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William Leibovitz
Ellis, Stringfellow, Patton and Leibovitz

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JUSTIFIABLE USE OF FORCE UNDER ARTICLE 35 OF THE PENAL LAW OF NEW YORK

WILLIAM LEIBOVITZ*

I. INTRODUCTION

A NEW and enlightened concept of restraint in the law defining justifiable deadly force was adopted in the 1965 revision of the Penal Law of New York.¹ Most notably, the revision brushed aside an archaic doctrine that had permitted the use of deadly violence by law enforcement officers against civilians and by civilians against each other in cases involving no counter threat of deadly force. Under the 1965 law the use of justifiable lethal force was limited essentially to the exigency of preserving innocent life. As a measure to reduce excessive deadly force, no more relevant and timely response was made by the revised Penal Law to present social conditions. In addition, the revision preserved the right to resist an unlawful arrest, as established in the case law, conditioned on the use of reasonable, nonvindictive force for those purposes.² Thus, the law maintained a balance of justice between the abused citizen and the police officer at fault.

However, the short-lived revision has already been jettisoned for a new doctrine of justification that is even more permissive in the use of deadly violence than was sanctioned by law prior to 1965. The imbalance has been extended further by a new provision overruling the case law that justified the victim of an unlawful arrest to use reasonable force in resisting the assault. Consequently, the new law subjects a wrongfully arrested citizen to criminal prosecution in the latter circumstances.

The social implications of the new Penal Law, as amended,³ are far-reaching in terms of continuing efforts to achieve social justice while curbing civil disorder. In these new modifications the Penal Law seriously fails to fulfill the promise of "modern sociological, psychological and penological thinking," envisioned by its authors, The Temporary State Commission on Revision of the Penal Law and Criminal Code.⁴ This article is meant to illuminate the nature of this failure, as expressed by the present Penal Law.

II. JUSTIFIED USE OF DEADLY FORCE

Since the enactment of the new Penal Law, Article 35, now entitled "Defense of Justification," has been materially erased and reformulated to reflect a

* A.B., Dartmouth College; LL.B., University of Pennsylvania; partner in the firm of Ellis, Stringfellow, Patton and Leibovitz, New York, N. Y.

1. N.Y. Sess. Laws 1965, ch. 1030, art. 35.

2. *People v. Cherry*, 307 N.Y. 308, 121 N.E.2d 238 (1954).

3. N.Y. Sess. Laws 1968, ch. 73, *amending* N.Y. Sess. Laws 1965, ch. 1030, art. 35.

4. N.Y. Pen. Law (McKinney 1967) [hereinafter cited as N.Y. Pen. Law], comm'n memorandum at XXXII.

new basis of justification in the use of deadly force.⁵ In brief, the amendment has substantially increased the number of instances in which persons may lawfully kill or violently injure other persons suspected (rightly or wrongly) of having committed various offenses.

A. *Influence of the "Fleeing Felon" Rule*

Prior to the 1965 revision, New York adhered to a modified form of the "fleeing felon" rule.⁶ At common law the fleeing felon rule permitted a peace officer, or one acting at his command, to kill a person who had actually committed any felony if necessary to arrest him or prevent his escape.⁷ The New York rule applied not only to the commission of a felony but to a lesser "crime" (misdemeanor) committed under circumstances in which there was "reasonable cause for believing the committed crime was a felony."⁸ At common law the fleeing felon rule was consistent with common law sentencing policy under which all felonies were considered sufficiently serious to be punished by death.⁹

By 1961, when the Commission on Revision was legislatively created to reappraise the criminal law of New York, it had become apparent to many observers that the fleeing felon rule was inconsistent with contemporary social conditions and prevailing concepts of law. When the revisers began their reevaluation of the former Penal Law, capital punishment in New York applied to three felonies.¹⁰ It has since been drastically curtailed.¹¹ It was clear, therefore, that any reformulation of the law of justification in respect to the use of deadly force should reflect the fact that very few felony suspects, if convicted, would be punished with death. Consequently, the use of deadly force in apprehending such persons would presumptively be unwarranted in the absence of exigent circumstances.

Original section 35.30 of the revised Penal Law of 1965 basically fulfilled the specifications of a just and socially realistic reformulation of the law of justifiable homicide. This law discarded the fleeing felon rule and restricted the use of deadly force by police officers to circumstances in which the suspected offender himself employed deadly force or otherwise seriously threatened human life and safety. Original section 35.30 permitted the use of deadly force by a peace officer only when he reasonably believed such necessary:

5. See N.Y. Sess. Laws 1968, ch. 73, *amending* N.Y. Sess. Laws 1965, ch. 1030, art. 35.

6. Former N.Y. Pen. Law § 1055(3) (McKinney 1944), [hereinafter cited as former N.Y. Pen. Law].

7. See 4 Blackstone, Commentaries 289-90 (4th ed. 1771).

8. Former N.Y. Pen. Law § 1055(3).

9. "[I]f a statute makes any new offense a felony, the law implies that it shall be punished with death, viz. by hanging . . ." Blackstone, *supra* note 7 at 98.

10. Under the former N.Y. Pen. Law, the following felonies were punishable by death: murder in the first degree (§ 1045); kidnapping (§ 1250); treason (§ 2382).

11. Only N.Y. Pen. Law § 125.30, *as amended*, N.Y. Sess. Laws 1967, ch. 791, pertaining to the killing of a peace officer on duty or murder committed by one serving a life sentence, imposes capital punishment. Also, the sentenced person must be over the age of eighteen.

