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POLICEMAN'S USE OF DEADLY FORCE IN ILLINOIS

INTRODUCTION

"Police Brutality Again," the headline blares; "Chicago Cop Kills Youth," the story describes the circumstances. A long haired youth walked by a policeman who was ticketing a car parked illegally on Rush Street in Chicago, Illinois. The youth spat upon the policeman and ran away. The patrolman warned him to halt and when the youth failed to heed the order, the policeman shot him to prevent his escape. The youth was pronounced dead on arrival at Henrotin Hospital.

The above story is hypothetical. But were it to occur, an offhand glance at the facts would indicate that a murder had been committed. However, under Illinois law, the above factual situation would probably be found to be justifiable homicide, not murder.

The Illinois Criminal Code provides:

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 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.¹

The youth in the hypothetical above could not have been otherwise apprehended. If spitting at a policeman is a forcible felony within the definition of the Illinois Criminal Code, the policeman has a complete defense to the charge of homicide. A forcible felony is defined in Illinois as, "treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery and any other felony which involves the use or threat of physical force or violence against any individual."² The youth in the hypothetical has in law, if not in fact, committed aggravated battery, a forcible felony. A battery is committed when one "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of any insulting or provoking nature with an individual."³ Rollin M. Perkins states unequivocally that, "Willfully spitting on another is a battery,"⁴ and cites statutes which so define the act.⁵

¹ Ill. Rev. Stat. ch. 38, § 7-5 (1969).

² *Id.* at § 2-8.

³ *Id.* at § 12-13.

⁴ R. Perkins, Perkins on Criminal Law 80 (1957).

⁵ *Id.* n.14.

A battery becomes aggravated under the Illinois Criminal Code when: "A person who in committing a battery . . . knows the individual harmed to be a peace officer, or a person summoned and directed by him . . . while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest. . . ." ⁶ The youth is thus guilty of a forcible felony and the policeman was completely justified in shooting him to prevent his escape. The result is clearly absurd, as the drafters of the Illinois Criminal Code would undoubtedly agree. Although the drafters did not intend this type of loophole to exist, it does exist; and the code, therefore, should be changed. This note will analyze how section 7-5 of the Illinois Criminal Code developed and discuss how it should be changed.

PROPOSAL FOR A NEW SECTION

The use of deadly force to effectuate an arrest has been allowed historically in the case of a felony, but not in that of a misdemeanor. The reason for this distinction was that at common law all felonies were punishable by death; committing a felony was considered a forfeiture of all rights. By fleeing, the criminal postponed certain death later, for certain death now.⁷ Today of course, this distinction is meaningless. Few crimes are now punishable by death. No legal execution in the United States has occurred for many years. Governors are presently awaiting a ruling by the United States Supreme Court on the constitutionality of capital punishment. The common law distinction, then, has no relevancy today. Courts have recognized the anachronistic character of the distinction in dicta as long ago as the 1800's. As early as 1877, in *Reneau v. State*,⁸ the court stated:

It is considered better to allow one guilty only of a misdemeanor to escape altogether than to take his life. And we may add that it may be a question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character created by comparatively recent legislation, whether as to these even escape would not be better than to take life.⁹

Again, in *United States v. Clark*,¹⁰ an 1887 case, a military guard appealed his homicide conviction for shooting an escaping prisoner. The conviction was affirmed since the escapee was a misdemeanant, but Judge Brown added:

I doubt, however, whether this law [justification for shooting escaping felon] would be strictly applicable at present day. Suppose, for example, a person were arrested for petit larceny, which is a felony at common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportionate to the magnitude of the offense.¹¹

⁶ Ill. Rev. Stat. ch. 38, § 12-4(b)6 (1969).

⁷ *Supra* n.4 at 874.

⁸ 2 Lea 720 (Tenn. 1877).

⁹ *Id.* at 721-22.

¹⁰ 31 F. 710 (6t Cir. 1887).

¹¹ *Id.* at 713.

