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THE USE OF FORCE IN EFFECTING OR RESISTING ARREST*

Roy Moreland**

One of the most difficult and perplexing problems in the law of criminal procedure is the amount of force that may be used in effecting an arrest and, conversely, the amount that may be used in resisting one. Perhaps this is due, in part, to the many phases and ramifications of the problem. Situations having to do with both felonies and misdemeanors and with arrest both with and without warrant are included in the problem and, in the case of each, whether the arrester can ever go so far to effectuate his purpose of bringing the party into submission as to take his life, if nothing short of that will accomplish the purpose of the arrest.

In the case of the arrestee the problem involves, among other things, a differentiation of rule based upon whether the arrest is legal or illegal. In the case of both the arrester and the arrestee a number of other factors affect the decision in particular cases, such as, for example, whether the defect is patent or latent when the arrest is under a defective warrant. Finally, there are a number of fundamentally separate questions, such as the right to self-defense, which often become involved in, and a part of, the general problem of force in effecting or resisting arrest.

It thus becomes immediately apparent that one of the major problems in a discussion of the amount of force that may be used in effecting or resisting arrest is that of breaking down the problem so that its various factors may be discussed with some particularity and clarity. With that in mind, it is proposed to begin the discussion with an examination of the situation where the force is exercised by an officer or private person in making an arrest for a major, atrocious felony.

A. Use of Force in Effecting Arrest.
1. Where the Arrestee Has Committed, Is Committing, or Is About To Commit a Major, Atrocious Felony.

An arrester can use the force requisite to effect an arrest. This general statement is broadly true but apt to be misleading. Of course, the arrester may meet force with force, but that simple torts statement will, in most cases, not consummate an arrest—it will result in a stalemate. The arrester, if the arrestee resists, must necessarily do more than meet force with equal force, he must meet force with sufficient more force to cause the arrestee to yield. But, suppose the situation becomes such in a particular case that the force requisite to effect the arrest would necessitate the taking of the life of the

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arrestee. May the arrester go that far? The answer is “Yes” in the case of major or atrocious felonies where the arrester sees the act or it was committed in fact by the arrestee; it is “No,” according to the better view, in the case of all other offenses.

The rule that an officer or a private person may do all that is reasonably necessary to affect an arrest for an atrocious felony even to the taking of the life of the arrestee\(^1\) is of ancient origin. Originally, it was based upon the theory that such a one had forfeited his life to the community for all felonies were punishable with death at the time.\(^2\) The rationalization today is more difficult. Fundamentally, it is based upon the belief that such a person should not escape trial for his crime. Further, there is the additional factor that in many such cases the arrestee—who is facing a severe penalty if taken—is a vicious person at heart and potentially dangerous to the peace and safety of the community so long as he remains at large. He cannot be shot on sight, his execution is the function of the proper state official after, and if, he is given the death penalty on trial but it is imperative that his arrest be effected and the arrester is given the authority to use all means necessary to achieve that goal even to the taking of his life, if it appears reasonably certain that he cannot be taken otherwise.

Does the rule that an officer can kill if it appears reasonably necessary to do so to effect an arrest for an atrocious felony extend to those cases where the officer does not see the felony committed but is nevertheless able to make a valid arrest without a warrant upon reasonable belief? It does not; in such cases the officer kills the arrestee at his peril. If it turns out that an atrocious felony was not committed in fact or that if one was committed the arrestee did not commit it, he is not protected. This is a natural result of a rational interpretation of the rule as to the amount of force that may be used by the officer in making an arrest. He may use reasonable force. When he sees an atrocious felony committed, the law considers that the force used is no more than reasonable if he find its necessary to go so far as to kill the arrestee if that appears reasonably necessary to prevent the escape of the arrestee. But, by the weight of authority,\(^3\) the law balks

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1 Storey v. State, 71' Ala. 329 (1892). See Greenleaf on Evidence (15th ed., 1892) sec. 115. For the rule as to private persons, see Perkins, The Law of Arrest, 25 Ia. L. Rev. 201, 274-276 (1940); A.L.I. Rest. Torts (1934) sec. 131. Since at common law all felonies were punishable by death, every felony was considered to be atrocious. There were no minor felonies at the time. Today the rule undoubtedly continues as to all atrocious felonies—the only question is whether it has softened as to non-atrocious, non-violent, minor, statutory felonies. This problem is discussed in the text at page 412.

2 Petrie v. Cartwright, 114 Ky. 103, 109, 70 S.W. 297, 299 (1902).

3 A note in the Kentucky Law Journal states that there are three views as to the liability of a police officer for killing a person whom he reasonably believes to have committed a felony where no felony has been committed in
and wisely—at taking the additional step of considering it reasonable to kill one who is only reasonably believed to have committed an atrocious felony. It is reasonable to arrest him under such circumstances but unreasonable to kill him although it reasonably appears necessary to do so to complete the arrest.

