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Use of Deadly Force in the Arrest Process

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"Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution."[42]

Conclusion

In conclusion, no one should ever be counseled to resist an arrest. The possible danger to the person should always be considered, and the civil damages recoverable should be weighed against the inconvenience and indignity of the illegal arrest. However, although there is yet no direct jurisprudence on the issue of the existence of a constitutional right to resist an unlawful arrest, this writer firmly believes that such a right is necessarily implicit in both the Fourth Amendment and in the concept of due process of law. To those who believe that resistance to *any* arrest has the disasterous effect of condoning disrespect for law and proper legal authority, it should be emphasized:

"The purpose of the right is not to encourage violent attacks on policemen, but to preserve the sense of personal liberty inherent in the right to reject arbitrary orders. To permit the police to provoke individuals into committing the crime of resisting arrest, creates a trap for citizens which must, in the long run, injure the integrity of the legal system."[43]

Allan L. Durand

USE OF DEADLY FORCE IN THE ARREST PROCESS

In recent years, police officers and police departments have been recipients of an ever-increasing barrage of accusations and denunciations concerning alleged police brutality. This fact is especially true with regard to the use of deadly force in effecting arrests. Positions, both pro and con, have been supported with equal vehemence, leaving the individual police forces, to a large degree, occupying a rather undesirable middle-ground between the extremes. A large portion of the difficulty in this area has stemmed from confusion and misconception, on the part of both police officers and society, as to the exact extent of an officer's

42. Wright v. Georgia, 373 U.S. 284, 291-92 (1962).
43. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L. J. 1128, 1150 (1969).

rights and duties in the use of deadly force while apprehending fleeing lawbreakers. It is the purpose of this comment to explore and to clarify the prevailing law on this subject, with particular emphasis upon the rights and duties of police officers to use deadly force[1] in the apprehension of fleeing felons. In addition, a discussion of the available remedies for redress of harm caused by the unauthorized use of force is included. It should be emphasized that only a very narrow band in the spectrum of use of deadly force is here under consideration. The right of a police officer to use deadly force, in self-defense or in defense of others, in the appropriate circumstances, is not of primary concern, as there seems to be little quarrel with this aspect of the law. Additionally, what is forthcoming should be read with the thought in mind that, generally speaking, the police officer is under a duty to go forward and to effect an arrest, where it is called for, and is not required to retreat in the face of resistance.[2]

The term "felon" originated in European feudalism—a social, economic and military system based on mutual obligation between lord and vassal, in which the unforgiveable sin was the breach of fealty.[3] Such feudal disloyalty was a threat to the entire social structure and therefore merited the severest sanctions available, such as forfeiture of all property and usually capital or corporeal punishment.[4] Breaches of feudal obligations thus punished were labeled felonies. The English common law adopted this terminology and imposed like sanctions for serious breaches of the King's peace such as homicide, arson, rape and robbery.[5]

As the concept of the felon evolved, the rule emerged that a police officer, or even a private citizen, could with impunity kill a felon to prevent his escape, as most felonies were extremely serious and dangerous crimes and all felonies were punishable by death. In many cases, the death penalty was preceded by mutilation or dismemberment of the body in public spectacles

1. For the purposes of this comment, the term "deadly force" will be defined as that force which causes death or creates a substantial risk of causing death or serious bodily harm. The basic situation which is contemplated is that of a police officer attempting to arrest a fleeing suspect. Riot situations, tantamount to civil insurrection, because of the very special nature of the problems involved are considered to be without the scope of this Comment.

2. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 452 (1957).

3. *See* Comment, 53 VA. L. REV. 403, 406 (1967).

4. *Id.* at 407. *See also* 4 W. BLACKSTONE, COMMENTARIES 95.

5. Comment, 53 VA. L. REV. 403 (1967). *See also* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 358 (1923).

calculated to serve as examples to other potential wrongdoers. This theory of crime and punishment involved the notion that anyone who would risk such terrible consequences by committing a crime must indeed be a desperate character. Consequently, it was imperative that such persons be immediately apprehended by any available means, in order to prevent them from laying waste the surrounding countryside.[6] In light of this attitude toward law enforcement, it made very little difference whether the suspected criminal was killed in the chase or whether he was captured alive. In any event, he was sure in most cases to meet his end at the hands of the courts in prescribing his punishment. Not only did the peace officers of the time have the right and the duty to either apprehend or kill the suspect, but the average citizen was impressed into the hunt by a device which was known in early England as *posse comitatus*.[7] When the hue and cry[8] was raised either by the local police officer or by any private citizen, all inhabitants were duty-bound to pursue the felon and use their best efforts to either capture or kill him. Because of this early vigilante action, the rights of a private citizen in the apprehension of a criminal for many years closely paralleled those of a duly appointed police officer. Consequently, the rule evolved that one may kill a felon in order to prevent his escape. It is significant that the rule was established at a time when practically all crimes were felonies and all felonies were punishable by death. It must be conceded that this original premise behind the rule has changed, as no longer are all crimes felonies nor are all felonies punishable by death. Indeed, fundamental assumptions concerning the propriety of capital punishment, after guilt has been adjudged in an adversary proceeding, are under very serious attack. It is imperative, therefore, that the present jurisprudence and statutory law be examined to see what effect the erosion of the underlying principle of the deadly force rule has had on the existence of the rule itself.

The general rule which prevails today among a majority of the American jurisdictions which have considered the matter is that if a felony has been committed and the felon flees from justice, it is the duty of every policeman to use his best endeavors

6. E. FISHER, LAWS OF ARREST 124-126 (1967).

7. *Id.* at 354. From Latin: *posse*, meaning power or ability, plus *comitatus*, meaning of the county or other European noblemen.