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

(b) to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes (i) has committed or attempted to commit a felony involving the use or threatened use of deadly physical force, or (ii) is attempting to escape by the use of a deadly weapon, or (iii) otherwise indicates that he is likely to endanger human life or to inflict serious physical injury unless apprehended without delay

However, such justification did not extend to "reckless or criminally negligent conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody."¹²

A civilian commanded by a peace officer to assist him in effecting an arrest or preventing an escape was authorized to use deadly force, a) if necessary to defend himself or a third person from what he reasonably believed to be "the use or imminent use of deadly physical force," or b) in following a direction of the peace officer to use deadly force unless the civilian actually knew that the officer himself was not authorized to use deadly force. However, a civilian acting on his own in making an arrest or preventing escape was justified in using deadly force only to defend himself or a third person from what he reasonably believed to be the use or imminent use of deadly force.¹³

The essential theme of each provision within original section 35.30 was the fact of its limitation of justifiable homicide to cases in which a threat of death or serious bodily injury compelled the use of deadly force. Purposeless killing was not to be sanctioned. In so providing, the revisers generally adopted the restrictions set forth in the Model Penal Code of the American Law Institute on the use of lethal force in law enforcement.¹⁴ Both the Model Penal Code and original section 35.30 were clearly a repudiation of the fleeing felon rule and a historic departure from indiscriminate use of violence under law.

Section 35.30, as amended in 1968, has now revived the right to commit homicide under considerably less exigent circumstances than the objective necessity of preserving human life. The statute permits the use of deadly force by a peace officer in effecting an arrest or preventing an escape only when he "reasonably believes" that:

(a) The offense committed by such person was:

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

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

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefore or attempting

12. N.Y. Pen. Law § 35.30(2) (a), (b).

13. *Id.* § 35.30(5), (6).

14. Model Penal Code (Proposed Official Draft, 1962) § 3.07 [hereinafter cited as MPC].

to escape from custody, such person is armed with a firearm or deadly weapon; or

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

There is no justification "for reckless conduct by such peace officer" toward innocent third persons.¹⁵

The amendment restates the provisions of original section 35.30 with respect to civilians acting at the command of a peace officer. However, a civilian acting on his own in making an arrest may now employ deadly force not only to defend himself or a third person against the use or imminent use of deadly force but also to "effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible sodomy and who is in immediate flight therefrom."¹⁶ The latter provision for the first time apparently authorizes a civilian acting on his own to pursue and kill, if "necessary," a person who presents no immediate danger to the life or safety of the pursuer or a third person and whose crime was not committed in the pursuer's presence.¹⁷ Even the rule observed at common law did not accord that freedom to civilians acting on their own when the crime was not in their presence.¹⁸ Accordingly, the amendment invites a civilian to take the law into his own hands on hearsay information purporting that such serious crimes have been committed. In the event of a false accusation of rape, robbery, etc., a not uncommon occurrence, the person falsely accused may very well become the victim of a self-appointed avenger or an amateur sleuth before the accused can plead his defense.

It should be noted that if the *raison d'être* of the amendment of section 35.30 was essentially to "extend" the use of justifiable deadly force to forcible sex crimes and muggings on the theory that original section 35.30 did not justify such use, the basis for amendment appears to be invalid. Original section 35.30 justified the use of deadly force in apprehending a person "who committed or attempted to commit a felony involving the use or threatened use of deadly physical force." "Deadly physical force" is defined in the Penal Law as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."¹⁹ Since the very nature of every truly forcible sex crime or mugging implicitly includes either the use or implied

15. N.Y. Pen. Law § 35.30(1), (2).

16. *Id.* § 35.30 (4)(b).

17. See S. 2308, N.Y. Sen., § 8 (1968). This proposed amendment was bypassed in favor of existing N.Y. Pen. Law § 35.30. The proposed provision required the commission of such crimes "in the actor's presence" before there was justification to pursue and kill the offender.

18. See Blackstone, *supra* note 7.

19. N.Y. Pen. Law § 10.00(11) (emphasis added).

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threat of "serious physical injury"²⁰ to its victim, original section 35.30 was applicable to such crimes without amendment.

In extending the use of deadly force to felonies involving "physical force" as opposed to "deadly physical force," the amendment can now be construed to permit the killing of any person reasonably believed to have used, attempted to use, or threatened the imminent use of even the slightest degree of physical contact with another person in the commission of a felony. This substantial retreat toward the fleeing felon rule overlooks the myriad felony cases particularly common to urban life in which the use or threat of minor physical force occurs, although retaliatory use of deadly force against the suspected offender would be clearly excessive and inhumane. A typical example is the family incident: Flo takes a rolling pin to Andy for assorted domestic grievances, thereby leaving a lump on his head. Under the new Penal Law, this constitutes assault in the second degree, a felony.²¹ Andy or a neighbor then summons the police who arrive to find Flo hastily exiting through the back door. Under amended section 35.30 the police may lawfully pursue her and shoot to kill.