Not until 1961 did Illinois recognize the need for change.¹² The drafters' comments to the present code section state:

To authorize the killing of an offender who is not likely to harm anyone if he successfully resists arrest, simply on the ground that his offense is designated as a felony instead of a misdemeanor, seems indefensible.¹³

The drafters state also that the new section was essentially a restatement of the old law "but with the right to use deadly force limited to situations in which the offender is likely to inflict death or great bodily harm if he is not arrested immediately, and the officer's use of deadly force is the only reasonable alternative to the successful resistance to or flight from such arrest."¹⁴

Thus, the drafters adopted the new statute. Surely the use of force likely to cause death or great bodily harm to prevent the escape of one who had spit upon a policeman was not what the drafters had contemplated. Their intention was clearly to establish a more logical standard. To paraphrase their own words—authorizing the killing of an offender who is not likely to harm anyone if he successfully resists arrest, simply on the ground that his offense is designated a forcible felony instead of a felony or misdemeanor, seems indefensible.

Under our statute the youth in the hypothetical, or a man breaking into a car to steal a package of cigarettes,¹⁵ or the suburbanite burning his stamp collection in the fireplace to collect the insurance money,¹⁶ would all be guilty of a forcible felony, while a drunken driver or a man stealing the car itself would not, since neither is guilty of a forcible felony under the Illinois Criminal Code. Clearly the drunken driver and the car thief are more dangerous to others.

The drafters of the American Law Institute's *Model Penal Code* recognized the problem in the proposed official draft of 1958. They did not attempt, as the comment to the Code indicates:

to draw up a list of serious felonies which ordinarily create substantial perils of death or serious injury. Such an approach is attended, first, with the difficulty that any list is not likely to be sufficiently comprehensive. But more serious, knowledge that the person has committed a felony such as arson, does not reveal enough about the person's actual character and disposition. The use of deadly force ought to be regulated

¹² Ill. Rev. Stat. ch. 38, § 368 (1961) still recognized the old common law rule. It read:

If any officer, in the execution of his office, in a criminal case, having legal process, be resisted and assaulted, he shall be justified if he kill the assailant. If an officer or private person attempt to take a person charged with treason, murder, rape, burglary, robbery, arson, perjury, forgery, counterfeiting, or other felony, and he be resisted in the endeavor to take the person accused, and, to prevent the escape of the accused, by reason of such resistance, he be killed, the officer or private person or killing shall be justified: Provided, that such officer or private person, previous to such killing, shall have used all reasonable efforts to take the accused without success, and that from all probability there was no prospect of being able to prevent injury from such resistance and the consequent escape of such accused person.

¹³ S.H.A. ch. 38, § 7-5 at 277 (1964).

¹⁴ *Id.* at 276.

¹⁵ This act would constitute burglary under Ill. Rev. Stat. ch. 38, § 19-1 (1969).

¹⁶ This act would constitute arson under Ill. Rev. Stat. ch. 38, § 20-1(b) (1969).

so far as possible by reference to the character of the particular offender and this, in turn, requires consideration of the actual conduct with which he is charged rather than the general category of crime in which it falls.¹⁷

The American Law Institute recommended a solution for this problem. Their proposed section on the "Use of Force in Law Enforcement"¹⁸ written in 1958 limited the use of deadly force to necessary situations. The section read:

- (b) The use of deadly force is not justifiable under this section unless:
 - (i) the arrest is for a felony; and
 - (ii) the person effecting the arrest is 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 officer believes that there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.¹⁹

Under this statute, the criteria for the use of deadly force is not the specific classification of, but the nature of the particular crime. If the person to be apprehended appears to threaten the life of another, some logical justification exists which would allow the use of deadly force to prevent his escape. The legislature of the State of Illinois should recognize the merits of this statute and adopt it in the Criminal Code.

The 1962 proposed draft of the *Model Penal Code* added a section which moved away from the logical position of the earlier draft. This section included the power to use deadly force when:

- b(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.²⁰

Though this 1962 draft is preferable to the present Illinois forcible felony rule, the old draft of the *Model Penal Code* seems more sensible. Since a right to trial by jury is an essential part of our constitutional system, and since most crimes are no longer punishable by death, the taking of the life of a suspected felon should be strenuously avoided. In considering what should be included in a section on the use of deadly force, it is also important to note whether the statute was intended to be penal or protective.

Texas has taken the protective position in its extreme form—allowing a police officer to use deadly force only in self-defense.²¹ The case law preceding

¹⁷ Model Penal Code § 3.07, Comment (Tent. Draft No. 8, 1958).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Model Penal Code § 3.07, (Pro. Off. Draft, 1962).