8. *Id.* at 360. "Hue and cry was the old common law custom of pursuing suspected felons with horn and with voice."

to prevent an escape. If in the pursuit the felon is killed where he cannot be otherwise arrested, the homicide is justifiable.[9] An officer endeavoring to arrest a known felon has the right to use all the force reasonably necessary to make the arrest, including taking the life of the fleeing criminal.[10] However, this general rule has been qualified in several significant respects. It is well established that an officer may never use deadly force simply to apprehend a person who has committed only a misdemeanor.[11] The reason usually given for this is that the interests of society in effecting the immediate apprehension of a misdemeanant is not so great as to justify the taking of his life in order to accomplish that result.[12]

An initial requirement to be fulfilled before the law officer may come within the privilege to use deadly force in making a felony arrest is that the arrest be legal.[13] The legality of an arrest for these purposes varies among jurisdictions. Generally, the arrest is considered valid if the arresting officer is aware that a valid warrant has been issued for the suspect's arrest or if the officer himself witnesses the consummation of the crime.[14] However, in the situation where a warrant has not been issued, and the arrest is based on probable cause alone, the privilege does not apply unless the suspect is a felon in fact.[15] Thus a

9. Union Indem. Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928); Johnson v. Chesapeake & O. Ry., 259 Ky. 789, 83 S.W.2d 521 (1935); Young v. Amis, 220 Ky. 484, 295 S.W. 431 (1927); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927); Jones v. Penketh, 31 Ohio N.P.(N.S.) 161 (1933); Commonwealth v. Micuso, 273 Pa. 474, 117 A. 211 (1922); Thompson v. Norfolk & W. Ry., 182 S.E. 880 (W. Va. 1935).

10. Stinnett v. Commonwealth, 55 F.2d 644 (4th Cir. 1932); United States v. Kaplan, 286 F. 963 (S.D. Ga. 1923); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905).

11. Weissengoff v. Davis, 260 F. 16 (4th Cir. 1919), *cert. denied,* 250 U.S. 674 (1919); United States v. Kaplan, 286 F. 963 (S.D. Ga. 1923); Suell v. Derricrott, 161 Ala. 259, 49 So. 895 (1909); Edgin v. Talley, 169 Ark. 662, 276 S.W. 591 (1925); Paramore v. State, 161 Ga. 166, 129 S.E. 772 (1925); Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

12. *See* Moreland, *The Use of Force in Effecting or Resisting Arrest,* 33 NEB. L. REV. 408 (1954).

13. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 452 (1957); Demato v. People, 49 Colo. 147, 111 P. 703 (1910); Carter v. State, 30 Tex. App. 551, 17 S.W. 1102 (1891).

14. *See, e.g.,* LA. CODE CRIM. P. art. 213.

15. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 452 (1957); Comment, 59 COLUM. L. REV. 1212, 1219 (1959); Note, 21 U. PITT. L. REV. 132, 133 (1959); Note, 5 WASHBURN L.J. 262 (1966); Union Indem. Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928); Wiley v. State, 19 Ariz. 346, 170 P. 869 (1918); Johnson v. Chesapeake & O. Ry., 259 Ky. 789, 83 S.W.2d 521 (1935); Young v. Amis, 220 Ky. 484, 295 S.W. 431 (1927); Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902); McKeon v. National Cas. Co., 216 Mo. App. 507,

majority of American jurisdictions hold that even though a police officer has probable cause to arrest a suspect and even though the use of deadly force is reasonably necessary to effect such arrest, its use is unreasonable unless the officer knows that the fleeing suspect has committed a felony.[16] This modification of the deadly force rule finds support in one particularly famous Kentucky case. In *Petrie v. Cartwright*,[17] the deceased became engaged in a scuffle over some comments made by two men regarding the deceased's wife. The deceased knocked one man down, the other man pulled a knife, and the deceased attempted to flee for his life. At this precise instant a police officer arrived on the scene and came to the conclusion that the deceased had committed a felony and was fleeing. The officer fired upon and killed the deceased. The Kentucky court of appeals held that the officer was not warranted in using deadly force where only a suspicion of a felony existed.[18]

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270 S.W. 707 (1925); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927); Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A.2d 235 (1946).

16. Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 NEB. L. REV. 408, 409 (1954): "Does the rule that an officer can kill if it appears reasonably necessary to do so to effect an arrest for an atrocious felony extend to those cases where the officer does not see the felony committed but is nevertheless able to make a valid arrest without a warrant upon reasonable belief? It does not; in such cases the officer kills the arrestee at his peril. If it turns out that an atrocious felony was not committed in fact or that if one was committed the arrestee did not commit it, he is not protected. This is a natural result of a rational interpretation of the rule as to the amount of force that may be used by the officer in making an arrest. He may use reasonable force. When he sees an atrocious felony committed, the law considers that the force used is no more than reasonable if he finds it necessary to go so far as to kill the arrestee if that appears reasonably necessary to prevent the escape of the arrestee. But by the weight of authority the law balks—and wisely—at taking the additional step of considering it reasonable to kill one who is only reasonably believed to have committed an atrocious felony. It is reasonable to *arrest* him under such circumstances but unreasonable to *kill* him although it reasonably appears necessary to do so to complete the arrest."

17. 114 Ky. 103, 70 S.W. 297 (1902). *See* Note, 38 KY. L.J. 609 (1950). *See also* Note, 38 KY. L.J. 618 (1950) for a *contra* view.

