

THE DEADLY FORCE ACT: NEW JERSEY'S ATTEMPT TO PROTECT THE HOMEOWNER FROM INTRUSION

I. Introduction:

After a hectic week at the office, a man decides to spend the weekend at a relative's country home, away from the clamor of city life. He grows tired as evening approaches, but after a few hours of tossing in bed, he is unable to sleep. So, he makes his way down the stairway through the dark and unfamiliar living room to the television. Because he is unable to find the light switch in the darkness and afraid of disturbing anyone, he watches a movie in the dark silence. Suddenly through the open window, he hears what he thinks is a rustle of leaves and a crackling of twigs. He is aware of the many wild animals that live in the nearby woods, so he dismisses the strange sound as that of a foraging animal. The noises disappear after a few moments, and he redirects his attention to the television.

A short while later, he hears noises which seem to be coming from the cellar. Remembering that the basement door opens to the outside, he begins to wonder if someone or something has found its way inside. The noises, which now resemble footsteps, grow louder. As he begins to doubt his own senses, he dismisses the noises as nothing more than the wind blowing against a loose window shutter. He reminds himself that he is drowsy and unfamiliar with the surroundings. A few more moments of quiet listening reveal that the noises are the result of neither the wind nor a loose shutter. Unsure of what to do, he grabs a poker from the nearby fireplace. Groping his way through the darkness, he finds and carefully opens the basement door. Complete silence engulfs him as he quietly walks down the staircase. The silence is restored as the only sounds he hears are the creaking wooden stairs under his own weight. As his eyes adjust to the surrounding darkness, he sees what appears to be a small figure crouching behind a group of crates and boxes. As he reaches the landing, he sees that the figure begins to move slowly. Too afraid to speak and too panic stricken to retreat, he quickly moves toward the boxes and without warning strikes the shadowy figure repeat-

edly with the poker. In his panic and fear, he fails to realize that the screams of pain are those of a man. A beam of light, turned on by the other frightened occupants upstairs, reveals the blood-stained body of a young man dressed in dark, shabby clothes. While he waits for the police, he regains his composure and wonders whether or not his actions were illegal. After relating his story to the detective, the detective informs him that he may face a homicide charge and that his case will be referred to the county prosecutor in the morning.

Until recently a person in this situation in New Jersey would probably have been tried and possibly convicted of murder or aggravated manslaughter despite any claims of self-defense. Today, however, it seems more likely that a different outcome would occur. As a result of a recent amendment to the New Jersey Code of Criminal Justice, a claim of justification or self-defense would probably secure an acquittal, if not preclude the charges from being brought entirely.

This note will explore the recent legislative enactments in New Jersey affecting the homeowner's right of self-defense.¹ It will discuss and compare the Model Penal Code and the New Jersey Code of Criminal Justice, and will present the reasons for the recent amendments including the opinions of the sponsors and opponents. Additionally, this note will examine the recent amendments enacted by the Colorado Legislature, the only state with similar statutory provisions, as well as the Colorado Supreme Court's interpretation of those amendments. In conclusion, it will propose alternatives to the existing legislation in the form of a model homeowners self-defense bill.

II. *New Jersey Law*

1. *The Use of Force in Self-Protection*

At common law, there was no absolute right to use unlimited force in self-defense.² "The defender only had a privilege to use

¹ The term "homeowner" encompasses those individuals who either own or possess a dwelling with or without abutting land and those individuals who occupy the dwelling as well as anyone properly within the premises.

² *State v. Fair*, 45 N.J. 77, 91, 211 A.2d 359, 367 (1965) (quoting R. PERKINS, *CRIMINAL LAW* 881 (1957)); see also *State v. Bonano*, 59 N.J. 515, 518, 284 A.2d 345, 346 (1971).

reasonable force to prevent the commission of the felony or to protect the [endangered] member of his household. . . ."³ The New Jersey Legislature codified the common law rule by providing that a person was privileged to use deadly force in situations involving his or her defense, a relative's defense, or the prevention of the commission of a serious crime.⁴

Effective 1979, the New Jersey Code of Criminal Justice⁵ (the "Code") allows a person to use force in self-defense when he or she reasonably believes that force is immediately necessary and uses such force to protect the individual against the unlawful force of another.⁶ In *State v. Kelly*,⁷ the New Jersey Supreme Court reiterated the legislature's purpose when it held that if belief concerning the necessity of force must be reasonable,⁸ the defendant's actions would not be justified.⁹

Despite these revisions, a person is not permitted to use force in all circumstances. For example, the use of force may not be justified in resisting a lawful arrest when the person knows it is being made by a peace officer.¹⁰ An individual can use force to resist that arrest when the peace officer employs unlawful force

³ *Fair*, 45 N.J. at 91, 211 A.2d at 367.

⁴ Former N.J. STAT. § 2A:113-6 provided:

Any person who shall kill another by misadventure, or in his or her own defense, or in the defense of his or her husband, wife, parent, child, brother, sister, master, mistress, or servant, or who shall kill any person attempting to commit arson, burglary, murder, rape, robbery or sodomy, shall be guiltless and totally acquitted and discharged.

