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NOTES

JUSTIFIABLE USE OF DEADLY FORCE BY THE POLICE: A STATUTORY SURVEY

In recent years much concern has arisen regarding the use of physical force by police authorities.¹ It is the purpose of this survey to examine the outer limit of such force, namely the justifiable use of deadly force.²

At the outset much confusion can be avoided by defining the scope of this study. The focus is upon the statutory response of the states³ to this area of the criminal law known as "justification."⁴ No attempt

1. See, e.g., Aspen, *Arrest And Arrest Alternatives: Recent Trends*, 1966 U. ILL. L. FORUM 241 (1966); Avins, *Equal Protection Against Unnecessary Police Violence and the Original Understanding of the Fourteenth Amendment: A Comment*, 19 BUF. L. REV. 599 (1970); Locke, *Police Brutality and Civilian Review Boards: A Second Look*, 44 J. URBAN L. 625 (1967); Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L. C. OF P. S. 225 (1963); Tsimbinos, *Justified Use of Deadly Force*, 4 CRIM. L. BUL. 3 (1968); Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566 (1961). See also MODEL PENAL CODE § 3.07, Comment 1, n.1 at 53 (Tent. Draft No. 8, 1958) [hereinafter cited as MPC Tent. Draft].

2. Compare these three statutory approaches to the definition of "deadly force":

... "deadly force" means 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, does not constitute deadly force

MODEL PENAL CODE § 3.11(2) (1962).

Force which is likely to cause death or great bodily harm . . . includes:

- (1) The firing of a firearm in the direction of the person to be arrested, even though no intent exists to kill or inflict great bodily harm; and
- (2) The firing of a firearm at a vehicle in which the person to be arrested is riding.

ILL. ANN. STAT. ch. 38, § 7-8 (Smith-Hurd 1964).

"Deadly physical force" means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

N.Y. PENAL LAW § 10.00(11) (McKinney 1967).

3. More than one half of the states have statutes dealing with the justifiable use of deadly force. Note 28 *infra*.

4. A distinction between justifiable and excusable homicide must be made, for it is only the former with which we are concerned. Justifiable homicide is authorized or commanded by law. Homicide which is not justifiable, but committed under circum-

is made to deal with the rights of private individuals, *i.e.* the civil liability of the police,⁵ or the police officer's right of self defense.⁶ Rather, the aim here is to examine the statutorily sanctioned use of deadly force primarily in the areas of effecting an arrest and preventing an escape.⁷

HISTORICAL PERSPECTIVE

The common law approach to the authorization of the use of deadly force by a police officer was based upon the simplistic distinction between a felony and a misdemeanor.⁸ As a general rule, deadly force was justified when necessarily⁹ used to combat a felon, but not a misdemeanor.¹⁰ The rationale of the common law rule rested upon the fact that all felonies were punishable by death.¹¹

stances not involving criminal guilt is deemed excusable. R. PERKINS, *CRIMINAL LAW* 33 (2d ed. 1969). See also J. MILLER, *CRIMINAL LAW* § 83 (1934).

5. See RESTATEMENT (SECOND) OF TORTS § 131 (1965); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Annot., 60 A.L.R.2d 873 (1958).

6. See, e.g., Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 283-85 (1940). See generally J. MILLER, *supra* note 4, § 84(e); R. PERKINS, *supra* note 4, at 997-1009; 1 O. WARREN, *HOMICIDE* § 148 (1938).

7. See, e.g., MODEL PENAL CODE §§ 3.07(1), (2), (3) (1962).

8. The term felony long ago lost its original and characteristic meaning. In the early common law it denoted those offenses which were punishable by forfeiture of lands and goods. This was the only test. The criterion of felony was not the character or degree of the unlawful act, but rather the penal consequence of forfeiture. At a later period those crimes which worked a forfeiture were spoken of as felonies, and eventually the actual crime committed was designated by the word felony. These crimes were of such a nature that capital punishment was often superadded, according to the degree of guilt, and in time felony erroneously came to include all crimes punishable by death.

Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582, 583 (1929) (footnotes omitted).

The common law divided crimes into three classes, namely treason, felony, and misdemeanor. The felonies were: felonious homicide (murder or manslaughter), arson, rape, robbery, burglary, larceny, prison breach and rescue of a felon. Misdemeanors comprised those crimes other than treason or felonies. R. PERKINS, *supra* note 4, at 9-11.