18. Petrie v. Cartwright, 114 Ky. 103, 106, 109-10, 70 S.W. 297, 298-99 (1902): "The jury were warranted in concluding from all the evidence that Petrie had in fact committed no felony . . . . We have been unable to find any common-law authority justifying an officer in killing a person sought to be arrested who fled from him, where the officer acted upon suspicion, and no felony had in fact been committed. The common-law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not be at large, and that the life of the felon has been forfeited; for felonies at common-law were punishable by death. But where no felony has been committed the reason of 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. . . . The notion that a peace officer may in all cases shoot one who flees from him when about to be arrested is unfounded. Officers have no such power,

Another variation involves the situation where an officer knows for a fact that a felony has been committed and uses deadly force to effect an arrest only to find out that the victim was not the felon. A leading case in this area, *Commonwealth v. Duerr*[19] concerned a situation where the police apprehended a car thief who told them of a rendezvous with his accomplices. The police laid a trap but captured the wrong men. The suspects bolted and deadly force was used to make the arrest. It was held that the police were not justified in killing the suspects, even though they knew a felony had been committed and reasonably believed the suspects had committed the felony, as the suspects had not in fact committed the crime.

The rationale behind the restriction which requires that a felony must have in fact been committed by the suspect before an officer is justified in using deadly force in the arrest process is aimed at the abolition of the indiscriminate use of deadly force by police officers which could otherwise, after the fact, be justified by the officer's mere assertion of his reasonable belief that the suspect was a felon.[20] However, such stringent requirements have been criticized on the basis that they restrict law enforcement officers too greatly, and, in fact, it has been argued that the law, as such, hampers its own enforcement.[21] It has also been contended that there is a growing trend away from such strict requirements of knowledge;[22] however, more recent writings have reflected the opinion that the trend is in reality toward requiring police officers to possess knowledge that the suspect

except in cases of felony, and there as a last resort, after all other means have failed. It is never allowed where the offense is only a misdemeanor; and where there is only a suspicion of felony the officer is not warranted in treating the fugitive as a felon. If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may lawfully arrest upon a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was in fact a felony." (Emphasis added.)

19. 158 Pa. Super. 484, 45 A.2d 235 (1946).

20. *See* Note, 38 KY. L.J. 609, 614 (1950).

21. *See* Comment, 38 KY. L.J. 618 (1950).

22. Note, 21 U. PITT. L. REV. 132, 140 (1959): "The rule of law has swung like a pendulum from one extreme where any person in flight from arrest could be shot at with impunity, to a position where no one could be shot at unless certain stringent conditions were met and a certain situation was in fact true, i.e. the commission of a felony by the person in flight. It now appears that the pendulum is swinging toward the extreme once more but that reason, justice and morality will prevent its complete orbit back to that point of barbarity which existed in earlier times. . . . [The police officer] should be allowed the right to his reasonable beliefs and trained suspicions which arise from his education in the methods of law and his study of the operations and characteristics of the criminal element of society."

was indeed a felon.[23] The latter view seems more in accord with the concern of modern society for the limitation of use of deadly force and for the sanctity of human life.

In addition to the several internal limitations (knowledge requirements) on the deadly force rule, there are growing external forces which threaten to topple the very framework of the rule itself. The deadly force rule has always been framed around the felony-misdemeanor dichotomy due to the early death-dealing nature of the crimes which were then felonies.[24] The very basis of the fleeing felon rule was that the felon had committed a vile and heinous crime for which he would undoubtedly be executed if brought to trial. However, with the advent of a large number of statutory, non-dangerous felonies, the distinction as to the use of deadly force between felonies and misdemeanors becomes questionable and indeed has been challenged as being of relatively little value.[25] As the nature of the term "felony" has changed, there has appeared a trend toward making a distinction between those felonies which are dangerous to human life and those which are not.[26] Particularly striking examples of the questionable nature of the distinction between some felonies and misdemeanors can be seen in cases of nonviolent property offenses. In Louisiana, the theft of $100.00 is a felony, whereas the theft of $99.00 is a misdemeanor.[27] Under the present scheme, the thief in the former case may be shot in order to prevent his escape, whereas the thief in the latter case may not. Could such a result be morally or pragmatically justified? It is submitted that in neither case should deadly force be applied, as the crime itself is not inherently dangerous to human

23. *See, e.g.*, Note, 5 WASHBURN L.J. 262, 269 (1966): "Probably the trend is toward requiring arrestors to know with certainty that the person to be arrested is a felon before deadly force can be used to effectuate the arrest. No doubt there will be attempts in the future to further limit the use of deadly force in arrest . . . ."

24. Weissengoff v. Davis, 260 F. 16 (4th Cir. 1919), *cert. denied*, 250 U.S. 674 (1919); United States v. Kaplan, 286 F. 963 (S.D. Ga. 1923); Suell v. Derricrott, 161 Ala. 259, 49 So. 895 (1909); Edgin v. Talley, 169 Ark. 662, 276 S.W. 591 (1925); Paramore v. State, 161 Ga. 166, 129 S.E. 772 (1925); Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902); Holloway v. Moser, 193 N.C. 185, 135 S.E. 375 (1927).

25. Comment, 33 NEB. L. REV. 408 (1954).

26. United States v. Clark, 31 F. 710, 713 (D.C. Mich. 1887); State v. Turner, 190 La. 198, 182 So. 325 (1938); State v. Ciaccio, 163 La. 563, 112 So. 486 (1927); State v. Bryant, 65 N. C. 327 (1871); Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626 (1879). *See also* the recent case of Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969).