1898 N.J. Laws 824, 825.

THE NEW JERSEY PENAL CODE Introductory Note to Chapter 3 at 78-79 (*Final Report of the New Jersey Criminal Law Revision Commission* Vol. II: Commentary 1971) (hereinafter N.J. PENAL CODE). The Commission noted that the statute was no longer followed by the courts and that the actual law, as to self-defense, was found in the judicial opinions. In an attempt to standardize the application of this justification defense, the Code abandoned "[t]his case-by-case development in favor of a fresh, integrated treatment of the subject. . . . [According to the Commission,] [t]he Code looks not to the offense with which the defendant has been charged but, rather, to the conduct which he seeks to justify." See also *State v. Kelly*, 97 N.J. 178, 197-98, n.6, 478 A.2d 364, 373 n.6 (1984).

⁵ N.J. STAT. ANN. §§ 2C:3-4, -6 (West 1987).

⁶ *Id.* § 2C:3-4(a).

⁷ 97 N.J. 178, 478 A.2d 364 (1984).

⁸ *Id.* at 199, 478 A.2d at 374; see also *State v. Burks*, 208 N.J. Super. 595, 604, 506 A.2d 779, 784 (App. Div. 1986) (The jury determines whether the belief was reasonable).

⁹ *Kelly*, 97 N.J. at 199, 478 A.2d at 374.

¹⁰ N.J. STAT. ANN. § 2C:3-4(b)(1)(a) (West 1987).

to effect the arrest,¹¹ or when the arrest is not made within the scope of the peace officer's duties.¹² In addition, a person may not resist force used by an occupier or possessor of property, or by his or her agent or employee, when the individual knows that he or she is using this force under a rightful claim to protect the property.¹³ However, if it is an attempt to recapture unlawfully dispossessed land, "then force may be used by a peace officer in an official capacity."¹⁴ Finally, if the actor reasonably believes that such force is necessary to protect against his or her death or serious bodily harm, then such force is justifiable.¹⁵

The Code also detailed the degree of allowable force which may be used. Although ordinary force can be employed against any unlawful force,¹⁶ deadly force can be used only where there is a reasonable belief that such force is necessary to protect against death or serious bodily harm.¹⁷ In *State v. Hipplewith*,¹⁸ the court noted that a person has a right to protect himself from serious bodily harm and to preserve his own life at the expense of another.¹⁹ However, the court, in *State v. Abbott*,²⁰ limited this decision when it held that a person cannot use more force than is necessary to defend himself in life threatening situations.²¹ Moreover, the Code does not permit the use of deadly force if the person provoked the initial use of force²² or if the person knew that the encounter can be avoided by retreating with complete safety.²³ This requirement of retreat does not apply to an attack occurring in the victim's own dwelling,²⁴ nor an attack on a police officer in the performance of his duties when faced with real or threatened resistance.²⁵

¹¹ *Id.*

¹² *Id.* § 2C:3-4(b)(1)(b).

¹³ *Id.* § 2C:3-4(b)(1)(b)(i).

¹⁴ *Id.* § 2C:3-4(b)(1)(b)(ii).

¹⁵ *Id.* § 2C:3-4(b)(1)(b)(iii).

¹⁶ *Id.* § 2C:3-4(a).

¹⁷ *Id.* § 2C:3-4(b)(2).

¹⁸ 33 N.J. 300, 164 A.2d 481 (1960).

¹⁹ *Id.* at 316, 164 A.2d at 490.

²⁰ 36 N.J. 63, 174 A.2d 881 (1961).

²¹ *Id.* at 68-69, 174 A.2d at 884.

²² N.J. STAT. ANN. § 2C:3-4(b)(2)(a) (West 1987).

²³ *Id.* § 2C:3-4(b)(2)(b).

²⁴ *Id.* § 2C:3-4(b)(2)(b)(i).

²⁵ *Id.* § 2C:3-4(b)(2)(b)(ii).

2. *The Use of Force in Defense of Premises*

According to the Code, a person can use force within his or her own dwelling when there is a reasonable belief that such force is necessary to prevent or terminate what reasonably appears to be the commission or attempted commission of a criminal act.²⁶ Before employing deadly force within a dwelling, the individual must first request the intruder to refrain from interfering with the property.²⁷ However, one exception to the rule is when such a request would be useless,²⁸ dangerous,²⁹ or substantial harm would be done to the property before the request could effectively be made.³⁰ Finally, another exception is that deadly force cannot be used if the individual knew or should have known that this force would expose the intruder to substantial danger of bodily harm.³¹

The use of deadly force in the defense of property was restricted before the legislature enacted the recent amendments. Previously, a homeowner or a licensee could only use deadly force when the intruder was used was attempting either to dispossess him of the dwelling³² or to commit arson, burglary, robbery or other criminal theft or property destruction.³³ Thus, the use of deadly force is justified in these situations either when the intruder uses or threatens to use deadly force against the homeowner or in his or her presence³⁴ or when deadly force is necessary to protect the victim, another is the victim's presence from substantial danger or serious bodily harm.³⁵

III. *The Effect of The Deadly Force Act*

The Code provisions regarding the use of force within the dwelling were modified by the enactment of L.1987, ch.120 (the "Deadly Force Act").³⁶ As a result of this enactment, it is no

²⁶ *Id.* § 2C:3-6(a).