9. The concept of "necessary" will be developed at note 20, *infra* and accompanying text.

10. See J. MILLER, *supra* note 4, §§ 63, 64; R. PERKINS, *supra* note 4, at 980-81; O. WARREN, *supra* note 6, §§ 145-47; Comment, *The Use of Deadly Force in the Arrest of Misdemeanants*, 5 MO. L. REV. 93 (1940); Note, *Legalized Murder of a Fleeing Felon*, *supra* note 8; Note, *The Application of Deadly Force to Effectuate an Arrest*, 5 WASHBURN L. J. 262 (1966).

11. Refer to the discussion of felonies at common law, *supra* note 8.

It was considered dangerous to allow a felon to be at large; and in committing a felony, the actor forfeited his right to life. The extirpation was but a premature execution of the inevitable judgment.¹²

Although the protections and formalities of an orderly trial and conviction were dispensed with, the killing of a felon resulted in no greater consequences than those authorized for the punishment of the offense.¹³

The "felony-misdemeanor" rule was invoked in varying situations: the effectuation of an arrest,¹⁴ the prevention of an escape¹⁵ or the commission of a crime,¹⁶ and the suppression of a riot.¹⁷ Some courts modified the general rule that a felony authorized the necessary use of deadly force in the prevention of the commission of a crime.¹⁸ A distinction was made between a dangerous or violent felony and one that was not dangerous; the latter was considered akin to a misdemeanor in that it did *not* justify homicide by the person attempting to prevent the crime.¹⁹

The main limitation upon the use of deadly force was the requirement that it be a "last resort" alternative by the police officer in accomplishing his lawful purpose. That is, its use had to be deemed

12. Note, *Legalized Murder of a Fleeing Felon*, *supra* note 8 at 583 (footnotes omitted).

13. MPC Tent. Draft, Comment 3, at 56. In the case of a misdemeanor, the punishment was quite different. The rationale was, therefore, that "[i]n such cases it is better, and more in consonance with modern notions regarding the sanctity of human life, that the offender escape than that his life be taken, in a case where the extreme penalty would be a trifling fine or a few days' imprisonment in jail." *State v. Smith*, 127 Iowa 534, 537, 103 N.W. 944, 945 (1905).

14. J. MILLER, *supra* note 4, § 64(b); R. PERKINS, *supra* note 4, at 980-81; O. WARREN, *supra* note 6, § 145; Perkins, *The Law of Arrest*, *supra* note 6 at 268-80; Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448 (1931); Note, *Officer's Right to Use Deadly Force to Arrest Fleeing Arrestee*, 24 IOWA L. REV. 154 (1938); Comment, *supra* note 10; Note, *The Application of Deadly Force to Effectuate an Arrest*, *supra* note 10.

15. J. MILLER, *supra* note 4, § 64(c); R. PERKINS, *supra* note 4, at 980-81; O. WARREN, *supra* note 6, § 145; Perkins, *The Law of Arrest*, *supra* note 6 at 285-89.

16. J. MILLER, *supra* note 4, § 64(f); R. PERKINS, *supra* note 4, at 990-91; O. WARREN, *supra* note 6, § 147.

17. See J. MILLER, *supra* note 4, § 64(d); O. WARREN, *supra* note 6, § 147; MPC Tent. Draft, Comment 5, at 68. See generally R. PERKINS, *supra* note 4, at 405-08.

18. Note 16, *supra*.

19. E.g., *Storey v. State*, 71 Ala. 329, 339 (1882). See also R. PERKINS, *supra* note 4, at 983-84, 990-92; Note, *Criminal Law—Use of Deadly Force in Preventing Escape of Fleeing Minor Felon*, 34 N.C.L. REV. 122 (1955).

"necessary,"²⁰ no other reasonable means being available to carry out his legal duty.

Problem areas in the simplistic common law approach to justification developed. For example, what was the criminal liability of a police officer who necessarily killed a fleeing suspect, believed to be a felon, but who was in fact a misdemeanor? Most courts, in applying the common law rule, held that if the police officer had reasonable grounds to believe that the criminal was a felon, the homicide was justifiable.²¹ Consequently, no criminal liability resulted. Other courts, however, took the position that a felon *in fact* was required by the law for homicide to be deemed justifiable.²² Illustrative of this view, a Kentucky court reasoned that:

. . . The common-law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death. But where no felony has been committed the reason for the rule does not apply, and it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common-law rule to cases of suspected felonies.²³

In effect, a strict or absolute liability was imposed on the police officer, notwithstanding that he may have acted reasonably and in good faith.

Today, not only does the distinction between a felony and a misdemeanor have a different meaning and consequence than it had at common law, but, as will be demonstrated later, many modern state statutes have not clarified whether a felony in fact is required.²⁴ Few felonies

20. The term "necessary" denotes an objective standard. For example, the cases speak of "the measure of necessary force [as] that which an ordinary prudent and intelligent person, with the knowledge and in the same situation of the arresting officer, would have deemed necessary." *Barrett v. United States*, 64 F.2d 148, 149 (App. D.C. 1933), citing *Castle v. Lewis*, 254 F. 917, 925 (8th Cir. 1918). For a more detailed discussion of the language used by the courts in describing "necessary", see Note, *Officer's Right to Use Deadly Force to Arrest Fleeing Arrestee*, *supra* note 14, at 159-61.