²¹ Vernon's Ann. P.C., art. 1210 (Texas) states:

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.

An interesting anomaly in Texas law is that despite this restrictive section in use of force, it has codified the "unwritten law" that a husband is justified in shooting his wife's adulteror when catching them in the act. *Id.* art. 1220.

adoption of this section goes back to 1874. In *Caldwell v. State*²² a sheriff who had shot a man to prevent his escape from custody, was convicted of murder in the second degree and his conviction was affirmed. The court stated, "The law places too high an estimate on a man's life, though he be a poor, friendless prisoner, to permit an officer to kill him, while unresisting, simply to prevent an escape."²³

Since the right to trial by jury, and more importantly, the right to life itself, is so precious, legal justification for depriving a citizen of either must be strong. The only true justification for the use of deadly force, it seems, is to preserve the life of another. But the Texas statute goes too far. It does not allow a policeman to use deadly force, even to prevent the escape of a lethally dangerous person, unless that person poses a direct threat to the policeman involved.

The 1962 *Model Penal Code* section and the similar New York statute²⁴ are remiss only in the concept embodied in subsection b(iv) shown above. Because the suspected escaping felon used force in committing his alleged crime, does not necessarily mean that he is dangerous. The man who kills his wife in the passion of a heated argument, or upon finding her in bed with another man, is not likely to go out and kill again. A policeman summoned to this type of case may know the circumstances. If he does know, his use of deadly force would not be justified. If he does not, he can reasonably believe the person poses a sufficient threat to others to justify the use of deadly force even under the 1958 draft. Thus, only to prevent the threat of harm to himself or another would an officer be justified in using deadly force. This is the principle embodied in the basic concept of self-defense.

If the statute is also concerned with the certainty of punishment of all who use or threaten use of force, the 1962 draft should be adopted. But the idea of certainty of punishment is contrary to basic democratic principles. If the basis of our entire penal system is, at least theoretically, rehabilitative and non-punitive, why make our law enforcement system punitive to the point of finality? Basic democratic ideals would demand the preventative approach. The President's Commission on Law Enforcement²⁵ supports this position. The report of the Commission stated:

²² 41 Tex. 86 (1874).

²³ *Id.* at 98.

²⁴ N. Y. Penal Code § 35.30 (McKinney, 1967). The section reads:

2. A Peace officer is justified in using deadly physical force upon another person for a purpose specified in subdivision one of this section includes affecting arrest or preventing escape only when he reasonably believes that such is necessary:

(a) to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes (i) has committed or attempted to commit a felony involving the use or threatened use of deadly physical force or (ii) is attempting to escape by the use of deadly physical force or (iii) otherwise indicates that he is likely to endanger human life or to inflict serious physical injury unless apprehended without delay; provided that nothing contained in this paragraph shall be deemed to constitute justification for reckless or criminal negligent 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.

²⁵ President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967).

A comprehensive regulation should be formulated by every chief administrator to reflect the basic policy that firearms may be used *only* when the officer believes his life or the life of another is in imminent danger, or when other reasonable means of apprehension have failed to prevent the escape of a felony suspect whom the officer believes presents a serious danger to others.²⁶

Beside excluding the forcible felony distinction, enactment of the proposed 1958 draft of the statute would also prevent the policeman from using deadly force when innocent persons might be harmed. This proposition is included in both the tentative and proposed draft. It too, is consistent with the preventative approach suggested above. If the officer is allowed to use deadly force to prevent an innocent person from being harmed by the escaping felon, it makes little sense for the officer himself to be allowed to cause such injury. Allowing an officer to shoot at an escaping felon, even one who is likely to harm another, when others are present and might be harmed, defeats the entire purpose of the statute. The officer, under these conditions, might be more likely to inflict great bodily harm on an innocent person than on the escaping felon himself.

PROTECTION OF POLICE

It is not only the suspected felon or the innocent bystander who would be protected by the adoption of the 1958 proposed official draft of the statute, but also the law enforcement officer himself. Although legal justification may be technically available to the officer shooting the youth who spit at him, if the policeman were prosecuted for murder, it seems unlikely that a jury, or even a reviewing court, would agree that it was justified.