²⁷ *Id.* § 2C:3-6(b)(1).

²⁸ *Id.* § 2C:3-6(b)(1)(a).

²⁹ *Id.* § 2C:3-6(b)(1)(b).

³⁰ *Id.* § 2C:3-6(b)(1)(c).

³¹ *Id.* § 2C:3-6(b)(2).

³² *Id.* § 2C:3-6(b)(3)(a).

³³ *Id.* § 2C:3-6(b)(3)(b).

³⁴ *Id.* § 2C:3-6(b)(3)(c)(i).

³⁵ *Id.* § 2C:3-6(b)(3)(c)(ii).

³⁶ 1987 N.J. Sess. Law Serv. 44 (West).

longer correct or accurate to say that the right to use force or deadly force is very limited.³⁷ In fact, the new Deadly Force Act makes the use of deadly force justifiable in many circumstances where it was previously prohibited.

The New Jersey Legislature supplemented the Code by including new provisions regarding the use of force or deadly force upon an intruder in a dwelling.³⁸ According to the Deadly Force Act, a person can justifiably use force against an intruder who is within his or her dwelling. However, the person must reasonably believe that the force was immediately necessary to protect the lives and well-being of those in the dwelling against the intruder's unlawful force.³⁹

The material portion of the Deadly Force Act requires that such a reasonable belief is present when the individual is in his or her own dwelling, or was privileged to be there, and the encounter between the individual and the intruder was both sudden and unexpected, compelling the individual to act instantly.⁴⁰ In addition, the individual must reasonably believe that the intruder will inflict personal injury upon anyone within the dwelling⁴¹ or that the intruder refuses to disarm, surrender, or withdraw after the owner or occupier makes such a demand.⁴² After satisfying these requirements, either the homeowner, occupier, or someone properly within the home is legally authorized to use either force or deadly force against the intruder. "It should be noted that unlike most [of the provisions in the original self-protection section of the Code, the Deadly Force Act] does not limit the use of deadly force to responses to danger of a similar level of force" to

³⁷ See also CODE OF CRIMINAL JUSTICE tit. 2C, Comment 5, N.J. STAT. § 2C:3-6 (Cannell ed. 1987) [hereinafter Cannell].

³⁸ Intrusion into Dwelling-Justifiable Use of Deadly Force, 1987 N.J. Sess. Law Serv. 44-50 (West) (codified as amended at N.J. STAT. ANN. §§ 2C:3-4, -6, -11 (West 1987)). SENATE JUDICIARY COMMITTEE STATEMENT 1987 N.J. Sess. Law Serv. 44, ch.120 [hereinafter JUDICIARY COMMITTEE STATEMENT].

³⁹ 1987 N.J. Sess. Law Serv. 46 (codified as amended at N.J. STAT. ANN. § 2C:3-4(c)(1) (West Supp. 1988)).

⁴⁰ 1987 N.J. Sess. Law Serv. 46 (codified as amended at N.J. STAT. ANN. § 2C:3-4(c)(2) (West Supp. 1988)).

⁴¹ 1987 N.J. Sess. Law Serv. 46 (codified as amended at N.J. STAT. ANN. § 2C:3-4(c)(2)(a) (West Supp. 1988)).

⁴² 1987 N.J. Sess. Law Serv. 46 (codified as amended at N.J. STAT. ANN. § 2C:3-4(c)(2)(b) (West Supp. 1988)).

that encountered.⁴³

The Deadly Force Act makes two significant alterations to the law of defense of property. First, it creates a presumption of reasonableness whenever a person uses force within his own dwelling.⁴⁴ Just as whenever the accused raises the defense of justification,⁴⁵ the Deadly Force Act expressly sets forth that the prosecution can only rebut this presumption by proving beyond a reasonable doubt that the homeowner's or occupier's belief was unreasonable.⁴⁶ This change is particularly significant because it eliminates the defendant's need to come forward with any evidence on the reasonableness of the belief that force was necessary.⁴⁷ Thus, the homeowner is relieved of the burden of establishing an affirmative defense.⁴⁸

Secondly, and perhaps most significantly, the Deadly Force Act permits the use of deadly force whenever the actor, or another in his presence, is subject to a substantial danger or mere bodily harm.⁴⁹ Thus, the Deadly Force Act eliminates the requirement that the actor be faced with serious bodily harm before deadly force is justified. The Code defines "serious bodily harm" as such harm which creates a substantial risk of death, or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ, or which results from aggravated sexual assault.⁵⁰ In comparison, the Deadly Force Act defines "bodily harm" to mean physical pain, temporary disfigurement or impairment of physical condition.⁵¹ Thus, "these changes likewise reduce the requirements for the use of deadly force and make it easier to employ

⁴³ Cannell, *supra* note 32, Comment 13, N.J. STAT. § 2C:3-4.

⁴⁴ JUDICIARY COMMITTEE STATEMENT, *supra* note 38.

⁴⁵ See also Cannell, *supra* note 35, Comment 5, N.J. STAT. § 2C:3-6. "The added language requiring the state to rebut the presumption affects no change in the law."