A leading decision on the point is the Kentucky case of Petrie v. Cartwright. In that case Petrie hit one of two men who earlier in the evening had made indecent remarks to his wife. The force of the blow caused the man to fall. At that instant someone called out to Petrie to run, which he did. The city marshal was standing a few yards distant but it was dark and neither he nor Petrie recognized the other. Seeing the man fall and his apparent assailant running away, he called on Petrie to halt. Petrie did not do so and the officer fired one bullet into the ground and then, taking aim, he fired a second time, killing Petrie. Mrs. Petrie brought a civil action under the Kentucky wrongful death statute and the officer contended that he was acting in his official capacity and reasonably believing that Petrie had committed a felony, he had shot him to prevent his escape. The court instructed the jury that, if the officer believed in good faith, and had reasonable grounds to believe, that Petrie had committed a felony and, after using all other available means to arrest him, fired the fatal shot solely to procure his arrest, and in doing so used no more force than appeared reasonably necessary in order to make the arrest, they should find for the defendant. The jury found for the defendant but the appellate court reversed the decision—for error in the instructions. The court first stated that Petrie had committed no felony and then went on to say:

We have been unable to find any common law authority justifying an officer in killing a person sought to be arrested, who fled from him, where the officer acted upon suspicion, and no felony had in fact been committed. The common law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death. But where no felony has been committed the reason of the rule does not apply, and it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common law rule to cases of suspected felonies.... [Shooting by an officer] is never allowed where the offense is only a misdemeanor, and where there is only a suspicion of felony the officer is not warranted in treating the fugitive as a felon. If he does this he does so at his peril,
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and is liable if it turns out that he is mistaken. He may lawfully arrest upon a suspicion of felony but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was in fact a felony.\(^5\)

A recent case taking the view that the person killed in effecting the arrest must have committed a felony in fact is Commonwealth v. Duerr.\(^6\) In that case the police arrested a car thief who told them of a supposed rendezvous with his accomplices. The police laid a trap but caught the wrong men. These men fled and were killed. The court held that no matter how reasonable the grounds of belief may be, an officer making an arrest upon suspicion of a felony is not justified in killing the suspect unless a felony has in fact been committed.

Professor Waite, however, supports the view that the officer should be protected although no felony has been committed in fact in an article in the Michigan Law Review.\(^7\) He argues that if the officer had reasonable ground to believe the fugitive guilty he should not be liable for killing him because of the accepted common law rule that reasonable mistake of facts negatives liability if the facts, had they been as believed, would have negatived it.

It must be admitted that there is some argument for support of the view that the officer should be protected in such cases. He is making a lawful arrest upon reasonable belief. In such a case, it may be argued, the arrestee should submit. If he is innocent, he will be released. But, on the other hand, the arrestee may not know that there is reasonable belief of his guilt. He only knows that he is innocent. He also knows that if he is arrested he will have to suffer the humiliation of the arrest and the confinement which will follow before his arraignment. If in fact innocent, he will desire to flee these evils.

And the danger inherent in such a rule is shown in the Petrie case,\(^8\) supra, and in the case of Johnson v. Williams' Administrator.\(^9\) In that case the officers had a warrant for the arrest of Dave Browder for murder. The officers, being informed that Browder was on his way to see his father, waited at a road crossing for his arrival. Moments later two men were seen approaching in a buggy leading a gray horse. The officers had been informed that Browder was leading a gray horse. They heard what they thought was the voice of Browder in the buggy. It was dark. The officers claimed that they attempted to halt the two men, but instead of halting they increased their speed,

\(^5\) Id. at 109, 299.
\(^6\) 158 Pa. Super. 484, 45 Atl.2d 235 (1946).
\(^8\) See the discussion of this case in the text, supra, at page 410.
\(^9\) 111 Ky. 289, 63 S.W. 795 (1901).
and in order to prevent what they thought was Browder's escape, the officers fired and killed the deceased. It turned out that it was not Browder in the buggy but two innocent young men. Undoubtedly, the officers had a reasonable right to believe that Browder was in the buggy but the facts do not support the reasonable suspicion found in many of these cases. It is one thing to make an arrest under such circumstances but an altogether different thing to kill to complete the seizure of the suspected felon.

In the end the determination of the issue depends upon whether it is reasonable to allow an officer to go so far as to take life to effect an arrest upon reasonable suspicion of the commission of an atrocious felony. The prevailing view—and the trend is also in that direction—is that it is unreasonable. Human life is so precious and so irreplaceable that it is better that an occasional felon escape than that an occasional innocent man be killed on suspicion, even though the suspicion be a reasonable one. A private person making a valid arrest in this type of case occupies an even weaker position. In the first place the arrest is invalid. But, even if it were valid, and the arrestee, although arrested on reasonable belief, did not in fact commit the crime, there is less argument for protecting a private person than an officer, who is, after all, acting in an official capacity.

2. The Rule in the Case of Minor, Non-Atrocious Felonies.

Suppose that the arrestee has not committed a major or atrocious felony but only a minor, non-atrocious one. May an officer go so far as to take the arrestee's life if it reasonably appears that otherwise he will escape arrest?