27. LA. R.S. 14:67 (Supp. 1970).

life, nor is it harshly punished as it might have been under the old common law. If the basis of the fleeing felon rule was once that the felon had forfeited his life by his crime and could therefore be killed to prevent his escape,[28] then, as illustrated by the example, the rationale for the rule is no longer present, at least for many of our lesser felonies. Therefore, it is submitted that in seeking to delineate between those types of crimes for which deadly force may be used to apprehend the perpetrator and those for which it may not be used, the felony-misdemeanor distinction is useless. Alternately, it is suggested that deadly force should only be used where the death-dealing nature of the crime involved requires that the arresting officer return force in kind to make the arrest.

In most American jurisdictions, a further limitation on the fleeing felon rule is that a police officer has the right to kill a fleeing felon (all other conditions satisfied) to prevent his escape, only if he could prevent it in no other way.[29] The standard generally adhered to is not one of actual necessity but is that of reasonable necessity.[30] The law allows the officer this amount of discretion after all other requirements are met. Courts will not and probably should not second guess an officer as to this requirement which necessitates, more than any other requirement, an on-the-spot, individual determination by the officer in question. In this vein, it should be noted that an officer almost universally has the option to call for assistance if necessary, to effect an arrest.[31] However, it has been held that the requirement that he exhaust all other possible avenues of arrest before using deadly force does not include the summoning of assistance from bystanders.[32]

The Louisiana jurisprudence appears to early have adopted the general rule that a fleeing felon could be killed if it were

28. E. FISHER, LAWS OF ARREST 124-26 (1967).

29. J. HAWLEY, THE LAW OF ARREST 31 (1891); Richards v. Burgin, 159 Ala. 282, 49 So. 294 (1909); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921).

30. 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 452, 459 (1957); Richards v. Burgin, 159 Ala. 282, 49 So. 294 (1909); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); Cornett v. Commonwealth, 198 Ky. 236, 248 S.W. 540 (1923); Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1922).

31. Monterey County v. Rader, 248 P. 912 (1926); Cornett v. Commonwealth, 198 Ky. 236, 248 S.W. 540 (1923); Caperton v. Commonwealth, 189 Ky. 652, 225 S.W. 481 (1920); Commonwealth v. Sadowsky, 80 Pa. Super. 496 (1922).

32. Daniel v. State, 23 Ala. App. 188, 122 So. 306 (1929).

necessary to prevent his escape.[33] However, here too, several exceptions to and refinements of the general rule have developed. As with the other American jurisdictions, Louisiana has adhered to the general exception which protects fleeing misdemeanants from apprehension by deadly force.[34] Further, early Louisiana cases indicate a predisposition to establish a distinction between felonies accompanied by violence and the so-called silent felonies.[35] Illustrative of this class of cases is *Carmouche v. Bouis*,[36] wherein the owner of a slave sued for the value of his slave after he had been killed by the defendant on the defendant's property. The Louisiana Supreme Court held for the plaintiff, reasoning that the dead slave had been in the act of committing, at worst, only a felony not attended by violence and hence his death was not justifiable. Thus, early in the judicial history of our state, the courts thought that there should be a distinction made between forcible violent felonies which entail serious danger to human life and the lesser non-violent felonies which usually constitute only offenses against property. They concluded that in the former situation deadly force may indeed be justifiable to effect the arrest of the felon, but in the latter instance the gravity and punishment of the crime were not such that the felon should be considered as having forfeited his life.[37]

This distinction between the use of deadly force in petty crimes and its use in serious violent crimes, as announced in the *Carmouche* case, appeared to be again sanctioned by Lou-

33. State v. Turner, 190 La. 198, 182 So. 325 (1938); State v. Plumlee, 177 La. 687, 149 So. 425 (1933); Carmouche v. Bouis, 6 La. Ann. 95 (1851). The right was also impliedly recognized in Gardiner v. Thibodeau, 14 La. Ann. 732 (1859), and Bibb v. Hebert, 3 La. Ann. 132 (1848).

34. *See* cases cited note 33 *supra*. *See also* Graham v. Ogden, 157 So.2d 365 (La App. 3d Cir. 1963).

35. Gardiner v. Thibodeau, 14 La. Ann. 732 (1859); Carmouche v. Bouis, 6 La. Ann. 95 (1851); Bibb v. Hebert, 3 La. Ann. 132 (1848). Note that these cases concern private individuals rather than law officers. However, it is submitted that the holdings should have been applicable to the police of the time since private individuals then had much the same rights to apprehend criminals as did peace officers.

36. 6 La. Ann. 95 (1851).

37. *Id.* at 97: "But in the case before us, the necessity to wound or kill, which a case of intended robbery may present, did not exist. The cane the negroes were about to take, is not of that class of things for which men commit a robbery, or take by putting the owner in fear. The trespassers intended to commit a misdemeanor, and not a crime. Homicide is not justifiable to prevent mere misdemeanor, or even felonies without force, such as picking pockets. Less dangerous means should have been resorted to even at the risk of failing to detect and arrest the trespassers." *See also* State v. Plumlee, 177 La. 687, 149 So. 425 (1933).

isiana's highest court in the case of *State v. Turner*.[38] The court affirmed a policeman's conviction for manslaughter where the evidence showed that he had shot and killed a suspect who was seen driving away from the vicinity of a junkyard after dark. The court, in rather broad language, held that the defendant had reasonable belief, at best, to suspect that the decedent had committed only larceny and therefore the use of deadly force was not available in attempting an arrest.[39] Testimony as to the value of the materials present in the junkyard was allowed in order to determine whether the officer had reasonable ground to believe that a felony had been committed. The initimation here is that the killing of the suspect might have been justified had the officer had a reasonable belief that a felony had been committed. This is contrary to the rule in a majority of the other American law jurisdictions which require knowledge that a felony has been committed.[40] It is submitted that in this case, the use of deadly force was also inappropriate because it was not reasonably necessary to effect the arrest. The officer did not need to use such "last resort means" as the suspect could have been identified by simply taking down the license and description of the car.