A variety of similar domestic assaults comprise the bulk of felonies with which police in many precincts are principally concerned. Other felonies frequently involve only the most technical or token uses or threats of physical force where injury is neither intended nor sustained. A derelict may forcibly and feloniously steal a drink of whisky from the bottle of another derelict in nothing more than a shoving match.²² Nevertheless, since amended section 35.30 does not now require a peace officer to recognize any difference between the token use of "physical force" and an actual mugging in which "deadly physical force" is necessarily used or threatened,²³ the officer may employ deadly force in either of these disparate examples. Similarly, youths over the age of sixteen, or those reasonably appearing so (who therefore may reasonably be believed to have committed a felony) are often involved in taking bicycles or like property from other youths without more than a token threat of physical force. Nevertheless, such felonious robberies²⁴ may be met by deadly force. These exemplify every-day incidents appearing on police blotters and in the criminal courts. There exists an infinite variety of such occurrences in which the suspected offender inappropriately becomes subject under amended section 35.30 to the use of deadly force if he tries, even momentarily, to evade apprehension. The application of lethal force to common disruptions in which human life has not been threatened is one of the serious failings of amended section 35.30.

The 1968 amendments to section 35.30 drastically alter the 1965 revision elsewhere by permitting the use of deadly force to arrest or prevent the escape of a felon who is reasonably believed by an officer to be "armed" with a firearm

20. *Id.* § 10.00(10).

21. *Id.* § 120.05(2).

22. *Id.* § 160.00.

23. *Id.* § 10.00 (11).

24. *Id.* § 160.00.

or deadly weapon.²⁵ The original statute restricted deadly force to cases in which any suspect was attempting to escape "by the use of" a deadly weapon. With no discernible basis, the amendment accords to a peace officer or his assistant the right to kill a fleeing felony suspect who, (a) did not in any manner use the weapon to commit the felony, (b) did not commit a felony involving any degree of force, violence or personal confrontation with a victim, and (c) did not employ the weapon to abet his escape or otherwise threaten its use against the officer or a third person.

Aside from the needless killing of an armed suspect who has made no effort to use the weapon, the amendment also permits deadly force against an unarmed suspect if the peace officer persuasively claims that he mistakenly but "reasonably" believed that the suspect was armed. Thus, in the common example of unarmed youths riding in or running from a stolen automobile, the law now permits and encourages a police officer to shoot to kill if, in the heat of the moment, he mistakenly but reasonably believes one or more of them armed, although he observes with absolute clarity that no weapon is being used. This provision materially rejects the requirement of original section 35.30 that deadly force be restricted to the exigent necessity of preserving innocent life. It is essentially a regression toward the anachronistic fleeing felon rule of the common law. Moreover, in some respects the present law is even more drastically permissive of violence than the common law, which discouraged deadly force by requiring the *actual* commission of a felony before one could kill the fleeing felon. By contrast, the law of New York now permits the killing of a person wholly innocent of any offense upon the "reasonably" mistaken belief that he appeared to be the culprit.²⁶

B. *Civil Disorder and Peaceful Demonstration*

The amendment of Article 35 is deleterious to the black ghettos and to the general citizenry engaged in or simply surrounded by the social ferment of our day. The present law of New York is unduly permissive of the use of deadly force in civil disorders. Experience of recent years throughout the United States has trenchantly shown that excessive use of force in law enforcement,

25. The amendment revises N.Y. Pen. Law § 10.00(12) to read: "'Deadly weapon' means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, dagger, billy, blackjack, or metal knuckles."

26. See N. Sobel, *The Pleader: A Comment on the Law of Search and Seizure* 4 (1962): "In New York City in 1960 there were 35,000 felony arrests which resulted in 11,000 discharges, and there were 100,000 misdemeanor arrests which resulted in 37,000 discharges (Police Department Report—1960)."

The chance of error in arrest situations is considerable. The person arrested may be entirely innocent, especially in multiple arrest cases, or the arresting officer may have misjudged a lesser offense to be a felony. Some "discharges" are attributable to reductions of technical felonies to lesser charges, and such arrests cannot be deemed erroneous. However, the cited statistics of 1960 cannot be blamed on exclusionary rulings of the United States Supreme Court, beginning with *Mapp v. Ohio*, 367 U.S. 643, since this case was not decided until June 20, 1961.

particularly deadly force, has exacerbated and sometimes initiated disastrous civil disorder.²⁷ As a result, the National Advisory Commission on Civil Disorders reports that authorities experienced in riot control have concurred in the view that local law enforcement agencies must acquire new standards of discipline and self-control in order to avoid indiscriminate use of force leading to further chaos.²⁸ The specific admonition of the Federal Bureau of Investigation in effecting control of large scale disturbances is that only the "minimum force necessary" should be applied.²⁹

It has been suggested by the Commission on Civil Disorders that law enforcement agencies must undergo a process of re-education in order to develop modern, efficient, and humane methods of coping with civil disturbances.³⁰ Restraint in the use of force by the police is considered to be one of the crucial elements of discipline. While legislation cannot achieve that goal, it can assist or hinder it materially. The attitudes of law enforcement personnel toward the use of lethal force in discretionary situations during civil disorder are clearly influenced by the state laws under which they function.³¹ The individual peace officer who operates under a state law that is inordinately permissive in the license it grants to employ violence will be guided accordingly. Consequently, laws should be designed to minimize deadly force and thereby instill a legally based discipline toward alternative methods of coping with disorder. A law that sanctions deadly force when such force has not been threatened against a peace officer or a third person is unduly permissive and will promote excessive violence, chaos and tragedy.³² A law restricting deadly force would preserve lives of innocent civilians in disturbed areas and promote the safety of police by deterring prolongation and recurrence of rioting caused by indiscriminate force.³³

27. See U.S. National Advisory Commission on Civil Disorders, Report 35-38, 53-61 (U.S. Gov't Printing Office ed. 1968) [hereinafter cited as Report on Disorders].