At a time when all felonies were punishable by death, all felonies were, in effect, atrocious and major. At such a time it was not unnatural that the killing of any felon was regarded as preferable to his escape from arrest. But the severity of the criminal law has been so far relaxed that the penalty for many of these old-time felonies is no longer death. Particularly is this true as to non-violent property felonies. In addition, legislatures have been busy creating new felonies, many of them non-atrocious in character and non-violent in fact and punishable merely by confinement in the penitentiary, frequently for a relatively short period. Nevertheless, it still remains the "law in the books" in most jurisdictions that an officer can kill to

10 For companion notes taking contra views of the question, see Note, 38 Ky. L. J. 609 (1950), and Note, 38 Ky. L. J. 618 (1950). Mr. Ison, the author of the first note, has a discussion of the situation in Kentucky, Note, 40 Ky. L. J. 192 (1951).

11 A private person cannot make a valid arrest in such a case unless a felony was committed in fact. See A.L.I. Code Crim. Proc., Off. Dr. with Com., June 15, 1931, at pp. 239-240.

effect the arrest of one guilty of any felony, if necessary to effect his arrest, but it is not considered to be a good rule by many, there are some cases vigorously opposed to it, and the trend is decidedly away from it.

The American Law Institute Restatement of Torts has taken the view that neither an officer nor a private person, with or without a warrant, is privileged to use deadly force merely to stop the flight of one whose arrest is sought for the commission of a non-dangerous felony. Rollin Perkins, decrying the lack of decision authority for the suggested rule, is of the opinion that the prestige of the Restatement of Torts will do much to further its acceptance on the criminal side.

The suggestion for modification is not a new one. As long ago as 1887, Judge Brown, later appointed to the Supreme Court, made this statement in a federal decision:

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

Also, in Reneau v. State, McFarland, J., in holding a peace officer guilty of manslaughter for shooting and killing a fleeing misdemeanant suggested that the same rule should apply in the case of lower grade felonies, saying:

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

Perhaps the most persuasive and most vigorous argument for the proposed rule was made by Professor Mikell in a debate at the annual meeting of the Council of the American Law Institute in 1931 on a proposed provision in the Model Code of Criminal Procedure to limit an officer's right to kill to effect an arrest to cases where "... the offense for which the arrest is being made or attempted is treason, murder, voluntary manslaughter, mayhem, arson, robbery, common

13 Orfield, Criminal Procedure From Arrest To Appeal 26 (1947).
17 United States v. Clark, 71 Fed. 710, 713 (1887).
law rape, kidnapping, burglary, or an assault with intent to murder, rape, or rob.” 19 Professor Mikell argued as follows:

It has been said, “Why should not this man be shot down, the man who is running away with an automobile? Why not kill him if you cannot arrest him?” We answer; because, assuming that the man is making no resistance to the officer, he does not deserve death. . . . May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? If we catch him and try him we throw every protection around him. We say he cannot be tried until 12 men of the grand jury indict him, and then he cannot be convicted until 12 men of the petit jury have proved him guilty beyond a reasonable doubt, and then when we have done all that, what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in a penitentiary. It cannot be that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that. Is it then for fleeing? And again, I insist this is not a question of resistance to the officer. Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than for stealing the automobile. If we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for? 20

However, the proposed provision encountered so much opposition that it does not appear in the Official Draft of the Model Code of Criminal Procedure.

Fortunately, there is positive case authority for the proposed modification in the common law rule in the case of private persons. The leading case is State v. Bryant. 21 A hog was stolen from the defendant’s employer and the defendant, suspecting one Cogdell, went to his house and charged him with the offense but he ran. The defendant, who was not an officer, shot him in order to prevent his escape. The stolen hog was found in Cogdell’s house. Cogdell did not die from the wound and the defendant was indicted for an assault and battery. In holding him guilty the court said:

It must be, however, that the powers of arresting, and the means used must be enlarged or modified by the character of the felony. The importance to society of having felons arrested in cases of capital felonies—such as murder and rape—must be much greater than in cases of inferior felonies, such as larceny. . . . Extreme measures, therefore, which might be resorted to in capital felonies, would shock us if resorted to in inferior felonies. 22

21 65 N.C. 327 (1871).
22 Id. at 328. “The stealing of a hog, a sheep, or a goat is, under our statute, a felony, without regard to the pecuniary value of the animal. So would be the larceny of a single ear of corn, which is ‘a part of any outstanding crop.’ It
The rule that a private person cannot go so far as to take the life of one who has committed a minor, non-atrocious felony even though it appears reasonably necessary to do so to prevent his escape was enunciated again in the recent case of Commonwealth v. Emmons, commented upon in the Annual Survey of American Law. The defendant, a woman, had defaulted in her conditional sale payments to a finance company and agents of the company came to repossess her automobile. They were unable to arouse her when they went to the house; she claimed that she was sleeping. They pushed the car and she, thinking they were stealing it, fired at them, shattering a bone in the leg of one of the men. She was convicted of aggravated assault and battery. There is some doubt that the men were committing a minor felony or even any crime in this case and the decision may in fact be one where the facts support a situation no stronger than a reasonable suspicion of a felony, where there was no felony in fact. At any rate the court uttered strong language in support of the rule that a private person cannot kill to prevent the escape of a minor felon. The court said:

While it has been asserted that some rule of law exists which justifies killing in order to prevent the commission of a felony we are convinced that no such broadly stated rule exists. There is no right to kill to prevent any felony. To justify the killing it must be to prevent the commission of a felony which is either an atrocious crime or one attempted to be committed by force (or surprise) such as murder, arson, burglary, rape, kidnapping, sodomy, or the like.