Another important case in this area is *Britt v. Merritt*,[41] which involved a deputy sheriff's attempt to halt an alleged liquor law violator in order to search his vehicle. When the

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38. 190 La. 198, 202-03, 182 So. 325, 327 (1938): "If any point is settled, or can be settled, it is that larceny, being a secret crime not attended with force or violence, and especially when the goods taken are of small value, furnishes no warrant to one person for killing another to prevent its consummation." It is submitted that if a person could not kill to prevent a crime then certainly he may not kill to apprehend the criminal. *See* Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969).

39. State v. Turner, 190 La. 198, 182 So. 325 (1938). The court cites with approval Gardiner v. Thibodeau, 14 La. Ann. 732 (1859); Carmouche v. Bouis, 6 La. Ann. 95 (1851); Bibb v. Hebert, 3 La. Ann. 132 (1848). It also seems to approve with respect to policemen the doctrine of State v. Plumlee, 177 La. 687, 149 So. 425 (1933), that the crime involved must not be a petty offense, but rather a serious crime attended by fear of bodily injury or death, before deadly force may be used to effect the arrest.

40. *See* 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 452 (1957); Comment, 59 COLUM. L. REV. 1212, 1219 (1959); Note, 21 U. PITT. L. REV. 132, 133 (1959); Note, 5 WASHBURN L.J. 262 (1966); Union Indem. Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928); Wiley v. State, 19 Ariz. 346, 170 P. 869 (1918); Johnson v. Chesapeake & O. Ry., 259 Ky. 789, 83 S.W.2d 521 (1935); Young v. Amis, 220 Ky. 484, 295 S.W. 431 (1927); Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902); McKeon v. National Cas. Co., 216 Mo. App. 507, 270 S.W. 707 (1925); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927); Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A.2d 235 (1946).

41. 45 So.2d 902 (La. App. 2d Cir. 1950).

man would not stop, the deputy shot and killed him to prevent his escape. The deputy in a civil suit for damages pleaded self-defense claiming that the decedent had attempted to run him down.[42] The Court of Appeal for the Second Circuit found that the homicide was not justifiable. They concluded that the deputy was attempting to arrest the decedent for an alleged violation of the liquor laws and said, "It is fair to conclude that he (the deputy) decided, as many deputies would erroneously have done, that he was authorized to effect arrest even though it required the most drastic method."[43] It is open to some conjecture why the court felt the use of deadly force was inappropriate. It is possible that they felt that the deputy did not have enough information to reasonably believe that a crime had been committed, hence, there would have been no basis for a valid arrest as there had been no warrant issued. Therefore, if the deputy could not have validly arrested the decedent based on the information he had, certainly he could not have killed him in order to effect the arrest.[44] However, in view of the fact that Louisiana adheres to the notion that in a determination of probable cause, flight by the suspect is a legitimate ground for an inference of guilt, this appears to be the less probable of the two alternatives.[45] However, it is possible that the court wished to follow the line of reasoning illustrated by the *Carmouche*[46] case. In view of these cases, it must be concluded that there is a jurisprudential basis in Louisiana for a division of crimes based upon the deadly nature of the crime rather than the artificial felony-misdemeanor criterion, at least where the use of deadly force is concerned.

It could be argued that the court's interpretation of the law in the *Britt* case was in direct conflict with statutory authority which existed at that time.[47] Louisiana Revised Statutes Title 15, Section 64 provided that an officer participating in a lawful

42. *Id.* The court found that the deputy was hiding in the woods and as the decedent drove by the deputy yelled for him to stop and when the decedent did not, the deputy killed him.

43. Britt v. Merritt, 45 So.2d 902, 907 (La. App. 2d Cir. 1950). Note that on appeal to the Supreme Court of Louisiana the judgment in favor of the plaintiff (decedent's wife and children) and against the Sheriff and the Sheriff's surety was reversed. The judgment against the defendant Merritt was affirmed. Britt v. Merritt, 219 La. 333, 53 So.2d 121 (1951).

44. LA. R.S. 15:64 (1950).

45. State v. Johnson, 249 La. 950, 192 So.2d 135 (1966).

46. Carmouche v. Bouis, 6 La. Ann. 95 (1851).

47. LA. R.S. 15:64 (1950). "Every one must submit peaceably to a lawful arrest, and, if he resists, any person lawfully arresting him may use such force as may be necessary to overcome the resistance."

arrest may use such force as may be necessary to overcome the resistance of a suspect. Presumably "resistance" would be understood in a broad sense and could include resistance by flight. There does not appear to be any limit on the amount of force allowed nor any qualification that it be reasonable to the situation. It would follow, that if in the *Britt* case, the deputy had been effecting a lawful arrest, there was statutory sanction for his use of any force necessary to effect the arrest, even if deadly.[48] Under a literal reading of this statute, a person could be killed to prevent flight even if guilty only of a misdemeanor. Such a result surely could not have been intended by the legislature. Therefore, the conclusion is persuasive that this statute was not intended to apply to criminals in flight, but only to those who actually put up physical resistance. Clearly then, the arresting officer could use such force as was necessary to overcome the resistance.