28. *Id.* at 174-76.

29. *Id.* at 176.

30. *Id.* at 174-76, 267-68.

31. See N.Y. Times, August 24, 1968, p. 1, col. 2 (city ed.). The commander of the National Guard unit assigned to Chicago during the Democratic National Convention of 1968 ordered his troops to shoot to kill any demonstrator who could not otherwise be prevented from assaulting a police officer. The commander pointed out that the law of Illinois authorizes deadly force in suppressing *any* "forcible felony," which includes altercations between unarmed civilians and armed police. N.Y. Pen. Law § 35.30, *as amended*, N.Y. Sess. Laws 1968, ch. 73 and Ill. Ann. Stat. ch. 38, §§ 7-5 (Smith-Hurd 1964) both permit a police officer to employ deadly force against one who is neither using nor threatening to use deadly force.

32. See Report on Disorders at 35-36. One of numerous instances of accidental death and maiming caused by law enforcement officers who used deadly force in situations not involving a counter threat of deadly force was the following occurrence in the Newark riot of 1967, cited by the Commission: "[T]he family of Mrs. D. J. was standing near the upstairs window of their apartment, watching looters run in and out of a furniture store . . . The police officers opened fire. A bullet smashed the kitchen window in Mrs. D. J.'s apartment. A moment later she heard a cry from the bedroom. Her 3-year old daughter, Debbie, came running into the room. Blood was streaming down the left side of her face: the bullet had entered her eye. The child spent the next two months in the hospital. She lost the sight of her left eye and the hearing in her left ear." *Id.*

33. *Id.* at 176.

Prior to the revision of 1965, the New York Penal Law permitted a peace officer, or one acting at his command, to employ deadly force "necessarily . . . in suppressing a riot, or in lawfully preserving the peace."³⁴ The statute, as such, lacked reasonable standards and limitations for the needs of present day law enforcement in civil crises. The provision essentially accorded a peace officer unlimited discretion to commit homicide during a riot or lesser breach of the peace. The revisers of the Penal Law omitted any reference to civil disorder in the 1965 enactment of original article 35. The single mandate in all law enforcement situations was that deadly force be used only in response to unlawful uses or threats of deadly force. Original article 35 thereby comported with overall recommendations for the use of minimum necessary force in cases of civil disorder. The statute provided a proper basis for the inculcation of the necessary new discipline against excessive use of force.

By contrast, the response of amended article 35 to urgent recommendations for new limitations on the use of force has been to increase the right of police and civilians to employ deadly force during such crises. Law enforcement officers are given the discretion to use lethal force in cases less exigent than the need to preserve life and prevent serious bodily harm. Under the amendment the opportunities for maximum use of force are great. In the course of civil disorders the streets are crowded not only with participants in the disturbance, but also with neighborhood spectators and with individuals merely scurrying for safety.³⁵ In the heat of events, it is all too easy for a peace officer "reasonably" to believe that anyone in sight is participating in the felonious act of rioting.³⁶ Amended section 35.30 now authorizes the officer to shoot to kill a participant in "a felony involving the use or attempted use or threatened imminent use of physical force against a person" if "necessary" to apprehend him or prevent his escape.³⁷ Original section 35.30 had required reasonable evidence that an individual evinced the intent to use unlawful deadly force before such force could be turned against him. Thus mere spectators and innocent persons in flight were differentiated from actual participants in violence. Under amended section 35.30 a peace officer's standard of restraint in the use of deadly force is so materially relaxed that in civil disturbances the law in effect conditions him to react with excessive violence.

According to the findings of the Commission on Civil Disorders, it is largely

34. Former N.Y. Pen. Law § 1055(3).

35. See Report on Disorders at 174-176. The findings of the Commission on Civil Disorders regarding the composition of crowds in areas of civil disorder included this observation: "Except in the later stages of the largest disorders, the crowds included large numbers of spectators not active in looting or destruction." *Id.* at 175.

36. N.Y. Pen. Law § 240.06 provides: "A person is guilty of riot in the first degree when (a) simultaneously with ten or more other persons he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and (b) in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs. Riot in the first degree is a class E Felony."

37. N.Y. Pen. Law § 35.30.

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meaningless that section 35.30 contains the provision barring reckless conduct by a peace officer against "innocent persons whom he is not seeking to arrest or retain in custody."³⁸ Such a provision cannot reasonably protect the innocent during a riot unless the basic law requires overall restraint in the use of deadly force, as did original section 35.30. As seen in Watts, Newark, and Detroit, many innocent men, women and children were accidentally shot to death by law enforcement personnel acting without fundamental guidelines to prohibit excessive force. Unless proper restraints are initially required by law and instilled as habit, the innocent will not be protected.

In other respects, section 35.30 adversely affects the rights and safety of citizens in the exercise of speech and assembly under the first amendment of the Constitution. We are witness to an era of social and political activism. Civil rights, military conflict, and other great issues are constantly the subject of public demonstrations and protest. Within the limits of law and order, such expression is the birthright and hallmark of democratic freedom. Nevertheless, large numbers of law abiding persons are effectively deprived of these rights through dampening threats of deadly violence³⁹ and actual physical attack.⁴⁰ There are two main sources of violence to demonstrators, namely, hostile anti-demonstrators and police. Anti-demonstrators habitually appear at such events as civil rights protests and peace rallies. They often incite violent incidents, the object and result of which are to stimulate police action. In responding, police often fail to distinguish between assailants and victims, using violence against both factions and against nonparticipants as well.