It may be concluded that there is considerable secondary authority and occasional vigorous dicta in decisions that an officer cannot kill to prevent the escape of one who has committed a non-atrocious, minor felony only. Further the rule is supported by the Restatement of Torts. The situation is a stronger one in the case of private persons. There is positive case authority to the effect that they cannot take the life of a minor felon in order to prevent his escape. In the case of both the officer and the private person the trend is strongly against taking the life of a minor felon under such circumstances.

3. Suggested Exceptions to the Minor, Non-Atrocious Felony Doctrine.

Suppose a farmer hears a noise in his henhouse at three o'clock in the morning. Standing in the doorway of his home, he fires a shot into the air and sees a man run out of the henhouse door. It is dark would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may, in the broad daylight, commit a wilful homicide in order to prevent the larceny of an ear of corn." Somerville, J., in Storey v. State, 71 Ala. 329, 341 (1882).


Annual Survey of Amer. Law 1148-1149 (1945).

43 Atl.2d at 569.
and he is unable to recognize the thief; he sees only a form. He shoots to kill or at least wound so grievously that the man may be caught. Stealing is a statutory felony. The thief is killed. Is the farmer guilty of a crime?

This supposititious case raises the problem of killing one who is committing a non-atrocious felony in the nighttime in order to prevent his escape. There are a number of cases which suggest an exception to the non-atrocious felony rule in this type of situation, saying that a private person should be able to take the life of a minor felon under such circumstances to prevent his escape. A fortiori an officer would have the same right. This is because the minor felon has committed his act in the nighttime; if he escapes he will evade punishment for his crime, because it is impossible to ascertain his identity.

A leading case suggesting this "exception" to the minor felony doctrine is Storey v. State. In that case the defendant, a private person, was indicted for murder. There was some evidence that he had been in pursuit of the deceased for the purpose of recapturing a horse, which the deceased had either stolen, acquired by fraud, or else unlawfully converted to his own use. The court held that the deceased's offense could not be greater than larceny in the daytime, a state statutory felony, and so the defendant had no right to take his life since the felony was non-atrocious and non-violent. The court said, however, by way of dictum, that some cases suggest that an exception should exist in the case of non-atrocious felonies committed at night, giving the owner of property the right to shoot the absconding felon, since if he escaped he would evade punishment, his identity being covered by the darkness.

Blackstone points out that both the Roman and Athenian laws made it lawful to kill a thief if he were caught in the act of theft at night. And Texas has a statute making a killing justifiable when property is being stolen at night or while the thief is within gunshot of the scene of the theft, provided the offense is a felony.

And yet, courts have not taken kindly to the suggested exception. Practically all states hold that a private person is not justified in killing one who is caught in the commission of a minor, non-violent felony, even though it be at night. This is as it should be. While one feels a great deal of sympathy for the owner of property who

20 71 Ala. 329 (1882).
21 4 Blackstone, Comm. (Sharswood ed. 1900) star-page 181.
22 Tex. Penal Code art. 1222 (Vernon, 1936).
apprehends a thief who is stealing it in the nighttime and who cannot
learn either the thief's identity or disable him so that he may be
identified, the fact remains that it is the policy of the law to consider
human life of more value than property.\textsuperscript{31} The same reasoning should
apply in the case of an officer.

There is a second reason for a repudiation of the suggested ex-
ception—it is pregnant with unintended tragedy. Sometimes the
person who is shot is guilty of no crime whatever—he is a neighbor
who has stopped in the henhouse or the barn to get out of the rain.
And, while generally those who commit such nighttime thefts and
other minor felonies are indolent colored men or shiftless poor-white-
trash, occasionally a neighbor's boy is shot robbing a water-melon
patch, an offense which may be a statutory felony, if committed in the
nighttime. It is one thing to kill a friendless ne'er do well, quite
another to take the life of a neighbor's son. And, there is always
that possibility, if one shoots at a fleeing form in the nighttime.\textsuperscript{32}

A related, suggested exception to the rule that one cannot take
the life of one guilty of a minor, non-atrocious felony in order to ap-
prehend him is found in cases involving the setting of spring guns.
There are those who argue that one should be permitted to set spring
guns to apprehend thieves and like depredators. However, although
there are some early decisions which seem to hold that life may be

\textsuperscript{31} Simpson v. State, 59 Ala. 1 (1887). See Moreland, Law of Homicide 267
(1952). In Commonwealth v. Beverly, 237 Ky. 35, 34 S.W.2d 941 (1931), noted
in 22 Ky. L. J. 450 (1934), the defendant suspected deceased of being about to
steal his chickens. He secreted himself near his henhouse and watched deceased
and another enter it and begin to take chickens. He then shot into the hen-
house. The deceased was killed. The appellate court held that under such facts
defendant would be guilty of at least manslaughter, although the offense was a
felony.