⁴⁶ JUDICIARY COMMITTEE STATEMENT, *supra* note 38.

⁴⁷ Cannell, *supra* note 37, Comment 5, N.J. STAT. § 2C:3-6.

⁴⁸ *Id.* Previously, the defendant had to establish such evidence to prove an affirmative defense.

⁴⁹ 1987 N.J. Sess. Law Serv. 48 (codified as amended at N.J. STAT. ANN. § 2C:3-6(b)(3)(c)(ii) (West Supp. 1988)).

⁵⁰ 1987 N.J. Sess. Law Serv. 49 (codified as amended at N.J. STAT. ANN. § 2C:3-11(d) (West Supp. 1988)).

⁵¹ 1987 N.J. Sess. Law Serv. 49 (codified as amended at N.J. STAT. ANN. § 2C:3-11(e) (West Supp. 1988)).

such force within the home."⁵²

Obviously, the Deadly Force Act increases the number of situations in which deadly force could be used to repel an intruder. Conceivably, "the owner of a building could use deadly force against a ten-year old graffiti artist if the owner reasonably believed that use of less force would place him in danger of a kick in the shin."⁵³ It is apparent that in most encounters with an intruder, a homeowner has the legal authority to use deadly force to protect himself or his loved ones.

To better understand New Jersey's position as to the use of force in self-defense, and to appreciate how the passage of the Act affects the homeowner's right of self-defense, a brief examination of the Model Penal Code and the foundation of the current New Jersey Code is helpful.

IV. *Self-Defense in the Model Penal Code*

Although the provisions of the Act are not included in the Model Penal Code, a review of the Model Penal Code reveals that it is similar to the New Jersey Code of Criminal Justice. In fact, much of the New Jersey Code is based primarily upon the Model Penal Code both in structure and substance.⁵⁴

Regarding the use of force in self-protection,⁵⁵ the Codes are almost identical with one important distinction: Under the Model Penal Code, force is permissible where the individual *believes* that such force is necessary,⁵⁶ while under the New Jersey Code only a *reasonable* belief will justify the use of force.⁵⁷ This divergence is significant, and could mean the difference between conviction and acquittal. Under the Model Penal Code, the jury would be instructed to assess the defendant's belief subjectively; while in New Jersey, the jury must apply an objective test.⁵⁸

The other significant difference between the two Codes con-

⁵² Cannell, *supra* note 37, Comment 1, N.J. STAT. § 2C:3-4.

⁵³ *Id.* at Comment 5, N.J. STAT. § 2C:36.

⁵⁴ N.J. PENAL CODE, *supra* note 3, at 78-79.

⁵⁵ MODEL PENAL CODE § 3.04 (Official Draft 1962) [hereinafter MODEL CODE].

⁵⁶ *Id.* § 3.04(1).

⁵⁷ N.J. STAT. ANN. § 2C:3-4(a) (West 1987).

⁵⁸ *Id.*

"The [New Jersey] Code as proposed required only the honest belief of the actor as a basis for a justification. The legislature rejected this view and added the word "reasonable" before "believes" throughout the

cerns the duty to retreat. Under the Model Penal Code, there is no obligation to retreat in either a person's dwelling *or* in his or her place of work.⁵⁹ In New Jersey, however, there is no exemption for a person's place of business.⁶⁰

Although both Codes have similar provisions on the use of force in defense of property, the Model Penal Code's provision is considerably longer and more detailed.⁶¹ Other differences center on the Model Penal Code's requirement that the individual only need believe the force is necessary,⁶² while the New Jersey Code requires that the individual's belief be reasonable before he or she is justified to act in defense of property.⁶³

Under the Model Penal Code, the use of force is justifiable to protect property where there is a reasonable belief that such force is immediately necessary to prevent or terminate an unlawful entry or other trespass upon land. The use of force is also justified to stop the unlawful carrying away of tangible, movable property, or to effect an entry or re-entry upon land to retake tangible, movable property which was wrongfully taken.⁶⁴ The actor must also use the force immediately or in fresh pursuit with the belief that the wrongdoer acted without a claim of right.⁶⁵ The New Jersey Legislature essentially adopted the Model Penal Code's limitations on the use of force except for the requirement that the actor subjectively believe a request to desist would be useless, dangerous, or would have no effect.⁶⁶

New Jersey also adopted substantially all of the Model Penal Code's provisions regarding the use of deadly force in the pro-

chapter. The result, reasonable belief that force is necessary, is a codification of pre-Code case law."

Cannell, *supra* note 37, Comment 3, N.J. STAT. § 2C:3-4.

Other states which have adopted the Model Code in whole, or in part, also follow this approach. See *Commonwealth v. Fisher*, 342 Pa. Super. 533, 493 A.2d 719 (1985), where the court held that the objective rather than the subjective test was to be used in determining whether the defendant's actions were justified.

⁵⁹ MODEL CODE, *supra* note 55, § 3.04(2)(b)(ii)(1).

⁶⁰ N.J. STAT. ANN. § 2C:3-4(2)(b)(i) (West Supp. 1987).