In other instances police and demonstrators clash directly. The causes are many. An infraction by a single demonstrator might release a tightly coiled unit of police against an entire group of citizens expressing their constitutional rights within lawful limits. Inadequately supervised and sometimes overburdened police forces, called upon to observe these events, are generally apathetic to the differences between lawful and unlawful protest. Picketing and demonstrations represent traffic problems, extra working hours, and added pressures to the policeman. Frequently, police are personally hostile to the social and political causes for which citizens demonstrate, a fact recognized by authorities at the Lemberg Center for the Study of Violence (Brandeis University) as one of the major causes of excessive police violence.⁴¹ As a result, entire groups and organizations become traditional adversaries and targets of the police wherever they appear.

38. See Report on Disorders at 35-38, 53-61.

39. See *supra* note 31.

40. See N.Y. Times, August 28, 1968, p. 31, col. 3 (city ed.). This article depicts the use of violence by Chicago police against twenty-one newsmen "covering demonstrations aimed at the Democratic National Convention" of 1968, after they had identified themselves as members of the press. Film of the attacks was confiscated by police who had removed their own identification tags and badges.

41. See Burnham, *Police Violence: A Changing Pattern*, N.Y. Times, July 7, 1968, sec. 1, p. 1, col. 5 [hereinafter cited as Burnham].

In the above context, amended section 35.30 increases the threat of serious violence to citizens engaged in lawful protest. The statute enables police to use deadly force against demonstrators who commit a felony involving "physical force." A violation of section 120.05(3), a felony involving "physical force," is frequently associated with demonstrations. That section provides in part: "A person is guilty of assault in the second degree when: . . . with intent to prevent a peace officer from performing a lawful duty, he causes physical injury to such peace officer. . . ."⁴² The issue arises in the following example of a typical confrontation: The police make an isolated arrest at a demonstration. The crowd voices disapproval, to which one or two police respond with nightsticks. Persons caught in the path begin flailing at the clubs to avoid injury to themselves or to shield others. Inevitably, some police are injured, occasionally by their own clubs. This signals all-out violence by the remaining police on the theory that the crowd has interfered with lawful police action and has threatened or caused them physical injury. In the example given, original section 35.30 prohibited the application of deadly force whereas the present law sanctions and invites the use of extreme violence by police as a standard response.⁴³ This permission jeopardizes the physical safety of a substantial number of citizens and significantly impedes constitutionally guaranteed expression.

C. *Defense of Premises*

Section 35.20, dealing with the use of deadly force by a civilian in defense of premises, seriously endangers the black ghettos and, ultimately, the community at large. Original section 35.20 contained no sanction for the commission of homicide by a civilian solely in defense of premises except in the case of an attempt to commit arson. However, the crime of arson necessarily involves a threat of death or serious bodily injury to any occupant of the target premises and to the occupants of surrounding premises. Therefore, justification of deadly force against an attempt to commit arson cannot be regarded truly as an exception to the rule prohibiting deadly force solely in defense of premises.

Amended section 35.20 now justifies the use of deadly force in defense of premises only. There need be no use or threatened use of violence against a person, nor does the new law require any confrontation whatever between an intruder and those authorized to kill him. The amendment provides:

A person in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of

42. N.Y. Pen. Law § 120.05(3).

43. See *supra* note 40. The story of the confrontation between police and demonstrators in Lincoln Park, Chicago, includes this account: "A long-time reporter for the Chicago Daily News said the police had come charging out of the park swinging their batons and chanting, 'Kill, kill, kill.' Roy Ries, a student at the McCormick Theological Seminary, was clubbed to the ground. He was taken to Henrotin Hospital with a fractured skull." The law of Illinois, regarding use of deadly force, and amended Section 35.30 are essentially identical. See *supra* note 31.

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such dwelling or building, may use deadly physical force when he reasonably believes such to be necessary to prevent or terminate the commission of such burglary.⁴⁴

A person who loots during civil disorder may now lawfully be killed on the spot. A looter is one who steals from a building, and, therefore, commits burglary within the meaning of section 35.20.⁴⁵ The definition of "building" in section 140.00 includes any structure used "for carrying on business therein."⁴⁶ A store owner, employee, watchman or any other person "licensed or privileged" to occupy the premises may employ deadly force against a person who is looting.⁴⁷ The statute expressly includes "peace officers acting in the performance of their duties" as persons "licensed or privileged" to be in buildings.⁴⁸ A peace officer at the scene of a civil disturbance may shoot to kill looters. There need be no threat or fear, whether objective or subjective, that a looter will physically endanger another person before shooting him.⁴⁹

Recent events indicate that looting in the course of civil disorder is not generally the work of professional burglars but of neighborhood families and individuals yielding to temptation by helping themselves to merchandise through shattered store windows and doors.⁵⁰ Looters in civil disorders typically include clusters of women and children casually entering and leaving such premises, against whom the use of bullets would amount to mass slaughter.⁵¹ The Commission on Civil Disorders voices specific misgivings about the use of deadly weapons and deadly force against persons engaged in looting.⁵² Amended section 35.20 seriously conflicts with those findings and expert opinions, and is plainly inimical to the general welfare of the community.