\textsuperscript{32} There is a student's note, Note, Defense of Property, 25 Mich. L. Rev.
57 (1926), which takes a distinctly contra view to that presented in the above
text. The note concludes:

"From the layman's point of view, it seems that a necessary killing
or serious bodily injury enacted in prevention of an irreparable loss of
property is justifiable as a matter of course. The lack of cases on the
exact point, considered in the light of the frequent newspaper accounts
of homicides under similar circumstances, might be construed as justify-
ing the conclusion that the 'right' of the question is so incontrovertibly
settled as not to even raise the question of a criminal charge against the
person acting in prevention of the threatened crime."

What the student says, above, is literally true—but he has failed to grasp the
larger aspects of the problem. There are few cases on the question; this is
because most persons killed under such circumstances occupy an inferior place
in the community—and the killers are usually properous property owners. The
writer knows of a number of such cases; in none of them did the property
owner stand trial. And yet, when these cases do actually go to trial and on to
the appellate courts, the decision is usually in favor of the protection of human
life over property. The note writer has the attitude of the property owner
toward the problem, not the attitude of the law.
taken in certain instances by spring guns set to defend property, modern authority is strongly opposed to this view. When a law breaker is killed or badly maimed by such a device, the injury is out of all proportion to the crime.

In Commonwealth v. Beckham, the defendant, owner of a small chili stand, placed a gun inside the building in such a position that it would fire when a window was raised from outside. The deceased, a "drifter," apparently tried to get into the building and was shot. It appeared from the evidence that the defendant had merely intended to frighten intruders away and not to kill them. Nevertheless, the jury found him guilty of criminal negligence in placing "so dangerous an agency" in so perilous a position.

In addition to the fact that set guns are highly dangerous agencies capable of inflicting serious injuries or death upon those whom they are set to catch, it must be kept in mind that they constitute a menace to everyone who may, by chance, come in contact with them. Children, visitors, even officers of the law upon their official business are all possible victims.

In Pierce v. Commonwealth, the accused, keeper of a small store, had been troubled by burglars for several years. He set a spring gun, aimed so as to fire into the body of any person who opened the door from outside. One night he failed to lock the door. A policeman upon his official duties tried the door, found it unlocked, pushed it open, and was killed. The appellate court held that a conviction of murder in the second degree would have been affirmed if there had not been error upon another point.

The right to use a set gun even in the protection of life is limited. One may justify a killing by such a device when he, himself, would have been justified in taking life. Thus, a defendant could justifiably take life by a set gun in order to prevent an atrocious and violent felony. This is really not a limitation, one could use a pistol and shoot to kill or maim under like circumstances.

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33 United States v. Gilliam, 1 Hayw. & H. 109, Fed. Cas. No. 15,205a (1882) (in a dwelling house or in the curtilage surrounding it); State v. Moore, 31 Conn. 479 (1863) (dictum); Gray v. Combs, 7 J. J. Marsh. 478 (Ky. 1832).
36 306 Mo. 566, 267 S.W. 817 (1924).
37 135 Va. 633, 115 S.E. 886 (1923).
38 State v. Marfaudille, 48 Wash. 117, 92 Pac. 939 (1907); State v. Barr, 11 Wash. 481, 39 Pac. 1080 (1895).
4. Where the Arrestee is Committing, Has Committed or is About to Commit a Misdemeanor.

At common law, neither an officer nor a private person can arrest without a warrant for a misdemeanor which is not committed in his presence and, in general, neither can arrest for one committed in his presence unless it involves a breach of the peace.30 An officer can, of course, arrest with a warrant for any misdemeanor.

Assume that an officer or a private person is making a valid arrest for a misdemeanor under the above rules. How far can he go in the use of force to effect the arrest? Of course, the amount of force that can be used depends upon the resistance offered to the arrest.40 But suppose the resistance or flight of the arrestee reaches the point where he will escape unless he is killed or wounded enough to bring him under subjection. Resistance or flight will never justify a dangerous wound or the taking of life to effect an arrest where the offense is only a misdemeanor. And this is true whether the resistance or flight occurs before or after arrest.41 As has been said in one combination of words or another by many judges: "It is more in consonance with modern notions regarding the sanctity of human life that the offender escape than that his life be taken, in a case where the extreme penalty would be a trifling fine or a few days imprisonment."42

A. Arrester's Right to Self-Defense

However, a different situation is presented where the misde- meanant's resistance becomes such as to raise the right of self-defense in the officer or private person who is attempting a valid arrest. Whatever the grade of the offense, felony or misdemeanor, neither an officer nor a private person loses his fundamental right to self-defense where he is attempting a valid arrest.43 And even if the arrest is illegal but the arrestee not only resists but becomes the aggressor, the arrester will be entitled to what is called "imperfect self-defense," if he finds it necessary to protect himself from death or serious bodily injury. In such a case of "imperfect self-defense" the arrester will be guilty of manslaughter only, his fault in bringing on the encounter by an illegal arrest preventing him from pleading "perfect self-defense."44