⁶¹ See MODEL CODE, *supra* note 53, § 3.06(2) which deals with the meaning of possession and MODEL CODE, *supra* note 55, § 3.06(3)(c) dealing with resistance of lawful re-entry or recaption, neither or which is found in the New Jersey Code.

⁶² *Id.* § 3.06(1).

⁶³ N.J. STAT. ANN. § 2C:3-6 (West Supp. 1987).

⁶⁴ MODEL CODE, *supra* note 53, § 3.06(1).

⁶⁵ *Id.* §§ 3.06(1)(i), 3.06(1)(ii).

⁶⁶ *Id.* § 3.06(3)(a).

tection of property.⁶⁷ Except for differences in form and structure, including the type of belief which is required prior to the use of force, both the provisions are essentially similar.

Both codes also contain the same list of definitions.⁶⁸ However, the Model Penal Code, unlike the New Jersey Code, does not include a definition of "serious bodily harm," because it is not used in this section of the Model Penal Code. The New Jersey Legislature essentially adopted this term from the Model Penal Code's provision on Criminal Homicide.⁶⁹ In addition, the Model Penal Code does not address harm created as a result of aggravated sexual assault, or sexual assault, as does the New Jersey Code.⁷⁰

V. *Behind the Scenes in Trenton*

According to Assemblyman Thomas J. Shusted, sponsor of the Deadly Force Act,⁷¹ it was passed primarily to end the confusion over the circumstances under which a citizen could legitimately use deadly force.⁷² Specifically, the sponsors were concerned that a person believing his or her life or the lives of family members to be in danger should not be required to pause and evaluate the legality of his actions before taking appropriate defensive measures.⁷³ They maintained that the Deadly Force Act was a reasonable compromise between a person's right of self-defense and society's need and desire to keep the use of that deadly force to a minimum.⁷⁴ The sponsors believed that the changes would protect homeowners whose homes have been burglarized, while preventing the abuse of the right to use force.⁷⁵

After receiving overwhelming support, the Governor's Of-

⁶⁷ *Id.* § 3.06(3)(d).

⁶⁸ *Id.* § 3.11.

⁶⁹ MODEL CODE, *supra* note 55, § 210.00.

⁷⁰ Compare N.J. STAT. ANN. § 2C:3-11 with MODEL CODE, *supra* note 55, § 210.00.

⁷¹ The Deadly Force Act was sponsored by Assemblyman Thomas J. Shusted (R-6th District), Assemblyman Peter J. Genova (R-21st District) and Senator Frank X. Graves, Jr. (D-35th District).

⁷² Letter from Thomas J. Shusted to David G. Tomeo (Nov. 10, 1987) (discussing the Deadly Force Act).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

fic favored the proposal and urged the legislature to enact it.⁷⁶ The Act passed 73-1 the Assembly on March 10, 1986, and an amended version unanimously passed the Senate on October 30, 1986.⁷⁷ On February 23, 1987, the Assembly unanimously concurred with the Senate changes and the Governor signed the Deadly Force Act on May 15, 1987.⁷⁸

Although the Deadly Force Act received much support and favorable commentary, it was not enacted without objection. The Attorney General's Office vigorously opposed the Deadly Force Act and recommended that the Governor veto it upon its passage by the legislature.⁷⁹ The Attorney General's primary concern was that the Deadly Force Act could inhibit the prosecution of those persons acting with the intent to commit murder.⁸⁰ It was also feared that the Deadly Force Act would also undermine the requirement that a person could use lethal force only when necessary and was based on a reasonable belief that one needs to use such force.⁸¹

The legislature's only opponent to the Deadly Force Act was Assemblywoman Mildred Garvin who was the only legislator to vote against its passage.⁸² Although Garvin agreed that homeowners have a right to use force to protect themselves, she believed that the Deadly Force Act's authorization of the use of force was excessive.⁸³ In short, the Deadly Force Act promoted and encouraged violence, and therefore had an overall negative impact on society.⁸⁴ In her opinion, violence encourages more criminal acts, which has the effect of adding to an already congested prison system where the inmates learn how to become better criminals.⁸⁵ Had the Act not been so encouraging for the use of force, Garvin felt that she might have supported its passage; but in its final version, she felt that the Act would harm

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* Telephone interview with Mildred Garvin (D-27th District) (Nov. 17, 1987) (discussing the Deadly Force Act) [hereinafter Telephone Interview].

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

society in general, and therefore it was not worthy of her vote.⁸⁶

Although the Deadly Force Act was passed with overwhelming approval, Assemblywoman Garvin's objections raise legitimate and thought provoking questions, which will have to be answered at some point in the future. The best place to resolve these questions is probably on the floor of the legislature. However, most likely the New Jersey's Supreme Court will resolve these lingering doubts when it is asked to review the Deadly Force Act.

VI. Colorado Addresses the Question of Self-Defense

On June 6, 1985, the Colorado Legislature enacted legislation similar to the Deadly Force Act concerning use of force in self-defense within the dwelling.⁸⁷ This Act (the "Colorado Act") was known as the "Make My Day Law".⁸⁸ It has met with

⁸⁶ *Id.*

⁸⁷ Reidinger, *Remaking My Day*, 73 A.B.A.J. 114 (1987) [hereinafter Reidinger].

