

LEGISLATURE OF NEBRASKA

ONE HUNDRED SECOND LEGISLATURE

SECOND SESSION

**LEGISLATIVE BILL 804**

Introduced by Lautenbaugh, 18.

Read first time January 05, 2012

Committee: Judiciary

A BILL

1 FOR AN ACT relating to crimes and offenses; to amend sections  
2 28-1406, 28-1407, 28-1412, 28-1413, 28-1414, 28-1415,  
3 28-1416, and 29-439, Reissue Revised Statutes of  
4 Nebraska; to change provisions relating to justification  
5 for use of force; to harmonize provisions; and to repeal  
6 the original sections.

7 Be it enacted by the people of the State of Nebraska,

1           Section 1. Section 28-1406, Reissue Revised Statutes of  
2 Nebraska, is amended to read:

3           28-1406 As used in sections 28-1406 to 28-1416 and  
4 section 3 of this act, unless the context otherwise requires:

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

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

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

24           (4) Actor ~~shall mean~~ means any person who uses force in  
25 such a manner as to attempt to invoke the privileges and immunities

1 afforded him by sections 28-1406 to 28-1416 and section 3 of this  
2 act, except any duly authorized law enforcement officer of the State  
3 of Nebraska or its political subdivisions;

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

7 (6) Public officer ~~shall mean~~ means any elected or  
8 appointed officer or employee of the State of Nebraska or its  
9 political subdivisions, except any duly authorized law enforcement  
10 officer of the State of Nebraska or its political subdivisions.

11 Sec. 2. Section 28-1407, Reissue Revised Statutes of  
12 Nebraska, is amended to read:

13 28-1407 (1) Conduct which the actor believes to be  
14 necessary to avoid a harm or evil to himself or herself or to another  
15 is justifiable if:

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

19 (b) Neither sections 28-1406 to 28-1416 and section 3 of  
20 this act nor other law defining the offense provides exceptions or  
21 defenses dealing with the specific situation involved; and

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

24 (2) When the actor was reckless or negligent in bringing  
25 about the situation requiring a choice of harms or evils or in

1 appraising the necessity for his or her conduct, the justification  
2 afforded by this section is unavailable in a prosecution for any  
3 offense for which recklessness or negligence, as the case may be,  
4 suffices to establish culpability.

5           Sec. 3. (1) For purposes of sections 28-1409 to 28-1411,  
6 an actor's use of force, up to and including deadly force, is  
7 presumed to be immediately necessary to protect the actor or another  
8 person against death or serious bodily harm if the person against  
9 whom the force is used, at the time the force is used, is unlawfully  
10 and forcibly entering, or has unlawfully and forcibly entered and is  
11 present within, the actor's dwelling or occupied motor vehicle or is  
12 unlawfully and forcibly removing or attempting to so remove another  
13 person against such other person's will from the actor's dwelling or  
14 occupied motor vehicle.

15           (2) The presumption set forth in subsection (1) of this  
16 section does not apply if, at the time the force is used, the person  
17 who uses defensive force is engaged in or attempting to escape from a  
18 crime or is using the dwelling or occupied motor vehicle to further a  
19 crime.

20           (3) In all cases in which the presumption described in  
21 this section does not apply, an actor who uses force, including  
22 deadly force, within the actor's dwelling or occupied motor vehicle  
23 may still seek justification under any other relevant provision of  
24 sections 28-1406 to 28-1416 and section 3 of this act.

25           Sec. 4. Section 28-1412, Reissue Revised Statutes of

1 Nebraska, is amended to read:

2           28-1412 (1) Subject to the provisions of this section and  
3 of section 28-1414, the use of force upon or toward the person of  
4 another is justifiable when the actor is making or assisting in  
5 making an arrest and the actor believes that such force is  
6 immediately necessary to effect a lawful arrest.

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

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

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

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

16           (a) The arrest is for a felony;

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

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

22           (d) The actor believes that:

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

25           (ii) There is a substantial risk that the person to be

1 arrested will cause death or serious bodily harm if his or her  
2 apprehension is delayed.

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

12 (5) A private person who is summoned by a peace officer  
13 to assist in effecting an unlawful arrest is justified in using any  
14 force which he or she would be justified in using if the arrest were  
15 lawful; ~~Provided, that as long as he or she~~ does not believe the  
16 arrest is unlawful.

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

22 (a) He or she believes the arrest is lawful; and

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

25 (7) The use of force upon or toward the person of another

1 is justifiable when the actor believes that such force is immediately  
2 necessary to prevent such other person from committing suicide,  
3 inflicting serious bodily harm upon himself or herself, committing or  
4 consummating the commission of a crime involving or threatening  
5 bodily harm, damage to or loss of property, or a breach of the peace,  
6 except that:

7 (a) Any limitations imposed by the other provisions of  
8 sections 28-1406 to 28-1416 and section 3 of this act on the  
9 justifiable use of force in self-protection, for the protection of  
10 others, the protection of property, the effectuation of an arrest, or  
11 the prevention of an escape from custody shall apply notwithstanding  
12 the criminality of the conduct against which such force is used; and

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

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

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

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

6           Sec. 5. Section 28-1413, Reissue Revised Statutes of  
7 Nebraska, is amended to read:

8           28-1413 The use of force upon or toward the person of  
9 another is justifiable if:

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

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

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

20           (2) The actor is the guardian or other person similarly  
21 responsible for the general care and supervision of an incompetent  
22 person and:

23           (a) Such force is used for the purpose of safeguarding or  
24 promoting the welfare of the incompetent person, including the  
25 prevention of his or her misconduct, or, when such incompetent person

1 is in a hospital or other institution for his or her care and  
2 custody, for the maintenance of reasonable discipline in such  
3 institution; and

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

8 (3) The actor is a doctor or other therapist or a person  
9 assisting him or her at his or her direction and:

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

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

20 (4) The actor is a warden or other authorized official of  
21 a correctional institution and:

22 (a) He or she believes that the force used is necessary  
23 for the purpose of enforcing the lawful rules or procedures of the  
24 institution, unless his or her belief in the lawfulness of the rule  
25 or procedure sought to be enforced is erroneous and his or her error

1 is the result of ignorance or mistake as to the provisions of  
2 sections 28-1406 to 28-1416 and section 3 of this act, any other  
3 provision of the criminal law, or the law governing the  
4 administration of the institution;

5 (b) The nature or degree of force used is not forbidden  
6 by section 28-1408 or 28-1409; and

7 (c) If deadly force is used, its use is otherwise  
8 justifiable under sections 28-1406 to 28-1416 and section 3 of this  
9 act;

10 (5) The actor is a person responsible for the safety of a  
11 vessel or an aircraft or a person acting at his or her direction and:

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

18 (b) If deadly force is used, its use is otherwise  
19 justifiable under sections 28-1406 to 28-1416 and section 3 of this  
20 act; and

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

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

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

4                   Sec. 6. Section 28-1414, Reissue Revised Statutes of  
5 Nebraska, is amended to read:

6                   28-1414 (1) The justification afforded by sections  
7 28-1409 to 28-1412 is unavailable when:

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

12                   (b) His or her error is the result of ignorance or  
13 mistake as to the provisions of sections 28-1406 to 28-1416 and  
14 section 3 of this act, any other provision of the criminal law, or  
15 the law governing the legality of an arrest or search.

16                   (2) When the actor believes that the use of force upon or  
17 toward the person of another is necessary for any of the purposes for  
18 which such belief would establish a justification under sections  
19 28-1408 to 28-1413 but the actor is reckless or negligent in having  
20 such belief or in acquiring or failing to acquire any knowledge or  
21 belief which is material to the justifiability of his or her use of  
22 force, the justification afforded by ~~those~~ such sections is  
23 unavailable in a prosecution for an offense for which recklessness or  
24 negligence, as the case may be, suffices to establish culpability.

25                   (3) When the actor is justified under sections 28-1408 to

1 28-1413 in using force upon or toward the person of another but he or  
2 she recklessly or negligently injures or creates a risk of injury to  
3 innocent persons, the justification afforded by ~~these~~ such sections  
4 is unavailable in a prosecution for such recklessness or negligence  
5 towards innocent persons.

6 Sec. 7. Section 28-1415, Reissue Revised Statutes of  
7 Nebraska, is amended to read:

8 28-1415 Conduct involving the appropriation of, seizure  
9 or destruction of, damage to, intrusion on, or interference with  
10 property is justifiable under circumstances which would establish a  
11 defense of privilege in a civil action based thereon, unless:

12 (1) Sections 28-1406 to 28-1416 and section 3 of this act  
13 or the law defining the offense deals with the specific situation  
14 involved; or

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

17 Sec. 8. Section 28-1416, Reissue Revised Statutes of  
18 Nebraska, is amended to read:

19 28-1416 (1) ~~In~~ Except as provided in section 3 of this  
20 act, in any prosecution based on conduct which is justifiable under  
21 sections 28-1406 to 28-1416 and section 3 of this act, justification  
22 is an affirmative defense.

23 (2) The fact that conduct is justifiable under sections  
24 28-1406 to 28-1416 ~~does not abolish or impair~~ and section 3 of this  
25 act abolishes any remedy for such conduct which is available in any

1 civil action.

2 Sec. 9. Section 29-439, Reissue Revised Statutes of  
3 Nebraska, is amended to read:

4 29-439 (1) If a peace officer receives complaints under  
5 section 28-323 from two or more opposing persons, the officer shall  
6 evaluate each complaint separately to determine who was the  
7 predominant aggressor. If the officer determines that one person was  
8 the predominant aggressor, the officer need not arrest the other  
9 person believed to have committed an offense. In determining whether  
10 a person is the predominant aggressor, the officer shall consider,  
11 among other things:

12 (a) Prior complaints under section 28-323;

13 (b) The relative severity of the injuries inflicted on  
14 each person;

15 (c) The likelihood of future injury to each person; and

16 (d) Whether one of the persons acted with a justified use  
17 of force under sections 28-1406 to 28-1416 and section 3 of this act.

18 (2) In addition to any other report required, a peace  
19 officer who arrests two or more persons with respect to such a  
20 complaint shall submit a detailed, written report setting forth the  
21 grounds for arresting multiple parties.

22 Sec. 10. Original sections 28-1406, 28-1407, 28-1412,  
23 28-1413, 28-1414, 28-1415, 28-1416, and 29-439, Reissue Revised  
24 Statutes of Nebraska, are repealed.