This conclusion is buttressed by the fact that when Louisiana's Code of Criminal Procedure was enacted in 1966, there was a provision expressly dealing with the use of force in effecting an arrest as contrasted to that used in overcoming resistance.[49] Instead of characterizing the permitted force as that necessary to effect the arrest, article 220[50] provides that the arresting officer must use only reasonable force in apprehending a suspect. This article also provides that the use of any force at all must be pursuant to a lawful arrest.[51] Since a police officer in Louisiana may make a valid arrest based on probable cause,[52] presumably this article provides a standard different from the "actual knowledge of the felony" standard which is in use in a majority of the other American jurisdictions. However, the Reporter's Comments to Code of Criminal Procedure article 220 indicate that it was the drafter's intention that the force employed must be "reasonable" both as to the *nature* and *amount* of the force.[53] Therefore, this word change, if it means anything

48. LA. R.S. 15:64 (1950). If the force used to stop Britt were found to be actually necessary to prevent his escape, then it could be argued that such a finding under the statute forecloses any inquiry into whether the use of the force was reasonable to the circumstances.

49. LA. CODE CRIM. P. art. 220. "A person shall submit peaceably to a lawful arrest. The person making a lawful arrest may use reasonable force to effect the arrest and detention, and also to overcome any resistance or threatened resistance of the person being arrested or detained."

50. *Id.*

51. *Id.*

52. LA. CODE CRIM. P. art. 213.

53. *See* LA. CODE CRIM. P. art. 220, comment (b).

at all, must mean, not only that an officer may proceed on his reasonable belief that the force is necessary to effect the arrest, but also that there may be situations where the use of certain types of force (e.g., deadly force) would not be warranted simply because reasonably necessary to effect the arrest. Such a conclusion is supported by the fact that there is no separate provision regarding the use of force in apprehending a misdemeanant. If the above interpretation is not given to article 220, then an officer would be statutorily warranted in using deadly force to capture a misdemeanant if he could not otherwise be stopped. In this way, the foregoing cases concerning the division, for the purposes of use of deadly force, of crimes into serious death-dealing offenses and non-serious "silent" offenses, could be incorporated into an interpretation of the statute. Thus, while an officer could proceed upon his reasonable belief, he could not apply deadly force simply to apprehend a person in flight who was suspected of committing only one of the so-called "silent felonies."[54]

It should be noted, however, that although this would seem to be the most appealing interpretation in light of the jurisprudence and current social morality, this article is rather general in its terms and may be subject to more than one interpretation. The reason for this may lie in the fact that in the Projet to the Code of Criminal Procedure, which was submitted by the Louisiana State Law Institute for adoption as the new code, there were three supplemental articles to what was then article 220.[55] From an examination of these articles, it can be seen that the proposed article 220 was meant as a general introduc-

54. *See* Carmouche v. Bouis, 6 La. Ann. 95 (1851).

55. Projet of the Code of Criminal Procedure art. 221: " 'Deadly Force' means force that creates a substantial risk of causing death or great 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 great 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."

Projet of the Code of Criminal Procedure art. 222: "Deadly force may not be used for the purpose of effecting an arrest unless:

(1) The person effecting the arrest is a peace officer;
(2) The arrest is for a felony involving danger to life or of great bodily harm, and there is a substantial risk that the person to be arrested will cause death or great bodily harm if his arrest is delayed;
(3) The officer reasonably believes that the force employed creates no substantial risk of injury to innocent persons; and
(4) The officer reasonably believes that an immediate arrest cannot be made without deadly force."

tory article to the more specific provisions to follow. For example, proposed article 222 would have limited the use of deadly force for these purposes solely to police officers,[56] and it would have also restricted the use of deadly force to situations where dangerous felonies were involved and where there was a substantial risk that the felon would cause additional harm to innocent persons if not immediately apprehended. Basically, these articles were derived from the American Law Institute's Model Penal Code and represent the prevailing trends in other American jurisdictions. Had article 222 and its companions been adopted as proposed by the Louisiana Law Institute, Louisiana would have had for the first time a comprehensive scheme of law regarding the use of deadly force in the arrest process. Unfortunately, these proposals were deleted and the Code was enacted containing only present article 220 on this topic.

In view of the rather loosely defined and general state of Louisiana law on the subject of unauthorized use of force, it is very difficult to discuss possible remedies which may exist for redressing a transgression of our law. However, some generalizations may be made. It is, of course, possible to file criminal charges, under our Criminal Code,[57] against a police officer where deadly force is used to apprehend a suspect. The standard to which an officer would be held is article 220 of the Code of Criminal Procedure.[58] However, because of its generality, it is doubtful whether article 220 would be of practical value in determining whether an officer had used more force than that which was authorized. In such cases, the courts have, in attempting to resolve the problem, gravitated toward the use of more firmly established institutions to provide legal justification. Consequently, there has been a tendency to gloss over the distinction between the use of deadly force in self-defense and the use of deadly force to effect an arrest.[59] Therefore, pleas of self-defense have been allowed and held valid where it seems that inquiry should have been made as to the right to use deadly force in the arrest procedure.[60]

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56. *See* Projet of the Code of Criminal Procedure art. 222.
57. *See, e.g.*, LA. R.S. 14:30 (1950).
58. LA. CODE CRIM. P. art. 220.
59. *See* Roberts v. American Employers Ins. Co., 221 So.2d 550 (La. App. 3d Cir. 1969); Greening v. Hill, 221 So.2d 261 (La. App. 2d Cir. 1969); McKellar v. Mason, 159 So.2d 700 (La. App. 4th Cir. 1964).
60. *See* note 59 *supra*.