There are some cases that state that the doctrine of self-defense has no application in cases where a homicide occurs in effecting an ar-

32 Idem., citing cases at fn. 727.
33 Idem.
It is argued that the officer or private person, where making a valid arrest, has the right to effect the arrest and to do so must needs become the aggressor. Even if this were literally true, the rule should be limited to arrests for atrocious felonies since in the case of lesser offenses the arrester should never take the life of the arrestee in effecting an arrest. As a matter of fact the statement is not true even in the case of atrocious felonies, since in all arrests, from those involving atrocious felonies to the lowest grade misdemeanors, the arrester never loses his right to self-defense, if the arrest is valid and he has not exceeded the force that he should use in effecting it, considering the circumstances.

B. Use of Force in Resisting Arrest

1. Where the Arrest is Lawful

There is no right to resist a lawful arrest made in a lawful manner. If the resistance is intentional and an intentional killing of the arrester occurs the offense is murder. The fact that the arrestee is mistaken as to either the law or the facts as to the legality of the arrest will not avail him. It is the policy of the law to protect one who is executing lawful process in a lawful manner and consequently it is considered unwise to protect one who is resisting such process, even though his resistance is supported by a reasonable belief that the service is illegal.

Where there is resistance to a lawful arrest, lawfully executed, but the killing is something less than intentional, the rule is more difficult to state. Dickey, in an excellent article in the *Cornell Law Quarterly*, states that the great majority of courts and text writers have assumed that the resistance in and of itself, per se, constitutes the malice requisite for murder. But Dickey points out that the cases do not support such a proposition for all of them, without exception, contain facts other than the resistance sufficient in and of themselves to support a murder conviction. For example, the killing will be with a deadly weapon, in the commission of a felony, or in some other manner which constitutes inferred or implied malice under accepted common law principles. Thus, in a Kentucky case where the defendant in resisting a lawful arrest killed the officer "with a deadly bowie knife," the court in affirming a murder conviction said:

The law did not require that they should have been told that the killing must have been malicious. The officer is the minister of the law;

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45 Birt v. State, 156 Ala. 29, 46 So. 858 (1908).
48 Dickey, Culpable Homicides in Resisting Arrest, 18 Cornell L. Q. 373 (1933).
49 Idem.
he represents its majesty; his person is therefore clothed with a peculiar sanctity. An assault upon him, when properly engaged in the execution of his duty, is an assault upon the law, and if he is stricken down at such a time...by one knowing him to be an officer, it is murder, although the doer may not have any particular malice. (4 Blackstone, page 201; 1 East, page 303.)

The use of the bowie knife, a deadly weapon, was sufficient in itself to support a conviction of murder grounded upon inferred malice in this case. The remarks of the court to the effect that the resistance to the arrest constituted the required malice, while not technically dictum, may be said to be superfluous.

At any rate there are at least two modern cases which hold that an unintended homicide resulting from resistance to lawful arrest is not necessarily murder. The first, an English decision is Regina v. Porter, decided in 1873. The defendant was legally arrested on a criminal charge. He refused to enter the cart which was to take him to jail and the officer called on the deceased, a bystander, to assist. During the scuffle which ensued, the prisoner kicked the deceased in the abdomen from which injury he died three days later. The court instructed the jury that if the accused kicked the deceased intending to inflict grievous bodily harm and death ensued, it was murder; or if he inflicted the kick in resistance to lawful arrest, even though he did not intend to inflict grievous bodily harm, it was equally murder; but if, within the course of the struggle, he kicked him unintentionally, then he was only guilty of manslaughter. The jury returned a verdict of manslaughter. The chief value of the decision lies in the obvious attempt of the judge to make a manslaughter verdict possible. While the second part of the instruction may be interpreted to give effect to the rule under discussion, the third part gives an opportunity to the jury to evade it. It is clear that the facts of the case call for a conviction of murder, if the rule were applied as ordinarily stated. It is by such a judge, with such instructions, with such a jury, that obsolete law is sloughed off.

A more distinct repudiation of the rule occurs in State v. Weisengoff, a West Virginia decision. The defendant had been indicted for unlawfully selling liquor and had given bond but the bond was forfeited and the sheriff had been instructed to bring him in. The officer stepped on the running board of the defendant's car for the purpose of arresting him in order to carry out these instructions. They were near the state line and Weisengoff attempted to get across a bridge into a neighboring jurisdiction and so escape the lawful arrest. In this at-
tempt the officer was killed by being crushed against the side of the structure.