21. *R. PERKINS*, *supra* note 4, at 981-83; Note, *Officer's Right to Use Deadly Force to Arrest Fleeing Arrestee*, *supra* note 14, at 156-61; Note, *The Application of Deadly Force to Effectuate an Arrest*, *supra* note 10, at 264-65 (1966).

22. *Id.* See also the discussion in MPC Tent. Draft, Comment 3, at 57.

23. *Petrie v. Cartwright*, 114 Ky. 103, 105, 70 S.W. 297, 299 (1902). See also *Commonwealth v. Duerr*, 158 Pa. Super. 484, 45 A.2d 235 (1946).

24. See notes 33 to 42 *infra* and accompanying text.

are now punishable by death, many "new" felonies have been created by statute,²⁵ and some misdemeanors are certainly of a more dangerous nature than some particular felonies.²⁶ The perpetuation of the common law "felony-misdemeanor" rule has, therefore, been aptly described as an anachronism in the modern criminal law.²⁷ What has been the response of state legislatures to the anachronistic common law "felony-misdemeanor" rule of justifiable homicide with regard to the police?

THE STATUTORY RESPONSE

More than one half of the states have enacted statutes dealing with the justifiable use of deadly force,²⁸ most of them containing an express

25. See MPC Tent. Draft, Comment 3, at 56-57; Note, *Officer's Right to Use Deadly Force to Arrest Fleeing Arrestee*, *supra* note 14, at 156.

26. Today, the significance of the distinction between felony and misdemeanor has wholly altered. Relatively few crimes are punishable by death. A very small percentage of arrests actually made are for offenses which are capitally punishable. . . . Moreover, under modern legislation, many statutory misdemeanors involve conduct more dangerous to life and limb than some felonies. Compare, for example, such felonies as the distillation of alcohol in violation of the revenue laws, on the one hand, and such misdemeanors as reckless and drunken driving, on the other. Even a felony which often is committed in such a way as to endanger life, may in many particular cases be committed in a fashion which creates no such peril. Accordingly the felony-misdemeanor distinction is inherently incapable of separating out those persons of such dangerousness that the perils arising from failure to accomplish immediate apprehension justify resort to extreme force to accomplish it. . . . As a result of these difficulties and the awareness that the reckless use of firearms by peace officers can create a social problem of no mean proportions, a number of attempts have been made to alter and rationalize the existing rules relating to the use of deadly force in arrest situations. . . .

MPC Tent. Draft, Comment 3, at 56-58.

27. Note, *Justification for the Use of Force in the Criminal Law*, *supra* note 1, at 583.

28. ALASKA STAT. § 11.15.090 (1962); ARIZ. REV. STAT. ANN. § 13-461 (1956); ARK. STAT. ANN. §§ 41-2237 to 39 (Repl. Vol. 1964); CAL. PENAL CODE § 196 (West 1969); COLO. REV. STAT. ANN. § 40-2-16 (1963); CONN. PENAL CODE § 24 (effective 1971); FLA. STAT. § 782.02 (1965); GA. CODE ANN. § 26-902 (1969); IDAHO CODE ANN. § 18-4011 (1948); ILL. ANN. STAT. ch. 38, §§ 7-5, 7-9 (Smith-Hurd 1964); IND. ANN. STAT. § 9-1007 (Repl. Vol., Burns 1956); LA. REV. STAT. ANN. § 14:20 (1950); MINN. STAT. ANN. §§ 609.06, 609.065 (1964); MISS. CODE ANN. § 2218 (1942); MO. ANN. STAT. § 559.040 (1949); MONT. REV. CODE ANN. § 94-2512 (Repl. Vol. 1969); NEV. REV. STAT. § 200.140 (1963); N.J. REV. STAT. § 2A:113-5 (1969); N.M. STAT. ANN. § 40A-2-7 (1953); N.Y. PENAL LAW § 35.30 (McKinney Supp. 1970); N.D. CENT. CODE § 12-27-04 (1960); OKLA. STAT. ANN. tit. 21, § 732 (1958); ORE. REV. STAT. § 163.100(1) (1968); S.D. CODE § 22-16-32 (1967); TEX. PEN. CODE ANN. art. 1210, 1212 (1961); UTAH CODE ANN.

provision relating to the police officer.²⁹ Others are cast in terms of "any person"³⁰ and thereby, impliedly at least, include police officers. These statutes have been categorized herein and are accompanied by a brief analysis.