III. USE OF FORCE TO RESIST UNLAWFUL ARREST

Amended article 35 includes new section 35.27, stating: "A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reason-

44. N.Y. Pen. Law § 35.20(3).

45. *Id.* § 140.20.

46. *Id.* § 140.00(2).

47. *Id.* § 35.20(3).

48. *Id.* § 35.20(4)(b).

49. *See* S. 2308, N.Y. Sen. § 4 (1968). This rejected legislative proposal would have prohibited deadly force against a looter unless: one "believes that the latter is using or about to use physical force against him or a third person, or when he is in fear that such person may use such physical force if not incapacitated from so doing, and when he reasonably believes deadly physical force to be necessary to defend against or prevent the actual, threatened or feared use of such physical force by such other person."

50. *See* Report on Disorders at 35, 53. The Commission reports that in the Detroit riot of 1967, a store owner, driving by in his car, shot and killed one Grzanka, a 45-year old white man who was looting the owner's market: "In Grzanka's pockets police found seven cigars, four packages of pipe tobacco, and nine pairs of shoelaces."

51. *Id.* at 52 (photograph).

52. *Id.* at 176. The Commission quotes a National Guard Commander and former Police Commissioner of Maryland: "I am not going to order a man killed for stealing a six-pack of beer or a television set."

ably appear that the latter is a peace officer."⁵³ This provision constitutes a major change in the criminal law of New York which previously followed the common law rule justifying the citizen's use of necessary force to resist an *unlawful* arrest.

The principle of justification for resistance to arrest was stated in *People v. Cherry*.⁵⁴ In that case a man was accosted on the street by two police officers who unlawfully attempted to arrest him. As the citizen tried to get away from his arrestors, one officer seized him around the shoulders from behind. At that point the man bit the officer's thumb. The citizen was prosecuted on charges of assaulting the police officer. The New York Court of Appeals dismissed the charges, holding that the defendant was justified in using sufficient force to prevent an offense against his person by the police. The officers had become his assailants in assaulting and unlawfully arresting him. The Court noted that a person who resists unlawful arrest "may not pursue his counter-attack merely for the sake of revenge or the infliction of needless injury," a condition of justification which the defendant in *Cherry* had not abused.⁵⁵

Section 35.27 has overruled *People v. Cherry* and has deprived the citizen of the defense of justification. Consequently, in a prosecution for assaulting a police officer during an arrest,⁵⁶ or for one of the several other related crimes and violations chargeable under the same circumstances,⁵⁷ a person arrested without lawful cause or authority has no better defense than one who resisted a lawful arrest. Without distinction, both persons can be convicted and imprisoned. Prior to the enactment of section 35.27, a person using no more than necessary force to resist an unlawful arrest could attempt to prove that fact as a complete defense to an assault charge. So much of section 35.27 as proscribes the use of any degree of force in resisting a *lawful* arrest is merely a restatement of the law of New York as, logically, it has always existed.

Advocates of the nonresistance position expressed by the new statute argue that law and order are best served by requiring a citizen who undergoes an unlawful arrest to await vindication by the courts. Permitting forcible conflict with a peace officer at the time of arrest⁵⁸ is said to be an undesirable alternative. It is reasoned that resisting an unlawful arrest does not have the same rational basis in law that applies to justifiable self-defense since there is no adequate redress for serious physical injury resulting from actual assault, whereas an arrest merely deprives one temporarily of his freedom. This loss is later redressed by the regaining of one's liberty. Proponents also point to civil remedies, such as actions against the tortious municipality and individual law enforcement officer for damages arising from false imprisonment, as the proper

53. N.Y. Pen. Law § 35.27.

54. 307 N.Y. 308, 121 N.E.2d 238 (1954).

55. *Id.* at 311, 121 N.E.2d at 240.

56. Such prosecutions may find their basis in N.Y. Pen. Law §§ 120.00, 120.05, 120.10.

57. See N.Y. Pen. Law arts. 120 and 240.

58. See Comment, *The Right to Resist Unlawful Arrest*, 7 Natur. Resour. Jour. 119 (1967).

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recourse for an aggrieved citizen who has been unlawfully arrested. Supporters of the nonresistance principle further contend that, official sanction of forcible resistance to an arrest weakens the community's respect for the law and law enforcement officers and needlessly creates the hazards of violence and injury to the arresting peace officer and to the person arrested. Positions similar to section 35.27 and contrary to the rule at common law and that held in *People v. Cherry* were taken by the Uniform Arrest Act and the Model Penal Code.⁵⁹

In response to these arguments, one is notably struck by the fact that, with the one exception of section 35.27, the amendment of article 35 of the Penal Law is devoted entirely to a substantial increment of the right to use deadly violence. The sole beneficiaries of the only reduction of force brought about by amended article 35 are policemen. The change of law effected by section 35.27 is particularly remarkable because the citizen, now deprived of justification to use reasonable force, is, by hypothesis, the law-abiding victim of an unlawful arrest. The newly protected peace officer is the hypothetical offender.