Although most state statutes still recognize the felony misdemeanor distinction in the use of deadly force, the American Law Institute observes that:

[T]here is no American case which actually sustains the use of deadly force for the sole purpose of affecting an arrest for an offense merely because the offense is a felony at common law or is made such by statute.²⁷

It seems equally likely that this would be true for a technical forcible felony which is, in fact, not forcible. Thus, the policeman himself might be misled by the law, reasoning that he has justification when in fact he does not.²⁸

Perhaps the best indication that the proposed statute is good for policemen as well as the general population, is that the Chicago Police Department rules are much more restrictive than the state statute. The rule on use of force states:

A. Force likely to cause death or great bodily harm will not be used in instances where there is a likelihood of serious injury being inflicted upon the persons other than the person against whom the officer is authorized by law to use such force.

²⁶ *Id.* at 119.

²⁷ Comment, *Arrest Without a Warrant*, 75 U. Pa. L. Rev. 485, 505 (1927). This article is a summary of the A.L.I. brief for the Restatement (Third) of Torts.

²⁸ The notorious reluctance of states' attorneys to prosecute policemen might save him, but under sufficient public pressure a prosecution and conviction could result.

B. The use of firearms will not be resorted to in instances where the consequences of such use would be likely to outweigh the police purposes served by such use. However, the immediate safeguarding of the life of the officer of a third party shall outweigh all other considerations.²⁹

These rules sound surprisingly like the tentative draft of the *Model Penal Code*, 1958. The purpose of the police rules is twofold: first, to protect the officer from prosecution; and second, to insure good police practice. The Police Department's Training Bulletin on "Use of Force in Making Arrests"³⁰ cautions:

In many instances across the nation when a peace officer has justifiably resorted to the use of force to protect himself from death or great bodily harm or to effect an arrest under circumstances that justified his use of force, the immediate effects have been disastrous. Rioting—lasting several days—has broken out, followed by property damage, looting and killing . . . Therefore, it can readily be seen that the use of deadly force by a peace officer, even when justifiable, entails a grave decision by the officer using it.³¹

In addition to state charges of homicide, the policeman in our hypothetical situation might well be subject to criminal prosecution under the Federal Civil Rights Act.³² The act provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.³³

Our hypothetical policeman could be sentenced to life imprisonment for the deprivation of the right to life and the right to trial by jury of the youth who spat at him.

The Civil Rights Act was reviewed by the United States Supreme Court in the case of *Screws v. United States*.³⁴ The case dealt with a policeman who had beaten a prisoner to death, but the principles of the case would easily apply to our hypothetical situation. *Screws* was remanded on other grounds, but the Court stated unequivocally that:

Those who decide to take the law into their own hands and act as

²⁹ Gen. Order 67-14, ¶ III.

³⁰ Vol. X, No. 27, 7 July 1969.

³¹ *Id.* at 1.

³² 18 U.S.C. § 242 (1969).

³³ *Id.*

³⁴ 325 U.S. 91 (1945).

prosecutor, jury, judge and executioner act to deprive a prisoner of the trial which due process of law guarantees him.³⁵

Our hypothetical officer clearly acted under color of law; he also acted as judge, jury and executioner. He willfully deprived the long haired youth not only of his right to trial, but of his right to life itself.

The policeman could claim in his defense that his act was justified under Illinois law. It would seem that this is true and such a finding might prompt the court to declare the Illinois Statute unconstitutional as to this factual situation, since it deprived the deceased of secured rights and due process of law. As Justice Rutledge stated in his concurring opinion in *Screws*:

The Amendment [14th] and the legislation [18 U.S.C.A. Sec. 242] were aimed at rightful state action. Abuse of state power was the target. Limits were put to state authority, and states were forbidden to pass them, by whatever agency.³⁶

Thus, *Screws* and other cases which have followed the decision,³⁷ could render our policeman vulnerable to federal prosecution, if the policeman had clearly deprived a felon of his civil rights.

The only rational approach, therefore, to the use of deadly force is to allow it only to preserve lives. It must, consequently, be restricted to cases where only the alleged felon can be harmed, and only when the acts of the felon present a danger to others. That is the only approach consistent with democratic ideals.

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³⁵ *Id.* at 106.

³⁶ *Id.* at 115.

³⁷ *Pool v. United States* 260 F.2d 57 (9th Cir. 1958); *Koehler v. United States*, 189 F.2d 711 (5th Cir. 1951); *Crews v. United States* 160 F.2d 746 (5th Cir. 1947).