Codification of the Common Law

The majority of the states which have enacted justifiable homicide statutes³¹ have essentially codified the common law "felony-misdemeanor" rule.³² Mississippi is illustrative of this type of statutory approach.

The killing of a human being by the act, procurement, or omission of another shall be justifiable in the following cases:

(a) When committed by public officers, or those acting by their command in their aid and assistance, in obedience to any judgment of a competent court;

(b) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty;

(c) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in retaking any felon who has been rescued or has escaped;

(d) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in arresting any felon fleeing from justice;

. . . .

§ 76-30-9 (1953); VT. STAT. ANN. tit. 13, § 2305 (Revision 1959); WASH. REV. CODE ANN. § 9.48.160 (1961); WIS. STAT. §§ 939.45, 939.48 (1958).

29. E.g., ALASKA STAT. § 11.15.090 (1962); CAL. PENAL CODE § 196 (West 1969); IDAHO CODE ANN. § 18-4011 (1948); N.M. STAT. ANN. § 40A-2-7 (1953).

30. E.g., GA. CODE ANN. § 26-902 (Revision 1969); LA. REV. STAT. ANN. § 14:20 (1950); MO. ANN. STAT. § 559.040 (1949).

31. Note 28, *supra*.

32. See ARIZ. REV. STAT. ANN. § 13-461 (1956); ARK. STAT. ANN. §§ 41-2237 to 2239 (Repl. Vol. 1964); CAL. PENAL CODE § 196 (West 1969); COLO. REV. STAT. ANN. § 40-2-16 (1963); CONN. PENAL CODE § 24 (effective 1971); FLA. STAT. § 782.02 (1965); IDAHO CODE ANN. § 18-4011 (1948); MINN. STAT. ANN. § 609.065(3) (1964); MISS. CODE ANN. § 2218 (1942); MONT. REV. CODES ANN. § 94-2512 (Repl. Vol. 1969); NEV. REV. STAT. § 200.140 (1963); N.M. STAT. ANN. § 40A-2-7 (1953); N.D. CENT. CODE § 12-27-04 (1960); OKLA. STAT. ANN. tit. 21, § 732 (1958); S.D. CODE § 22-16-32 (1967); UTAH CODE ANN. § 76-30-9 (1953); WASH. REV. CODE ANN. § 9.48.160 (1961).

(h) When necessarily committed in lawfully suppressing any riot or in lawfully keeping and preserving the peace.³³

It is evident from this statute that the requisites for the sanctioned use of deadly force by a police officer in the effectuation of an arrest or the prevention of an escape are identical. The homicide must have been "necessarily committed," and the arrestee or escapee must have been a felon. A basic weakness of this simplistic approach is that it is not clear from the statute whether or not a felon in fact is required in order to justify the homicide.³⁴ A literal reading of the statute indicates the requirement of an actual felon. Consequently, if the arrestee or escapee is not in fact a felon, a homicide is not justifiable, and a police officer who killed such a person would be criminally responsible. Although most courts at common law had held that the felony requisite was satisfied if the police officer had reasonable grounds to believe that the arrestee or escapee was a felon,³⁵ it is disturbing that in the drafting of a statute the ambiguity surrounding the felony in fact problem was not avoided by the use of more lucid terminology.

Seven states within the "codification of the common law" classification have attempted to remedy this problem by utilization of the language "a person charged with a felony" in lieu of merely "a felon."³⁶ Of these seven states, five have chosen to apply this language in the case of an arrest but not in the prevention of an escape.³⁷ For example:

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance either:

1. In obedience to any judgment of a competent court, or
2. Necessarily committed:

(a) In overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty.

(b) In retaking *felons* who have been rescued or who have escaped.

33. MISS. CODE ANN. § 2218 (1942).

34. See notes 21-24 *supra* and accompanying text.

35. *Id.*

36. ARK. STAT. ANN. § 41-2238 (Repl. Vol. 1964); ARIZ. REV. STAT. ANN. § 13-461(c) (1956); CAL. PENAL CODE § 196(3) (West 1969); COLO. REV. STAT. ANN. § 40-2-16 (1963); IDAHO CODE ANN. § 18-4011(3) (1948); MONT. REV. CODES ANN. § 94-2512(3) (Repl. Vol. 1969); UTAH CODE ANN. § 76-30-9(3) (1953).

37. ARIZ. REV. STAT. ANN. § 13-461(c) (1956); CAL. PENAL CODE § 196(3) (West 1969); IDAHO CODE ANN. § 18-4011(3) (1948); MONT. REV. CODE ANN. § 94-2512(3) (Repl. Vol. 1969); UTAH CODE ANN. 76-30-9(3) (1953).