⁸⁸ The "Make My Day" law is codified at COLO. REV. STAT. § 18-1-704.5 (1986).

The Colorado self-defense statute provides:

- (1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.
- (2) Deadly physical force may be used only if a person reasonably believes a lesser degree of force is inadequate and:
 - (a) The actor has reasonable ground to believe, and does believe that he or another person is in imminent danger of being killed or receiving great bodily injury; or
 - (b) The other person is using or reasonably appears about to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary. . . ; or
 - (c) The other person is committing or reasonably appears about to commit kidnapping, . . . robbery, . . . sexual assault, . . . or assault.
- (3) Notwithstanding the provisions of subsection (1) of this section, a person is not justified in using physical force if:
 - (a) With intent to cause bodily injury or death to another person, he provokes the use of unlawful physical force by that other person; or
 - (b) He is the initial aggressor, except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter

both objection and acclaim. Proponents have asserted that the Colorado Act protects the rights of citizens to be safe within their homes, while critics have countered by "charging that the law enshrines vigilantism and the 'shoot first, ask questions later' spirit of the Wild West."⁸⁹ While opinions in the public arena have differed on the value of or need for the Colorado Act, it has proven to be equally controversial.⁹⁰ Recently in an attempt to resolve conflict, the Colorado Supreme Court has interpreted the Colorado Act for the first time.⁹¹ In this manner, Colorado presents an interesting case study in the interaction between the judiciary and legislature in the creation and interpretation of self-defense provisions.

The Colorado Act is divided into four parts. In the first part, it declares "[t]hat citizens of Colorado have a right to expect absolute safety within their homes."⁹² Secondly, the Colorado Act authorizes any occupant of a dwelling to use any degree of physical force, against any unlawful intruder.⁹³ However, the occupant must possess a reasonable belief that the intruder has committed or intends to commit a crime within the dwelling, and that the intruder might use physical force, no matter how slight against one of the occupants.⁹⁴ Additionally, the third part provides that any occupant, using force or deadly force in accordance with the second part, shall be immune from criminal prosecution for the use of such force.⁹⁵ Finally, the Colorado Act exempts an occupant from any civil liability for injuries or death resulting from the use of such force.⁹⁶

At a legislative committee hearing, one of the sponsors, Senator Brandon, explained that the Colorado Act was designed to

nevertheless continues or threatens the use of unlawful physical force, or

- (c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

COLO. REV. STAT. § 18-1-704.

⁸⁹ Reidinger, *supra* note 87.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² COLO. REV. STAT. § 18-1-704.5(1) (1986).

⁹³ *Id.*

⁹⁴ *Id.* § 18-1-704.5(2).

⁹⁵ *Id.* § 18-1-704.5(4).

⁹⁶ *Id.*

spare a homeowner the financial burden of a criminal trial.⁹⁷ He noted that under prior Colorado provision, "a homeowner probably would not be convicted in a self-defense situation" in the dwelling, but the cost of defending himself at trial would be so great that the homeowner would be forced to "put his home on the block" to avoid a jail sentence.⁹⁸

In its original version, the Colorado Act created a presumption that a homeowner's use of deadly force was reasonable.⁹⁹ This is the same language that the New Jersey Legislature adopted in the Deadly Force Act.¹⁰⁰ These words were eventually omitted from the Colorado Act in response to concerns expressed by some of Colorado's district attorneys.¹⁰¹

Almost a year after the controversial Colorado Act became effective, David and Pamela Guenther were confronted with a situation contemplated by the sponsors. Although there is much disagreement as to what occurred, apparently three people from a nearby house party stood outside the Guenther's home and began to harass them verbally.¹⁰² Shortly thereafter, Mrs. Guenther reported the disturbance to the police, who promptly responded.¹⁰³ After the police left, another confrontation between the Guenthers and several people from the nearby party began

⁹⁷ Tape Recording of Senate Committee on State Affairs Hearing, Apr. 2, 1985 (remarks of Senator Brandon) (quoted in *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987)).

⁹⁸ *Id.*

⁹⁹ As originally introduced, the "Make My Day" law would have added to COLO. REV. STAT. § 18-1-704(2) (1986), the following statement:

[A]ny person using deadly physical force within his residence shall be presumed to have a reasonable ground to believe that he, a member of his family, or a member of his household is in imminent danger of being killed or of receiving great bodily injury when that force is used against another person who is not a member of the family or household and who unlawfully and forcibly enters the residence and when the person using the force knows or has reason to believe that an unlawful and forcible entry has occurred.

See *People v. Guenther*, 704 P.2d 971, 976 (Colo. 1987).

¹⁰⁰ 1987 N.J. Sess. Law Serv. 48 (codified as amended at N.J. STAT. ANN. § 2C:3-6(b)(3)(c)(ii) (West Supp. 1988)).

¹⁰¹ Tape Recording of Legislative Conference Committee Meeting, May 22, 1985 (remarks of Representative Mielke) (quoted in *People v. Guenther*, 740 P.2d 971, 976 (Colo. 1987)).

¹⁰² *People v. Guenther*, 740 P.2d 971, 973 (Colo. 1987).