It is altogether possible that Weisengoff's act was sufficiently dangerous to constitute murder; it might even be argued that the death or serious bodily harm of the officer was "substantially certain," but the case was not tried on either of these theories but on the supposition that, if the officer's death resulted from resistance to the lawful arrest, the offense was murder. Weisengoff was convicted of murder and appealed. The appellate court reversed the conviction and, facing the issue squarely, said:

We have examined a great many cases of homicide of officers, committed while making lawful arrests, but have been unable to find any case holding that, where the death resulted from the prisoner's efforts to escape, and not in the doing of some particular act inherently dangerous, or designedly committed for the purpose of inflicting bodily injury, the accused is guilty of murder.... Malice... cannot be inferred from the mere effort to escape arrest. 54

These two decisions constitute the only judicial expression opposed to the supposed historic doctrine that an unintentional homicide resulting from resisting arrest is necessarily murder but modern legal writers are uniformly opposed to it, some going so far as to say that it is at last recognized as nonexistent. Equal opposition is found among writers in England. "This is as it should be. The test for determining whether a defendant, who has committed a non-intentional homicide is guilty of murder is, in this instance as in a case where one has inadvertently killed while committing a felony, not the lawfulness or unlawfulness of the act which caused the death but the amount of danger in it. If the act in itself was so wantonly dangerous and barbarous as to constitute the kind and degree of negligent conduct requisite for murder, then he is guilty of murder, otherwise not." 55

2. Resisting Unlawful Arrest.

A private person has the right to resist an unlawful arrest. He can repel force with force. It does not have to be pat-a-cake force,
the one making the illegal arrest is in the wrong and may be repelled. In the end, the arrestee may take the life of the arrester in such a case if it becomes necessary to do so in self-defense.\textsuperscript{60}

But suppose the arrestee in a case of illegal arrest kills the arrester not in self-defense but in anger or to avoid the arrest? Such a situation raises a difficult problem as to the guilt of the arrestee. Fundamentally, in such a case the well known common law principle that an illegal arrest may raise heat of passion sufficient to reduce an intentional killing to voluntary manslaughter comes into play.\textsuperscript{61}

The common law recognizes several provocations as sufficient to raise heat of passion in a reasonable man, making him likely to so lose control over himself, as to kill the provoker. One of such provocations is illegal arrest.\textsuperscript{62} The law does not condone homicide under such circumstances; it is not the theory of the law that one should kill in anger at, or to avoid, an illegal arrest. Rather, it is the position of the law that even reasonable men, while they should not kill under such circumstances, often are so filled with heat of passion because of the frailty of human nature\textsuperscript{63} that they do kill. When a defendant fails to measure up to the standard of a reasonable man when emotionally stirred up by a legal provocation and kills, the law, as a sort of compromise, holds him guilty of voluntary manslaughter rather than of murder or of excusable homicide.\textsuperscript{64}

Apparently, the rule operated automatically in favor of the one illegally arrested in the time of Hale.\textsuperscript{65} If the arrest was illegal and a killing occurred the offense was manslaughter, except in the case

\textsuperscript{60} Orfield, Criminal Procedure From Arrest To Appeal 27 (1947).

\textsuperscript{61} It should be pointed out that there is a line of cases taking the view that hot blood aroused by an illegal arrest will \textit{not} reduce a killing from murder to manslaughter. Dickey, Homicides In Resisting Arrest, 18 Cornell L. Q. 373, 386 (1933); Note, 31 Ky. L. J. 359, 360 (1943). The position of these courts is well expressed in a Kentucky case, Alsop v. Commonwealth, 4 Ky. L. Rep. 547, 552 (1883):

"When a known officer of the law, armed with a warrant, though defective, emanating from official authority, whether the charge it contains be true or false, makes known his purpose, and in good faith attempts to execute it, it is the duty of the person about to be arrested to submit to his authority, when exercised in a proper manner."

Fortunately, it is believed, the great majority of jurisdictions hold otherwise. The law should be lawfully enforced. It is ironic for these courts to talk about the majesty of the law when it is being violated. It is true that the position of the officer must be considered in such cases, often he operates at a disadvantage. Consequently, for his protection the law distinguishes between patent and latent defects. But there are limits in the extent to which the law can go in protecting him, even when he is acting in good faith. So, he should be cautious and make every effort not to make an illegal arrest. When he does so, he becomes a law-violator and his rights must be balanced with those of the arrestee, who is being illegally arrested.

\textsuperscript{62} Moreland, The Law of Homicide 77 (1952).

\textsuperscript{63} State v. Ferguson, 2 Hill (S.C.) 619, 622, 20 S.C. 619 (1835).

\textsuperscript{64} See the discussion, Moreland, The Law of Homicide 67 (1952).
of express malice. That is to say that it was unnecessary for the defendant, subjectively, to actually be filled with heat of passion because of the illegal arrest in order to gain the benefit of the rule. The present rule in England is not clear on the point but some American courts have definitely gone so far as to hold specifically that the illegality of the arrest will necessarily reduce the offense to manslaughter, except in the case of express malice. Cases adopting this view base their reasoning, fundamentally, not upon the doctrine of provocation but upon a social policy of protecting the liberty of the individual citizen against unlawful enforcement of the law. One must not make light of such a fundamentally sound public policy or belittle the importance of preserving inviolate the love of liberty in each and every heart and the willingness to defend it with all vigor against any encroachment, no matter from what source it may come. On the other hand even the most ardent lover of individual liberty would find it difficult to maintain the position that one should kill to prevent an illegal arrest. Most illegal arrests arise out of expediency, bad judgment, lack of precise knowledge of the law on the part of the person making the arrest, or the heat generated by the circumstances of the particular case. In spite of the humiliation and anger aroused in the breast of the one illegally arrested by the unlawful affront to his person, his respect for human life and his common sense should prevent him from killing the trespasser to his person in the absence of some element of self-defense.