(c) In arresting *persons charged with felony* who are fleeing from justice or resisting arrest.³⁸

There appears to be no valid basis for the distinction between an arrest and an escape in this type of statute. Literally construed, the above statute requires a felon in fact in the case of an escape, while requiring only "a person charged with a felony" in an arrest situation. By comparison, the remaining two states adopting the "charged with a felony" language have used the same or similar qualifying language in *both* the arrest and escape situations.³⁹ In these two states then, it is clear that a felony in fact is not necessary in either an arrest or an escape. Additionally, statutes of two other states within the common law classification appear to indicate that a felony in fact is required in an arrest, but not in an escape.⁴⁰ This approach places the "in fact" emphasis precisely opposite the previously mentioned five states which appear to require a felony in fact for an escape but not for an arrest.⁴¹ It is difficult, therefore, to rationalize the legislative intent which resulted in such arbitrary and inconsistent modifications of the common law rule.

If one assumes that the objective of a statute is to provide that a felony in fact is not required in either an arrest or an escape, such a statute can readily be drafted. The phrase "charged with a felony" in only one of the arrest or escape situations leads to confusion which might best be avoided by an approach akin to the recent Connecticut formulation:

(a) For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law

38. ARIZ. REV. STAT. ANN. § 13-461 (1956) (emphasis added).

39. ARK. STAT. ANN. §§ 41-2238, 2239 (Repl. Vol. 1964); COLO. REV. STAT. ANN. § 40-2-16 (1963). These statutes are essentially identical, and each provides that a police officer may be justified in killing an arrestee who is "charged with a felony" or an escapee who is "accused of any felony."

40. Homicide is justifiable when committed by a public officer, or person acting under his command and in his aid, in the following cases:

. . . .

3. When necessary in retaking an escaped or rescued prisoner who has been committed, arrested for, or convicted of a felony; or in arresting a person who has committed a felony and is fleeing from justice

NEV. REV. STAT. § 200.140(3) (1963). See also WASH. REV. CODE ANN. § 9A.160(3) (1961).

41. Notes 37, 38 *supra* and accompanying text.

is otherwise does not render justifiable the use of physical force to make an arrest or to prevent an escape from custody.

....

(c) A peace officer is justified in using deadly physical force upon another person for a purpose specified in . . . [this section] only when he reasonably believes that such is necessary to:

....

(2) *effect an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony.*⁴²

This statute is a great improvement over the other statutory formulations discussed, for the use of the language "a person whom he [the policeman] reasonably believes has committed or attempted to commit a felony" clearly and simply solves the felony in fact problem.

Before leaving the discussion of the "codification of the common law" statutes, a brief mention of the use of deadly force by the police in a riot situation is in order.⁴³ As seen in section "h" of the Mississippi statute reproduced above,⁴⁴ all that is required to justify a homicide is that it be "necessarily committed in lawfully suppressing any riot" This is a common provision⁴⁵ among the more than thirty states which have adopted such statutes expressly dealing with the suppression of riots by the police.⁴⁶ It is interesting to note, parenthetically, that a riot is generally a statutory misdemeanor,⁴⁷ and this permitted use of deadly force to combat a misdemeanor constitutes an exceptional situation. The English common law provided for justifiable homicide in the suppression of a riot,⁴⁸ but the adoption of the English "Riot

42. CONN. PENAL CODE § 23(a), (c) (effective 1971) (emphasis added). For a general discussion of the newly enacted penal code, see Comment, *The Structure of Connecticut's New Penal Code*, 2 CONN. L. REV. 661 (1970).

43. The use of deadly force by the police in a riot situation has been recently discussed in depth elsewhere. E.g., McGee, *Arrests In Civil Disturbances: Reflections On the Use of Deadly Force In Riots*, 22 RUTG. L. REV. 716 (1968); Comment, *Kill or Be Killed?: Use of Deadly Force In the Riot Situation*, 56 CAL. L. REV. 829 (1968).

44. Note 33 *supra* and accompanying text.

45. E.g., ALASKA STAT. § 11.15.100 (1962); CAL. PENAL CODE § 197(4) (West 1969); FLA. STAT. §§ 782.02(3), 870.05 (1965); MICH. COMP. LAWS ANN. § 750.527 (1968); MO. ANN. STAT. § 559.040(3) (1949); N.J. REV. STAT. § 2A:126-6 (1969); TEX. PEN. CODE art. 1219 (1961); VT. STAT. ANN. tit. 13, §§ 904, 2305(3) (Revision 1959).