The mechanics of an unlawful arrest emphasize the inequity of section 35.27. An officer may arrest a person when he has reasonable cause to believe that such person has committed a felony or has committed a lesser crime in his presence.⁶⁰ An arrest is lawful as long as the arresting officer acts reasonably. When he is mistaken in his belief that a person has committed an offense, the arrest itself is lawful if the error was a reasonable one. Only when an arresting officer is *both* mistaken and unreasonable in his actions toward the citizen does the arrest become unlawful.⁶¹ Even then, the *Cherry* case, now repudiated, did not allow the citizen to seek revenge or needlessly to injure the offending officer. Only reasonable force was permitted. Nevertheless, section 35.27 now alters the circumstances to assure criminal conviction of the offended citizen who has employed any degree of force during the arrest.

The proposition that self-defense is rationally justified in law, whereas resistance to an unlawful arrest is not, reflects a misconception of the human condition. Modern experience and knowledge urge a different conclusion. The law of self-defense could not practicably be otherwise because a person who is suddenly and unexpectedly assaulted, with no avenue of escape, will tend to express the biology he shares with other animals. He will seek to survive the attack through the use of necessary force. A person attacked in the sanctuary of his home tends to defend even more spontaneously and fervently than he would elsewhere. The law responds with scientific sophistication by excusing one from the need to retreat from an assault in his own dwelling.⁶²

The use of necessary force to resist an unlawful arrest arises essentially

59. See Uniform Arrest Act § 5; MPC § 3.04.

60. N.Y. Code Crim. Proc. § 177 (McKinney 1958). Proposed New York Criminal Procedure Law (Edward Thompson Co. ed. 1967) § 70.30.

61. An arrest pursuant to a warrant is occasionally effected, rather than an arrest without a warrant. Although an unlawful warrant may reflect the error of an authority other than the arresting officer, the citizen is no less aggrieved.

62. See N.Y. Pen. Law § 35.15.

from the same spontaneous motivation. To a person being unlawfully (mistakenly and unreasonably) arrested, the arrest is an attack. It does not matter, as specified in section 35.27, that the statute applies only when "it would reasonably appear" that the individual conducting the arrest is a peace officer.⁶³ The officer is an assailant. The officer's identity, even if known, may be of little comfort to the citizen undergoing the trauma. An unlawful arrest is often abrupt, violent, and terrifying to the victimized citizen. In the *Cherry* case, those were precisely the circumstances. The citizen began to run away. One of the officers attacked him from behind. The citizen bit his thumb. In doing so, the citizen was acting as much out of the impulse for self-preservation as he would if attacked by anyone else. In the Court's opinion: ". . . [I]t would be a travesty to adjudge the very victim of the illegal arrest and the unprovoked attack guilty of the crime of assaulting his captors and assailants. The administration of justice would be ill served by such a result."⁶⁴

To continue analysis of the point made by advocates of nonresidence, *i.e.*, that self-defense and resistance to unlawful arrest are not analogous, one can reasonably argue, in light of modern scientific findings, that the site of many such arrests, the ghetto, is especially vulnerable to injustices stemming from section 35.27. Comprehensive behavioral studies have produced substantial evidence that our behavior may parallel other animal behavior, which has been shown to become progressively less tolerant of physical attack as the scene of attack moves closer to the home territory of the victim.⁶⁵ The home territory is not merely the abode but the surrounding neighborhood to which claim is laid. Thus, while the law of self-defense properly reflects the fact that a man attacked in his own dwelling will tend to exert a maximum effort toward his defense, the law may now require some readjustment to reflect additional findings. Citizens consigned to the ghetto often regard the ghetto streets as their home territory and their only sanctuary. The rest of the community is foreign territory from which they and their families have been effectively barred. Consequently, when an intruder unlawfully arrests, and thereby attacks, a ghetto resident in his own streets and territory, the impulse to resist or, more accurately, to defend himself, is fundamental.⁶⁶ Section 35.27 takes none of these factors into account.

A major fallacy in the concept of nonresistance to an unlawful arrest is the assumption that a citizen can submit peacefully and thereby avoid needless violence and injury to himself and the officer. This position presupposes that police officers who effect unlawful arrests have erred only in good faith and seek to avoid all violent confrontation with the citizen. In fact, the assumption is demonstrably incorrect and utopian. It is true that unlawful police violence has

63. See N.Y. Pen. Law § 35.27.

64. 307 N.Y. at 311, 121 N.E.2d at 240.

65. See Lorenz, *On Aggression* 23-48 (Harcourt, Brace and World ed. 1966).

66. For examples of recurring intrusions by the police on ghetto residents, see Report on Disorders at 158-60.

undergone a process of evolution since the Wickersham Commission reported to the nation in 1931 that police brutality was rampantly practiced and openly condoned.⁶⁷ Officially sanctioned violence is now rarely seen, but individual police actions involving excessive force still exist on a significantly large scale. Victims of excessive violence today encompass not simply the so-called criminal types and hoodlums, but ghetto and slum residents in general, as well as persons in active pursuit of social and political causes. In the latter group, victims of blood-letting violence today include female college students, clergymen, lawyers, doctors, college teachers, and working members of the press.

Lawyers actively engaged in the practice of criminal law in large urban areas are compelled on a regular basis to observe and analyze patterns of police violence through personal investigation in relation to their clients' problems. An urban practitioner observes that on a large city police force there exists a broad continuum of behavioral attitudes toward excessive violence. Generally stated, the spectrum includes those policemen who reject the use of excessive violence out of professional pride and discipline, a broad middle sector of police who occasionally employ unlawful force to satisfy various personal motives, and a third group who are recognized to use excessive violence habitually and with sadistic zeal.