¹⁰³ *Id.*

on the Guenther's front lawn.¹⁰⁴ Concerned that his home and wife were in danger, Guenther returned from his house with a gun and began shooting.¹⁰⁵ As a result, one woman was shot dead and two others were wounded.¹⁰⁶

Subsequently, Guenther was charged with second degree murder.¹⁰⁷ Under the Colorado Act, Guenther moved to dismiss the charges and enjoin further prosecution.¹⁰⁸ Although concluding that there was probable cause for believing that Guenther had committed the crimes charged, the Colorado district court granted Guenther's motion to dismiss.¹⁰⁹

In *People v. Guenther*,¹¹⁰ the Colorado Supreme Court granted certification, and reversed the district court's ruling and remanded the case for further proceedings.¹¹¹ This case was the first time a state supreme court had to determine what the legislature intended with its passage of the "Make My Day Law". After initially concluding that the Colorado Act authorizes the district court to dismiss a prosecution at the pretrial stage¹¹² and that the Colorado Act did not unconstitutionally interfere with the separation of the executive and judicial branches of state government,¹¹³ the court decided the material questions before it. The court strictly interpreted the words of the Colorado Act, and held that it provides the home occupant with immunity from prosecution only where force is used against one who has made an unlawful entry into the dwelling. Thus, the immunity does not extend to force used against non-entrants.¹¹⁴ More importantly, the court held that the prosecution does not have to establish, beyond a reasonable doubt, that the defendant did not act within the limits of the statute.¹¹⁵ Rather, it is the defendant's burden to prove his entitlement to an order of dismissal on the basis of this

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 972. Mr. Guenther was also charged with two counts of first degree assault and one count of the commission of a crime of violence.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 972-73.

¹¹⁰ 740 P.2d 971 (Colo. 1987).

¹¹¹ *Id.* at 982.

¹¹² *Id.* at 975.

¹¹³ *Id.* at 977.

¹¹⁴ *Id.* at 979.

¹¹⁵ *Id.* at 980.

immunity by a preponderance of the evidence.¹¹⁶

The court narrowed and limited the scope of the "make my day law" by placing the burden of proof on the defendant.¹¹⁷ In addition, the court restricted the immunity to instances where force is employed within the dwelling.¹¹⁸ Apparently, the court reasoned that the legislature had granted too much authority and that these limitations were necessary for the good of society.¹¹⁹ Despite these limitations, however, the "make my day law" is still a significant grant of power to the Colorado homeowner. Subsequent cases will determine whether the Colorado court will retract from their position or further restrict the "make my day law." Alternatively, the legislature may amend the statute to render the *Guenther* opinion moot. Whatever the outcome of the struggle between the Colorado judiciary and the legislature, New Jersey lawmakers, those elected and appointed, should pay attention to that state for it is likely that these same issues will arise as a consequence of the Act.

Although the Deadly Force Act and the Colorado "make my day law" are not identical, there are significant similarities especially regarding legislative intent. As with its Colorado counterpart, the Deadly Force Act leaves much subject to judicial interpretation. How the New Jersey Supreme Court will construe "sudden and unexpected"¹²⁰ or "dwelling"¹²¹ is uncertain. Also unclear is whether the supreme court will restrict, as the Colorado court, the scope of the Deadly Force Act, or whether it will expand the legislative grant of authority. Nevertheless, when the hypothetical person, described in the Introduction is prosecuted, New Jersey courts will have to make some difficult policy deci-

¹¹⁶ See generally Reidinger, *supra* note 87.

¹¹⁷ The significance of the court's placing the burden of proof on the defendant is better appreciated when it is realized that in Colorado the prosecution must disprove beyond a reasonable doubt, any affirmative defense after the defendant has satisfied the burden of production. The court justified its conclusion by distinguishing the pre-trial hearing from an actual trial, for in the former the defendant cannot lose his liberty, while in the latter this is exactly what is at stake. See generally *People v. Guenther*, 740 P.2d 971, 980-81 (Colo. 1987).

¹¹⁸ 1987 N.J. Sess. Law Serv. 49 (codified as amended at N.J. STAT. ANN. § 2C:3-11(c) (West Supp. 1988)).

¹¹⁹ *People v. Guenther*, 740 P.2d 971, 980-81 (Colo. 1987).

¹²⁰ *Id.* at 976.

¹²¹ 1987 N.J. Sess. Law Serv. 46 (codified as amended at N.J. STAT. ANN. § 2C:3-4(c)(2) (West Supp. 1988)).

sions, which will affect New Jersey's homeowners and society in general. It can only be hoped that the court's interpretation will be the correct one, for life and death truly hang in the balance.

VII. Conclusion

Unfortunately, the fear of violent or deadly attack within the home pervades our society. Legislators in New Jersey and Colorado have attempted to alleviate this problem by enacting legislation providing homeowners with a greater right to use force to repel intrusion. Because this problem is not readily resolved, all those in government must not react impulsively but with great caution. As the struggle between the court and the legislature in Colorado has demonstrated, drafting a statute which adequately addresses homeowner and societal concerns is a complicated and controversial task. The compromise between those who demand the protection of human life and those who advocate the protection of homeowners' safety and property is not readily attainable. Finding this middle ground, however, should be the objective of every legislative committee which attempts to draft such a bill.