46. MPC Tent. Draft, Comment 5, at 68.

47. E.g., CONN. PENAL CODE §§ 185 to 188 (effective 1971); GA. CODE ANN. § 26-2601 (1969); NEB. REV. STAT. §§ 28-804, 29-102 (Reissue 1964); S.D. CODE § 22-10-7 (1967). See also Annot., 49 A.L.R. 1135 (1927).

48. See note 17, *supra*.

Act" in 1714 made a riot a felonious offense.⁴⁹ Finally, it must be noted that the police officer's right of self-defense might often be invoked in a riot situation.⁵⁰

"Crime-Escape" Statutes

Alaska and Oregon have drastically altered the common law "felony-misdemeanor" rule with regard to an escape. For example, the Alaska statute provides that:

The killing of a human being is justifiable when committed by a public officer or a person acting in the aid and assistance and by the command of a public officer

. . . .

(3) when necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued; or

(4) when necessarily committed in arresting a person fleeing from justice who has committed a felony.⁵¹

The phrase "a person . . . who has committed a felony" implies that a felon in fact is necessary to justify the homicide of an arrestee. In the prevention of an escape, however, the statute provides only that the escapee be charged with a crime. Thus, a crime, impliedly not a crime in fact, rather than a felony is required. An escapee who is merely charged with a misdemeanor can apparently be justifiably killed by a police officer in order to prevent an escape. This approach is indeed much harsher upon the escapee than the common law "felony-misdemeanor" rule.

The Texas "Self-Defense" Statute

Texas has perhaps the most unique provision applicable to police officers within its justifiable homicide statute.

Art. 1210. Homicide by an officer in the execution of lawful orders of magistrates and courts is justifiable when he is violently resisted and has just grounds to fear danger to his own life in executing the order.

49. 1 Geo. I, stat. 2, c. 5 (1714); See R. PERKINS, *supra* note 4, at 407.

50. See the discussion in MPC Tent. Draft, Comment 5, at 68.

51. ALASKA STAT. §§ 11.15.090 (3), (4) (1962). See also ORE. REV. STAT. §§ 163.100(1)(b), (c) (1968).

Art. 1212.

. . . .

8. The officer or other person executing an order of arrest is required to use such force as may be necessary to prevent an escape when it is attempted, but he shall not in any case kill one who attempts to escape, unless in making or attempting such escape the life of the officer is endangered, or he is threatened with great bodily injury.

9. In overcoming a resistance to the execution of an order, the officer or person executing the same may oppose such force as is necessary to overcome the resistance, but he shall not take the life of the person resisting unless he has just ground to fear that his own life will be taken or that he will suffer great bodily injury in the execution of the order.

10. A prisoner under sentence of death or of imprisonment in the penitentiary or attempting to escape from the penitentiary may be killed by the person having legal custody of him, if his escape can in no other manner be prevented.⁵²

A policeman is apparently not privileged to resort to the use of deadly force against an arrestee or escapee (except one attempting to escape from a penitentiary) unless the officer's own life is endangered, or he is threatened with great bodily injury. In essence, this is tantamount to a requirement of self-defense.⁵³ The focus of the statute is upon the dangerousness of the arrestee vis-à-vis the police officer, and not on the statutory classification of the criminal's act as a felony or misdemeanor. Only in the case of a prisoner under sentence of death, or of a penitentiary escapee, may the officer resort to deadly force when his own life is not endangered. Although this is an exception to the "self-defense" provisions of the statute, it is justified by the rationale that an escapee under such conditions would normally be inclined toward a dangerous nature.⁵⁴

"Dangerous Felony" Statutes

As a result of the harshness of the application of the common law "felony-misdemeanor" rule today,⁵⁵ a number of states have enacted

52. TEX. PEN. CODE ANN. arts. 1210, 1212(8), (9), (10) (1961).

53. See, e.g., *Grohoske v. State*, 124 Tex. Crim. 338, 61 S.W.2d 847 (1933).

54. Illinois, as well as the Model Penal Code, has similarly distinguished between an escape from custody and an escape from a detention facility. For a discussion of the rationale underlying this type of distinction, see note 65 *infra* and accompanying text.