From time to time, various governmental and sociological studies of police behavior have confirmed what practitioners of criminal law observe empirically. Some of these findings are as follows:

(1) Police of the lowest calibre and also those most actively prejudiced against Negroes are frequently assigned to the ghetto and slum areas.⁶⁸ Unlawful police violence, unlawful detentions, arrests and searches, and other police abuses are widespread in ghettos and slums.⁶⁹

(2) In 1966, investigators of the President's Commission on Law Enforcement and Administration of Justice recorded police actions by accompanying 450 policemen on 850 typical eight-hour tours of duty in Negro and white slums in Washington, Chicago, and Boston. The federal investigators found that 10% of all the police officers observed had used excessive force against citizens of these areas *while aware that their actions were being recorded*.⁷⁰

(3) Authorities on police behavior conclude that a small but detectable number of police commit frequent acts of excessive violence out of sadistic indulgence.⁷¹

67. U.S. National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (U.S. Gov't Printing Office ed. 1931).

68. See Report on Disorders, at 160.

69. *Id.* at 93, 157-165; U.S. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 178-207 (U.S. Gov't Printing Office ed. 1967) [hereinafter cited as Task Force Report].

70. Task Force Report, at 182; Burnham at p. 34, col. 4.

71. Burnham, at p. 34, cols. 5-6. The article cites the belief of a McGill University sociologist that "it is difficult to weed out the sadists because of the general acceptance of violence and the extreme emphasis on secrecy by the police." A psychologist on the staff of the International Association of Chiefs of Police is quoted: "The very fact that police are

(4) The practice of rewarding lawful police violence with promotions and other incentives serves as encouragement for excessive police violence.⁷²

(5) Police use excessive violence against students and other demonstrators because of personal fear, stress, resentment toward educational status, and disagreement with their causes and values.⁷³

Clearly, ample enough evidence exists to dispute the notion that violence will not erupt unless the citizen himself forcibly resists unlawful arrest. On the contrary, experience verifies that unlawful physical attacks on citizens are frequently initiated by the police in those very situations. If the citizen physically opposes such an attack and is injured by the countering officers, under section 35.27, he may be legally taken into custody for resisting arrest and consequently deprived of any recovery for the injuries resulting from the initial unlawful arrest.⁷⁴ Therefore, not only does section 35.27 invite unlawful police violence, but it also provides the offending officer with an escape from responsibility and threatens the abused citizen with criminal conviction for assault against the officer or for derivative offenses.

Similarly, the provisions of section 35.27 reduce even further the slim possibilities of civil recovery for damages resulting from unlawful arrest. For the reasons already noted, a citizen may be effectively barred from civil action for assault and battery for injuries suffered by him during an unlawful arrest if the officer claims that he used only necessary force to combat forcible resistance by the citizen. However, it is notable that even prior to the present enactment, redress for unlawful arrest by means of civil recovery was considerably remote to the average citizen. The expense, time commitment, and uncertainty of ultimate recovery in such litigation are usually beyond the capacity and endurance of aggrieved citizens, many of whom lack even sufficient knowledge or sophistication to explore such remedies.⁷⁵

the only group authorized by the state to use force tends to attract the occasional man who likes to use it." *Id.*

72. *Id.* at p. 34, col. 7. A former New York City official who now commands a department in another city is quoted: "[I]t is unfortunately a fact that the tradition of rewarding the man who winds up in violent confrontation is still a very real part of the New York Police Department and most other departments, too."

73. *Id.* at p. 34, cols. 6-7. See J. Skolnick, *Justice Without Trial: Law Enforcement in a Democratic Society* 59-61 (1966). The author concludes that the "working personality" of a police officer is influenced by the fact that "policemen are notably conservative, emotionally and politically."

74. The report of the President's Crime Commission quotes a police officer on this subject: "For example, when you stop a fellow for a routine questioning, say a wise guy, and he starts talking back to you and telling you that you are no good and that sort of thing. You know you can take a man in on a disorderly conduct charge, but you can practically never make it stick. So what you do in a case like this is to egg the guy on until he makes a remark where you can justifiably slap him, and then if he fights back, you can call it resisting arrest." Task Force Report at 182, as quoted from Westley, *Violence and the Police*, 1 *American Journal of Sociology* 30 (1953).

75. See Comment, *supra* note 58 at 128. The author, a proponent of the nonresistance position, nevertheless concedes: "Practically speaking, it is difficult to recover damages for false imprisonment in an unlawful arrest situation."

IV. CONCLUSION

The amendment of article 35 represents a major regression in the Penal Law of New York. The enactment of original article 35 had achieved the true function of penal reform. It had departed from the law of centuries ago that was no longer relevant to contemporary conditions. It had responded to the desperate need of our age to reduce the use of deadly violence to a necessary minimum. At the same time, it recognized the inequity of punishing a citizen who was the victim of an unlawful arrest, if he had used only reasonable resistance to the unlawful act against him.

Diverse governmental agencies and individuals concerned with excessive violence, incitement of civil disorders, and abuse of civil liberties, have recommended that laws and law enforcement be limited to the use of minimum necessary force. The new law totally violates that principle. However, one might ask whether the principle is valid. If it is valid, our permissive laws will tend to breed violence both in law enforcement and in reaction to violent law enforcement. In the view of some persons, there is an aura of it now.