While the Deadly Force Act and the "make my day law" will be used as the prototype upon which other states will base their legislation, neither completely or adequately addresses the intricacies of this problem. An act which would combine the best features of both, however, would create the best statutory scheme. One such model may be:

Model Bill: Use of Force Within the Home to Repel Criminal Intrusion

1. The Legislature expressly declares that it is the public policy of this state that while homeowners and those privileged to be in the dwelling have a right to prevent attack and to enjoy safety within the home, human life is very valuable and must be preserved whenever and wherever possible.
2. A homeowner, or one lawfully within the dwelling, can use reasonable force to repel any use of force, or the immediately threatened use of force against him personally, by an intruder within the dwelling.
 - (A.) Before using force the homeowner must warn the intruder of his intent to use force.
 - (B.) The homeowner is privileged to use force, as provided in Section 2, to protect any other person in the

dwelling as long as the warning provided for in subsection (A) is given by the homeowner.

- (C.) The privilege to use force, as provided in Section 2, extends to the grounds surrounding the dwelling owned by the homeowner and to land a reasonable distance from the dwelling, as long as the intruder has instigated the incident involving force and the homeowner gives the intruder the warning provided for in subsection (A).
3. A homeowner, or one lawfully within the dwelling, can use deadly force only when the intruder immediately threatens deadly force, with either a dangerous weapon or with physical force, or is using such deadly force.
- (A.) Deadly force by the homeowner or one lawfully within the dwelling is not justifiable, if the intruder has ceased his threat of deadly force and/or is fleeing or retreating from the dwelling.
 - (B.) The homeowner, or one lawfully within the dwelling, need not warn the intruder as provided for in Section 2(A) where the homeowner or one lawfully within the dwelling is about to use deadly force as provided in Section 3.
 - (C.) The homeowner is privileged to use deadly force, as provided in Section 3, to protect any other person in the dwelling.
 - (D.) The privilege to use deadly force, as provided in Section 3, extends to the grounds surrounding the dwelling owned by the homeowner and to land a reasonable distance from the dwelling as long as the intruder has instigated the incident involving deadly force.
4. Neither force nor deadly force can be used by a homeowner, or one lawfully within the dwelling, against an intruder who has entered the dwelling merely to take personal property.
- (A.) The intruder will be presumed to have entered the dwelling only for the purpose of removing personal property, where it reasonably appears that he carries no weapon and has made no effort to disturb or attack anyone within the dwelling.
 - (B.) This prohibition against force or deadly force extends to the grounds surrounding the dwelling

owned by the homeowner and to lands a reasonable distance from the dwelling.

- (C.) This prohibition against force or deadly force is immediately dissolved when at any time during the intruder's presence in the dwelling or on the lands surrounding it, the intruder threatens or employs force or deadly force against anyone on or in the premises.
 - (1) In such circumstances, the homeowner or one lawfully within the dwelling need not give any warning to the intruder before using force or deadly force against him.
- 5. The homeowner, or anyone lawfully within the dwelling, shall be immune from any liability in a civil action for damages brought by the intruder or a survivor, for any injuries or death to the intruder sustained in a confrontation instigated by the intruder.
 - (A.) The intruder shall be fully liable for any harm or injury done to any other person as a result of a confrontation instigated by the intruder.
 - (B.) As long as his actions were reasonable in the circumstances as they existed at the time of the confrontation, a homeowner or anyone lawfully within the dwelling shall be immune from civil liability for any harm or injury caused to any other person as a result of a confrontation with an intruder.
- 6. In any criminal pretrial hearing or proceeding, a homeowner or one lawfully within the dwelling accused of any crime as a result of a confrontation with an intruder shall have the burden of establishing by a preponderance of the evidence that his conduct conforms with the requirements of this statute. Once this burden has been met, he shall be acquitted of all criminal charges resulting from the confrontation. If the accused does not meet this burden, the case will proceed to trial where the prosecution shall prove beyond a reasonable doubt that any or all of the accused's conduct constituted a crime.

Although no statute no matter how carefully drafted will satisfy the variety of opinion on this or any controversial issue, this model bill attempts to appease all points of view through compromise. It values human life by prohibiting the use of force in defense of property, and by requiring a warning before the homeowner can use

force. It is equally protective, however, of the rights of those attacked within their dwelling. The model bill extends the right to use force and deadly force beyond the dwelling itself, requires no warning on the part of the homeowner before deadly force is used, and mandates acquittal if the homeowner establishes, by a preponderance of the evidence, that his conduct conforms to the bill's requirements.

As previously noted, the problem of attack within the dwelling and the homeowner's response is not readily remedied. New Jersey and Colorado have attempted to address this problem and it is likely that other states will follow suit. Hopefully, the draftsmen in these states will establish the necessary equilibrium between the competing concerns involved, and will attach equal weight to the safety of the homeowner as well as to the value of human life. Whether other states enact statutes which resemble the New Jersey Act, the Colorado Act of the Model Bill, is of secondary importance, because any of these statutes is preferable to allowing the homeowner to take the law and another's life itself into his or her own hands.

David G. Tomeo