Similarly, a civil action brought to redress damage done by the unwarranted use of force by police might fall upon equally barren soil. Both the imprecision with which the line separating proper conduct from civil transgression is drawn and the difficulty of procuring the testimony of fellow officers would prove formidable barriers to hurdle. In addition, a doctrine which may be used to deny the plaintiff recovery in a civil action involving use of excessive force is the so-called aggressor doctrine. Briefly stated, this doctrine holds that a plaintiff cannot recover civil damages for injuries if he is at fault in provoking the difficulty in which the injury is received.[61] This is true even though the person inflicting the injury is criminally responsible.[62] While use of this doctrine may possibly be appropriate in some self-defense situations it is submitted that its use to preclude recovery is inappropriate where a suspect has ceased resistance and is bent solely on escape. However, some courts have failed to sharply mark this distinction and have lumped the aggressor doctrine and the self-defense privilege together to defeat recovery. It is submitted that the more relevant inquiry might have been into the use of deadly force to effect an arrest.[63] Incorporate with these difficulties, the unfortunate fact that police officers are often unable to satisfy even small judgments and the fact of prevailing

61. Robertson v. Polman, 74 So.2d 408 (La. App. 1st Cir. 1954); Britt v. Merritt, 45 So.2d 902 (La. App. 2d Cir. 1950).

62. *See* Oakes v. H. Weil Baking Co., 174 La. 770, 141 So. 456 (1932), and cases cited therein; Massett v. Keff, 116 La. 1107, 41 So. 330 (1906); Miller v. Meche, 111 La. 143, 35 So. 491 (1903); McCurdy v. City Cab Co., 32 So.2d 720 (La. App. 2d Cir. 1947); Ponthieu v. Coco, 18 So.2d 351 (La. App. 2d Cir. 1944); Welch v. Van Valkenburgh, 189 So. 297 (La. App. 2d Cir. 1939); Finkelstein v. Naihaus, 151 So. 686 (La. App. Orl. Cir. 1933).

Britt v. Merritt, 45 So.2d 902, 905 (La. App. 2d Cir. 1950): "It is entirely possible under the jurisprudence of this state for a person to be properly charged with and convicted of the killing of another, or of inflicting great bodily harm upon him, and the injured person or his heirs, in case of his death, be without recourse civilly against the person so charged and convicted. This happens when the deceased or injured person provokes, instigates or creates conditions by words or action, of such character as to make him the aggressor in the difficulty out of which the action is alleged to have arisen. For instance, a man may, without provocation, violently strike another with his fist, they being equal or nearly so in physical strength, and if the one struck should with a pistol shoot his assailant and is thereafter charged with and convicted of the shooting, the injured man, the one who started the difficulty being the aggressor, is without right to recover civil damages from the other. The fact that the other man is not excusable for his offense is immaterial in the civil phase of the case." *See also* Smith v. Clemnin, 48 So.2d 813 (La. App. 1st Cir. 1950).

63. Roberts v. American Employers Ins. Co., 221 So.2d 550 (La. App. 3d Cir. 1969); Greening v. Hill, 221 So.2d 261 (La. App. 2d Cir. 1969).

municipal immunity in some jurisdictions, the hope of civil remedy for unlawful use of force diminishes noticeably.

Some light may have been cast on the question of remedies by a recent federal case, *Sauls v. Hutto*,[64] which was decided in 1969 by the U.S. District Court for the Eastern District of Louisiana (New Orleans Division). There, two officers pursued a group of boys in a car thought to be stolen. The driver of the car, the decedent, lost control, and the car was wrecked. The officers took custody of the other occupants of the car but the decedent, Sauls, was shot and killed trying to escape. The decedent's natural mother filed this civil suit under section 1983[65] of Title 42 of the U.S.C.A. The court found for the plaintiff, holding that it was illegal under Louisiana law to use deadly force in order to apprehend a person suspected of having committed only a felony against property involving no danger to life or limb. In reaching this conclusion, the court read article 220[66] of the Code of Criminal Procedure, together with article 20 of the Criminal Code.[67] The court reasoned that if such force could not be used to prevent the present crime, neither could it be used to arrest the offender. Therefore, plaintiff was allowed to recover for the death of her son. Clearly, this represents an interpretation by a federal court that Louisiana statutory law does in fact contain a distinction between crimes which are death-dealing and those which are not, at least where the concern is the amount of force which may be used to apprehend those involved. Consequently, it would seem that the federal courts provide Louisiana citizens, who have been injured in the manner under consideration, with legal redress when such suit is brought under section 1983 of Title 42 of the U.S.C.

The question may be posed, however, as to the effectiveness

64. 304 F. Supp. 124 (E.D. La. 1969).