55. Note 26 *supra*.

justifiable homicide statutes which depart from the common law by requiring that the felony in question be of a "dangerous" nature.⁵⁶ The commission of "any" felony is not enough to justify a homicide as was true at common law; it must be a "forcible felony" involving danger to life or great bodily harm:

A homicide is justifiable:

(1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger; or

(2) When committed, for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm, by one who reasonably believes that such an offense is about to be committed and that such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without the killing.⁵⁷

Since it is not permissible to use deadly force to prevent the commission of "any" felony under the statute, a fortiori it is not permissible for a policeman to use deadly force to effect an arrest or prevent an escape of one who has committed such a felony.⁵⁸ For example, following a theft of an automobile and a high speed chase by the police, a thief attempting to flee on foot was shot and killed by a policeman attempting to prevent his escape. It was held, under the Louisiana statute reproduced above, that this was not a justifiable homicide.⁵⁹ The court reasoned that once

56. See GA. CODE ANN. § 26-902 (Revision 1969); ILL. ANN. STAT. ch. 38, §§ 7-5, 7-9 (Smith-Hurd 1964); LA. REV. STAT. ANN. § 14:20 (1950); N.Y. PENAL LAW § 35.30 (McKinney Supp. 1970).

57. LA. REV. STAT. ANN. § 14:20 (1950). The recently adopted Georgia statute is very similar:

(a) A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person, or the commission of a forcible felony. . . .

GA. CODE ANN. § 26-902 (1969).

58. See *Sauls v. Hutto*, 304 F. Supp. 124, 130 (E.D. La. 1969).

59. *Id.* at 129-32.

the high speed chase was ended and the thief had abandoned the stolen automobile, the theft was complete and the felony no longer involved any danger to others, as it had while the chase was in progress. Had the felon been killed during the chase the homicide would have been justifiable; but once the chase had ended, the homicide was not committed in self-defense or for the purpose of preventing a violent or forcible felony.⁶⁰

Illinois has also adopted a statute which departs from the common law approach:

(a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

- (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
- (2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.⁶¹

....

(a) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(b) A guard or other peace officer is justified in the use of force, including force likely to cause death or great bodily harm, which he reasonably believes to be necessary to prevent the escape from a penal institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence

60. *Id.* at 131.

61. ILL. ANN. STAT. ch. 38, § 7-5(a) (Smith-Hurd 1964). See generally Aspen, *Arrest and Arrest Alternatives: Recent Trends*, 1966 U. ILL. L. FORUM 241 (1966).

for an offense or awaiting trial or commitment for an offense.⁶²

"Forcible felony" means treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnaping, aggravated battery and any other felony which involves the use or threat of physical force or violence against any individual.⁶³

The use of deadly force is restricted, in general, to certain enumerated felonies and any others involving physical violence, or to situations which endanger human life or threaten great bodily harm.⁶⁴ Prevention of an escape from a penal institution (as distinguished from personal custody after arrest) is the sole exception. The rationale for the less restrictive rule in this situation is said to be based on (1) the need to deter other prisoners, likewise confined, from making a similar attempt either immediately or at a later time; (2) the belief that the guard in charge of the prisoners cannot be expected to know the history of each prisoner,

62. ILL. ANN. STAT. ch. 38, § 7-9 (Smith-Hurd 1964).

63. *Id.* § 2-8.

64. New York's recently amended statute is very much in accord with Illinois:

1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

2. The fact that a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody. . . .

N.Y. PENAL LAW § 35.30 (McKinney Supp. 1970). See generally Tsimbinos, *The Justified Use of Deadly Force*, 4 CRIM. L. BUL. 3 (1968).

i.e., whether his offense was a forcible felony or whether he is likely to endanger the lives of others; (3) the knowledge that the sudden and unexpected nature of an escape leaves the guard no time to investigate into the person's possession of a deadly weapon; and lastly, (4) the recognition that the desperate nature of such an escapee is such that he can be expected to use any instrumentality of deadly force he finds available.⁶⁵

In four states, then, the use of deadly force by the police is restricted to forcible or violent felonies which include the use or the threatened use of dangerous physical force.⁶⁶

The Model Penal Code

The Model Penal Code, promulgated in 1962, provides:

Section 3.07. Use of Force in Law Enforcement.

(1) *Use of Force Justifiable to Effect an Arrest.* Subject to the provisions of this Section and of Section 3.09, 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) *Limitations on the Use of Force.*

(a) The use of force is not justifiable under this Section unless:

(i) 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

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

(b) The use of deadly force is not justifiable under this Section unless:

65. ILL. ANN. STAT. ch. 38, § 7-9, Comment, at 287 (Smith-Hurd 1964). Compare the New York provision:

A guard or peace officer who is charged with the duty of guarding prisoners in a detention facility, . . . or while in transit to or from a detention facility, may use physical force when and to the extent that he reasonably believes such to be necessary to prevent the escape of a prisoner from a detention facility or from custody while in transit thereto or therefrom.

N.Y. PENAL LAW 35.30(5) (McKinney Supp. 1970). See also the Commentary to this section of the statute indicating that this provision includes the use of deadly force. *Id.* at Commentary, 49.