But suppose that he does kill him? The law in the interest of protecting the person of the individual from unlawful arrest might excuse him. On the other hand since he has acted in an unreasonable manner in going so far as to kill the individual who is attempting the illegal arrest, it might hold him guilty of murder. The law does neither. Weighing the interests involved, the law, ordinarily, strikes a position of compromise and concludes that the arrestee should be guilty of manslaughter. The penalty is still so severe that others will hesitate to kill to prevent an illegal arrest. And, since the officer knows that the mantle of protection is not thrown completely around

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65 1 Hale, Pleas of the Crown (ed. of 1778) 457-465.
68 State v. Scheele, 57 Conn. 307, 18 Atl. 256 (1889); Roberson v. State, 43 Fla. 156, 29 So. 535 (1901); People v. White, 333 Ill. 512, 165 N.E. 168 (1929); Rafferty v. People, 72 Ill. 37 (1837); State v. Holcomb, 86 Mo. 371 (1885); Galvin v. State, 46 Tenn. (6 Cold.) 283 (1869).
69 See People v. Scalisi, 324 Ill. 131, 154 N.E. 715 (1926).
70 As to this factor, see the excellent article by Hall, Law of Arrest in Relation to Social Problems, 3 U. Chi. L. Rev. 345 (1936).
him either if the arrest should prove to be illegal, he too will proceed with caution, or, at least, be forwarned of the possible consequences if he fails to do so.

It would seem, then, that the rule that an individual who protects his personal liberty from the affront of an illegal arrest by killing his assailant is guilty of manslaughter is an expression of wise social policy. The question remains, however, whether the rule should operate automatically. There is considerable argument that, since the rule is a judicial compromise, it should do so. On the other hand there are at least two valid arguments against an automatic operation of the rule.

First, if the rule operates automatically, it will sometimes work in favor of one who was not in fact incensed by the illegality of the arrest. For example, the arrest may have been illegal because of some technical defect unknown to the defendant. That means, that so far as his knowledge went, the arrest was legal. In such a case the real incentive for the killing was something other than the illegality of the arrest. To permit a defendant who has committed a homicide to seize upon the rule under such circumstances as a means of reducing the offense to manslaughter involves going further in the protection of personal liberty than is socially expedient, it is believed.

Second, if the rule operates automatically, it creates a variance in the law. The rule in the provocation cases is that the defendant must have been filled with heat of passion at the time of the homicide in order to obtain the benefit of the rule. If, in the cases of illegal arrest the reduction were based upon an objective social policy for the protection of personal liberty, those who administer the law would be continually harassed by being forced to attempt to explain and rationalize this variance. When a judge went through this process a few times he would be apt to conclude that the subjective test would be preferable in all cases.

It is concluded that the rule in the majority of jurisdictions that the reduction of the offense to manslaughter does not operate automatically but that the defendant must in fact, subjectively, have been filled with heat of passion in order to claim its benefits is preferable.

Before concluding, it will be helpful to inquire whether the division of defects in warrants into those which are patent and latent, which is of value in determining the liability of the arrester where he has killed the arrestee in executing a defective warrant, is of value in determining the liability of the arrestee where he has killed the arrester in resisting arrest on a defective instrument. It is submitted that the division is not of value in the latter group of cases. As
pointed out in a note in the *Kentucky Law Journal*, the proper test for determining whether the arrestee should have his offense reduced to manslaughter in such a case is whether he was in fact aroused to heat of passion by the illegality of the arrest, not whether the defect was patent or latent. He may never have seen the warrant and so did not know whether the defect was one or the other. He may have seen it and the defect was latent but he had other information that the arrest was illegal. The courts have occasionally seized upon the classification to reduce the offense where the defect was patent, considering that the officer in such a case had acted without authority and that consequently the arrest was illegal. Conversely, where the defect was latent, the courts have often seized upon that fact as a ground for refusing to reduce the offense to manslaughter upon the ground that the officer should be protected under such circumstances. The distinction is not supported by reason, it is believed. It is difficult to understand, for example, how heat of passion could be aroused by a warrant void on its face but not seen by the defendant any more than by a warrant which had a latent defect, but was not seen. The proper degree of the crime would be more certain of determination if the type of defect were not permitted to control the case, the test being grounded solely upon whether the defendant, subjectively, was filled with heat of passion by the illegality of the arrest.

\[\text{Note, 34 Ky. L. J. 73, 74, et seq. (1945).}\]

\[\text{Idem.}\]