65. 42 U.S.C. § 1983 (1964). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

66. LA. CODE CRIM. P. art. 220.

67. LA. R.S. 14:20 (1950). "A homicide is justifiable: (1) When committed in self-defense. . . , (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. . . ."

of such a remedy against an individual policeman. This inquiry, of course, turns upon the availability to the officer-defendant of sufficient funds from which a contrary judgment could be deducted. It is submitted that the remedy as provided in the *Sauls v. Hutto* case is illusory if there is no financially solvent enterprise which can be reached to satisfy such a judgment. One answer to this might be a statute which would hold the municipality employing the offending officer liable in solido with that officer for any such judgment. One Comment on the subject has reached the conclusion that the general rule which precludes municipal liability for the tortious conduct of its police is in a state of flux.[68] He sees the holding of *Pierce v. Fidelity Cas. Co. of N.Y.*,[69] that a provision in a city charter that the municipal corporation has the authority "to sue and be sued" constituted a waiver of its traditional immunity, will be extended to provide municipal liability for a policeman's torts. If this were to become fact, it is submitted that this would be desirable in that it would put the burden of satisfying such judgments on the enterprise (the municipality) with the greatest power to improve the police force and to screen out the type of applicant who might be prone to use excessive force in the performance of his duty. It also suggested that the individual-policeman should be given immunity from damages caused by his negligence in executing his official acts.[70] This would seem to be a well-founded suggestion providing that the municipality is found to be liable for the officer's torts committed during the pursuit of his official duties. However, a proviso making the offending officer and the municipality liable *in solido* for the officer's acts which are committed in bad faith while on duty would seem to be soundly advisable in light of the public concern for improvement of the police force.

In conclusion, it may be said that an examination of the old rule that a fleeing felon may be killed to prevent his escape, reveals glaring frailties. Such an indictment finds support in the simple fact that in many cases the existence of the rule has outlived the reason for its existence. No longer are all felonies punishable by death. The increase in the number of these statu-

68. Comment, 29 LA. L. REV. 130, 139 (1969). *See also* Musmeci v. Amer. Auto. Ins. Co., 146 So.2d 497 (La. App. 4th Cir. 1962).
69. 205 So.2d 831 (La. App. 1st Cir. 1967).
70. Comment, 29 LA. L. REV. 130, 142 (1969).

tory non-violent felonies has made the distinction between felony and misdemeanor arrest, as to which may be accomplished by deadly force, unrealistic. It is submitted that the cited Louisiana cases provide a basis for the differentiation of crimes into those involving physical violence to the person and those which do not. In addition, adoption of the Louisiana Law Institute's proposed articles on deadly force, which are based upon this differentiation, seems desirable, not from the point of view of punishing the trangressing officer, but rather to help the conscientious officer stay within prescribed bounds in performing his duty. Furthermore, it is advocated that the use of deadly force be limited to those situations where the officer has knowledge that the suspect has committed a serious felony. In light of the fact that there are no firm Louisiana cases deciding this issue, it would appear that such a policy would put Louisiana in line with developing trends in other American jurisdictions and in accord with a public policy of limiting the indiscriminate use of firearms. These suggestions may be brought more clearly into focus by considering two elements which are needed to resolve problems in this area. Initially, a comprehensive scheme of statutory regulations is needed to precisely delineate conduct which society deems inappropriate to the apprehension of certain types of criminals. The Law Institute's proposals would serve this purpose as they fit the above criterion and are sanctioned by Louisiana jurisprudence adopting the deadly—non-deadly crime dichotomy. Such statutory regulations would only provide what physical acts were prohibited. Furthermore, since these acts would remain constant regardless of the remedy chosen for redress, it is extremely important that they be specifically set out and understood. Once the impermissible conduct is firmly standardized, it then becomes appropriate to speak of possible remedies. It is submitted that the available remedies will naturally be gauged in accordance with the mental element involved in breach of the statutory standard of conduct. Thus, while the standard of conduct will remain constant, the remedy which will be chosen for its transgression will vary according to the officer's state of mind at the time of the violation. Secondly, a realistic scheme of liability distribution, with an eye upon the goal of an improved police force, should be established. It is suggested that the municipal corporation, which usually bears the burden of providing police protection, should also bear the

responsibility of providing a financially solvent enterprise which could satisfy a judgment secured by a plaintiff injured through breach of the above standards. However, because of the increasing difficulty of the duties of the police force, it is felt that there should be a differentiation between negligent breaches and intentional breaches. In the former situation, the officer should be disciplined by way of administrative procedure while the municipality should bear the brunt of a civil judgment for the torts of its employee. However, in the latter situation, the mental element makes it desirable that the officer and the municipality be liable *in solido*. It is noted that such a scheme presupposes that the veil of municipal immunity would be lifted as previously discussed. It is submitted that the adoption of the above proposals would give our courts the gauge by which to adequately judge and redress violations of the legal rights of criminal suspects and would in the end accomplish the purpose of upgrading our police force.

The problem of inappropriate use of deadly force by a police officer is as old and as complicated as the problem of crime itself. To criminally convict or to civilly condemn the individual policeman is to treat the symptom while encouraging the disease to fester. The causes of the problem are an inadequately trained police force and law in the state of generality to the point of uselessness. It is only when these causes are eliminated that the problem will be resolved.

Van R. Mayhall, Jr.

CIVIL COMMITMENT PROCEDURE IN LOUISIANA

As of 1966, the United States had between 600,000 and 650,000 persons hospitalized because of mental illness.[1] Today more people are involuntarily hospitalized in mental institutions than are imprisoned for the commission of crime.[2] Voluminous research and writing in both the medical and the legal fields have been concerned with the problems of America's mentally disturbed. The dilemma of the mentally ill is com-

1. Couch, *Book Review*, 44 TUL. L. REV. 426, 431 (1970). In 1962-63, the average daily population in Louisiana mental hospitals was 7,188 patients. Another 10,069 persons were cared for in community clinics. LOUISIANA'S NEW PLAN—MENTAL HEALTH SERVICES 11 (La. State Dep't of Hospitals 1964).

2. Note, 35 BROOKLYN L. REV. 187, 188 (1969).