66. Note 56 *supra*.

- (i) the arrest is for a felony; and
- (ii) the 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; and
- (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
- (iv) 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.

(3) *Use of Force to Prevent Escape from Custody.* 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) *Use of Force to Prevent Suicide or the Commission of a Crime.*

(a) 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:

- (i) any limitations imposed by the other provisions of this Article 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

- (ii) 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.

(b) The justification afforded by this Subsection 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, unless the person confined has been arrested on a charge of crime.⁶⁷

Section 3.09. Mistake of Law as to Unlawfulness of Force or Legality of Arrest; Reckless or Negligent Use of Otherwise Justifiable Force; Reckless or Negligent Injury or Risk of Injury to Innocent Persons.

(1) The justification afforded by [Section] . . . 3.07 . . . 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 due to ignorance or mistake as to the provisions of the Code, 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 [Section 3.07] . . . 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 [Section 3.07] . . . in using force upon or toward the person of another but he reck-

67. MODEL PENAL CODE § 3.07 (1962).

lessly 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.⁶⁸

Even the most cursory examination of the Code reveals its departure from the common law, as well as its influence upon the Illinois and New York statutes.⁶⁹ Although the Model Penal Code is much more comprehensive than either of these statutes, the basic thrust is the same. The hallmark of the Code, and similarly of the "dangerous felony" statutes, is the sanction of the use of deadly force by the police only when the felon's conduct includes the use or threatened use of deadly force, or when there is a substantial risk that the felon will cause death or serious bodily harm if his apprehension is delayed.⁷⁰ The Code expressly recognizes the need to temper the use of deadly force with the potential risk of injury to innocent third persons.⁷¹ In brief, the Model Penal Code is bottomed on the principle that ". . . the use of deadly force should only be justifiable in those situations where the *immediate* apprehension of the person to be arrested overrides all competing considerations."⁷²

CONCLUSION

At common law all felonies were punishable by death, thereby establishing the basis for the rule that deadly force was justified when neces-

68. *Id.* § 3.09. See also the Model Penal Code's definition of deadly force, note 2 *supra*.

69. The Illinois and New York statutes are reproduced in the text accompanying notes 61-63, 64-65 *supra*.

Compare MODEL PENAL CODE §§ 3.07(2)(b)(iii), (5)(a)(ii)(1) (1962) with N.Y. PENAL LAW § 35.30(2) (McKinney Supp. 1970) (innocent third parties); MODEL PENAL CODE § 3.09 (1962) with N.Y. PENAL LAW § 35.30(2) (McKinney Supp. 1970) (reckless conduct of the police officer); MODEL PENAL CODE § 3.07(3) (1962) with ILL. ANN. STAT. ch. 38, § 7-9 (Smith-Hurd 1964) and N.Y. PENAL LAW § 35.30(5) (McKinney Supp. 1970) (escape from custody-detention); MODEL PENAL LAW § 3.07(2)(b)(iv) (1962) with ILL. ANN. STAT. ch. 38, § 7-5(a) (Smith-Hurd 1964) and N.Y. PENAL LAW § 35.30(1)(a)(i), (1)(c) (McKinney Supp. 1970) (forcible felony concept or dangerousness if apprehension is delayed).

70. MODEL PENAL CODE §§ 3.07(2)(b)(iv), (5)(a)(ii)(1) (1962). Compare GA. CODE ANN. § 26-902(a) (1969); ILL. ANN. STAT. ch. 38, § 7-5(a) (Smith-Hurd 1964); LA. REV. STAT. ANN. § 14:20(2) (1950); N.Y. PENAL LAW § 35.30(1) (McKinney Supp. 1970).

71. MODEL PENAL CODE § 3.07(2)(b)(iii) (1962). Compare N.Y. PENAL LAW § 35.30(2) (McKinney Supp. 1970).

72. MPC Tent. Draft, Comment 3, at 58-59.

sary to combat a felon, but not a misdemeanor. As the law evolved, many new felonies were created by statute, while the use of the death penalty became restricted to but a very few crimes. Although the basis for the common law rule had disappeared, the rule itself remained. As a result, today it is possible, under the majority of state statutes, for a suspected criminal to be justifiably killed by a police officer in the course of an arrest or of preventing an escape for *any* felony regardless of the dangerousness of the crime involved. A few states have taken cognizance of this anachronism in the law and departed from the common law rule in an attempt to balance the interests of society against the competing interest of the criminal's life. In formulating a new rule, these states have specified that the criminal's life may not justifiably be taken unless such a person commits a forcible or dangerous felony, or threatens the life or person of another. This new approach appears far more valid than the perpetuation of the outmoded, and arguably immoral, common law rule.

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