;

(b) Under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(c) The actor believes that his intervention is necessary for the protection of such other person.

(2) Notwithstanding subsection (1) of this section:

(a) When the actor would be obliged under section 4 of this act to retreat, to surrender the possession of a thing or to comply with a demand before using force in self-protection, he shall not be obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person;

(b) When the person whom the actor seeks to protect would be obliged under section 4 of this act to retreat, to surrender the possession of a thing or to comply with a demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to do so before using force in his protection if the actor knows that he can obtain complete safety in that way; and

(c) Neither the actor nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

Sec. 6. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(a) To prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property; Provided, that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or

(b) To effect an entry or reentry upon land or to retake tangible movable property; Provided, that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession; and provided further, that:

(1) The force is used immediately or on fresh pursuit after such dispossession; or

(2) The actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or reentry until a court order is obtained.

(2) For the purposes of subsection (1) of this section:

(a) A person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless such property is movable and was and still is located on land in his possession;

(b) A person who has been dispossessed of land does not regain possession thereof merely by setting foot thereon; and

(c) A person who has a license to use or occupy real property is deemed to be in possession thereof except against the licensor acting under claim of right.

(3) The use of force is justifiable under this section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:

(a) Such request would be useless;

(b) It would be dangerous to himself or another person to make the request; or

(c) Substantial harm will be done to the physical condition of the property which is sought to be protected before the request can effectively be made.

(4) The use of force to prevent or terminate a trespass is not justifiable under this section if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily harm.

(5) The use of force to prevent an entry or reentry upon land or the recaption of movable property is not justifiable under this section, although the actor believes that such reentry or recapture is unlawful, if:

(a) The reentry or recapture is made by or on behalf of a person who was actually dispossessed of the property; and

(b) It is otherwise justifiable under subdivision (1) (b) of this section.

(6) The use of deadly force is not justifiable under this section unless the actor believes that:

(a) The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(b) The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(1) Has employed or threatened deadly force against or in the presence of the actor; or

(2) The use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.

(7) The justification afforded by this section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so with safety to the property, unless the person confined has been arrested on a charge of crime.

(8) The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:

(a) Such device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm;

(b) Such use of the particular device to protect such property from entry or trespass is reasonable under the circumstances, as the actor believes them to be; and

(c) Such device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(9) The use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing the actor from going to a place

to which he may lawfully go is justifiable if:

(a) The actor believes that the person against whom he uses force has no claim of right to obstruct the actor;

(b) The actor is not being obstructed from entry or movement on land which he knows to be in the possession or custody of the person obstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless the circumstances, as the actor believes them to be, are of such urgency that it would not be reasonable to postpone the entry or movement on such land until a court order is obtained; and

(c) The force used is not greater than would be justifiable if the person obstructing the actor were using force against him to prevent his passage.

Sec. 7. (1) Subject to the provisions of this section and of section 9 of this act, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) The use of force is not justifiable under this section unless:

(a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony;

(b) Such person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(1) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(2) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(4) The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(5) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest is justified in using any force which he would be justified in using if the arrest were lawful; provided, that he does not believe the arrest is unlawful.

(6) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, if:

(a) He believes the arrest is lawful; and

(b) The arrest would be lawful if the facts were as he believes them to be.

(7) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, except that:

(a) Any limitations imposed by the other provisions of this act on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply

notwithstanding the criminality of the conduct against which such force is used; and

(b) The use of deadly force is not in any event justifiable under this subsection unless:

(1) The actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(2) The actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

(8) The justification afforded by subsection (7) of this section extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can do so, unless the person confined has been arrested on a charge of crime.

Sec. 8. The use of force upon or toward the person of another is justifiable if:

(1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation; or

(2) The actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:

(a) The actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class

or other group, and that the use of such force is consistent with the welfare of the minor; and

(b) The degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under subdivision (1) (b) of this section;

(3) The actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person, and:

(a) Such force is used for the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of his misconduct, or, when such incompetent person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in such institution; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme or unnecessary pain, mental distress, or humiliation;

(4) The actor is a doctor or other therapist or a person assisting him at his direction, and:

(a) Such force is used for the purpose of administering a recognized form of treatment which the actor believes to be adapted to promoting the physical or mental health of the patient; and

(b) Such treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent or guardian or other person legally competent to consent in his behalf, or the treatment is administered in an emergency when the actor believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent;

(5) The actor is a warden or other authorized official of a correctional institution, and:

(a) He believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution, unless his belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his error is the result of ignorance or mistake as to the provisions of this act, any other provision of the criminal law, or the law governing the administration of the institution;

(b) The nature or degree of force used is not forbidden by section 3 or 4 of this act; and

(c) If deadly force is used, its use is otherwise justifiable under this act;

(6) The actor is a person responsible for the safety of a vessel or an aircraft or a person acting at his direction, and:

(a) He believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order, unless such belief in the lawfulness of the order is erroneous and such error is the result of ignorance or mistake as to the law defining such authority; and

(b) If deadly force is used, its use is otherwise justifiable under this act; and

(7) The actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train or other carrier or in a place where others are assembled, and:

(a) He believes that the force used is necessary for such purpose; and

(b) Such force used is not designed to cause or known to create a substantial risk of causing death, bodily harm, or extreme mental distress.

Sec. 9. (1) The justification afforded by sections 4 to 7 of this act is unavailable when:

(a) The actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous; and

(b) His error is the result of ignorance or mistake as to the provisions of this act, any other provision of the criminal law, or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under sections 3 to 8 of this act but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is

unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under sections 3 to 8 of this act in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Sec. 10. Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:

(1) This act or the law defining the offense deals with the specific situation involved; or

(2) A legislative purpose to exclude the justification claimed otherwise plainly appears.

Sec. 11. (1) In any prosecution based on conduct which is justifiable under this act, justification is an affirmative defense.

(2) The fact that conduct is justifiable under this act does not abolish or impair any remedy for such conduct which is available in any civil action.

Sec. 12. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.

Sec. 13. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.