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Criminal Law - Arrests - Use of Deadly Force

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In summary, it seems that there are compelling reasons for abolishing all forms of privity unconditionally. If a manufacturer makes a defective product, he should not escape liability simply because the "proper" relationship is lacking. This would be no burden on the manufacturer in this age of insurance and general economic affluence, and it would insure a market filled with merchantable commodities.

Stephen G. Walker

CRIMINAL LAW—ARRESTS—USE OF DEADLY FORCE—The Pennsylvania Supreme Court established a rule that a private person may use deadly force to effectuate an arrest only when certain enumerated felonies have been committed, and approved the rule that an arresting party will always be criminally responsible if deadly force is used against anyone but an escaping felon.

Commonwealth v. Chermansky, 430 Pa. 170, 242 A.2d 237 (1968).

Petitioner was convicted of second degree murder as a result of a fatal shooting in front of his home. He testified that on the night in question he was awakened by a noise at about three a.m. He found a set of doors to the outside pushed open but still secured by an attached chain. He then saw an unidentified person run out of an adjacent alleyway, across a street and to a neighbor's house, where, petitioner said, "he started fixing around the windows." A car then passed and the unidentified person darted into an alleyway. Later petitioner saw the same person "monkeying around" windows of another neighbor's house. Because his own home lacked a telephone, petitioner sent his son to notify police. He then secured a rifle and stepped outside onto the doorstep. The unidentified man began to run and petitioner shouted, "Halt or I'll shoot." The man continued running and petitioner fired one shot, which was fatal. Petitioner testified that he had fired at a tree.

The instant case marks the first time a Pennsylvania appellate court has placed a limitation on the felonies for which deadly force may be used in preventing a fleeing felon's escape. It is also the first ratification by the Supreme Court of a twenty-three year old Superior Court rule

Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966). No Pennsylvania cases have considered the exact problem above, but see RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *l* at 354, illustration 1 at 355 (1965).

which requires police officers and private citizens to be absolutely positive that a suspect is a felon before deadly force may be used to prevent his escape.¹

In deciding the instant case, the court noted that a non-officer in fresh pursuit of one who has committed a felony may arrest without a warrant,² and that deadly force may be used if his arrest cannot otherwise be effected.³ The court established that the common law rule as to the use of deadly force was "manifestly inadequate" for today,⁴ and then stated that:

We therefore hold that from this date forward the use of deadly force by a private person in order to prevent the escape of one who has committed a felony or has joined or assisted in the commission of a felony is justified only if the felony committed is treason, murder, voluntary manslaughter, mayhem, arson, robbery, common law rape, common law burglary, kidnapping, assault with intent to murder, rape or rob, or a felony which normally causes or threatens death or great bodily harm.⁵

Secondly, the court stated that besides the commission of an enumerated felony it was "absolutely essential" that the person killed had actually participated in the felony.⁶

While there are no prior Pennsylvania cases specifically dealing with the *Chermansky* holding quoted above—and none cited by the court—some authority on the subject existed which the court seemingly failed to consider. Dean Trickett wrote that "[t]he felony which justifies the killing of the perpetrator in effecting his arrest may be, not homicide only, but robbery, burglary, entering a stable with intent to steal [a] harness, larceny. . . ."⁷ This description included statutory burglary, which was excluded by the instant court's ruling.⁸ As early

1. Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A.2d 235 (1946).

2. Commonwealth v. Micuso, 273 Pa. 474, 117 A. 211 (1922); Commonwealth v. Long, 17 Pa. Super. 641 (1901); 2 W. TRICKETT, THE LAW OF CRIMES IN PENNSYLVANIA 683 (1908) [hereinafter cited as TRICKETT].

3. Commonwealth v. Micuso, 273 Pa. 474, 117 A. 211 (1922); TRICKETT, *supra* note 2, at 683.

4. The court noted that the rule developed when virtually all felonies were punishable by death and when the distinction between felony and misdemeanor was very different than it is today.

5. Commonwealth v. Chermansky, 430 Pa. 170, 173-74, 242 A.2d 237, 240 (1968).

6. *Id.* at 174, 242 A.2d at 240, citing Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A.2d 235 (1946).

7. TRICKETT, *supra* note 2, at 678.

8. 430 Pa. at 173-74, 242 A.2d at 240. Statutory burglary is defined as follows: "Whoever, at any time, wilfully and maliciously, enters any building, with intent to commit any felony therein, is guilty of burglary, a felony. . . ." PA. STAT. ANN. tit. 18, § 4901 (1963).

as 1869 the Pennsylvania Supreme Court stated in *Brooks v. Commonwealth*⁹ that either a private person or a police officer could use deadly force to arrest after "any felony" had been committed, provided he was present at the commission. In a later Pennsylvania case, *Commonwealth v. Long*,¹⁰ where it was established that a homeowner had lawfully used deadly force against a fleeing common law burglar, there was no indication that the felony had to be a dangerous one.

Thus, until *Chermansky*, the Pennsylvania rule appeared to be that even after the commission of a non-dangerous felony the arresting party was permitted to use deadly force to effect the capture. It was in line with the common law rule¹¹ stated in the *Restatement (Second) of Torts*.¹²

In dealing with the instant court's apparent affirmation of the rule of *Commonwealth v. Duerr*,¹³ which held police officers and private persons criminally responsible if the fleeing arrestee who is the subject of deadly force turns out to be an innocent non-felon, two different situations should be distinguished: the use of deadly force to *prevent* the occurrence of a felony and its use to *arrest* a fleeing felon once the crime has been attempted or committed. Here only the latter situation will be dealt with.

It is also noteworthy to state at the outset that an innocent person can be killed by the mistaken use of deadly force by an officer or private person in either of two situations. *First*, the arresting party can be mistaken in his belief that a felony was committed, when in fact none was. And *second*, he can err in thinking that the person he is attempting to arrest committed a particular felony, which, while it actually occurred, was committed by another. Reference will be made to these errors as the *first* and *second* mistake as noted above.

During the early common law (the late 1600s), both officers and private citizens were allowed to arrest—without the use of deadly force

9. 61 Pa. 352, 358 (1869).

10. 17 Pa. Super. 641 (1901).

11. R. PERKINS, CRIMINAL LAW 874 (1957) [hereinafter cited as PERKINS].

12. See RESTATEMENT (SECOND) OF TORTS § 131 (1965) where it is stated as follows: "The actor's use of force against another, for the purpose of effecting a privileged arrest of the other, by means intended or likely to cause death, is privileged if . . . the arrest is made without a warrant for treason or for a felony which has been committed. . . ." In RESTATEMENT (SECOND) OF TORTS, Appendix § 131 (1965), it is reported that the former rule, which allowed the use of such force to arrest for only those felonies which caused or threatened death or serious bodily harm, or involved a common law burglary, had no direct authority to support it.

13. 158 Pa. Super. 484, 45 A.2d 235 (1946).

—only when a felony had in fact been committed.¹⁴ In other words, in making an arrest neither was allowed to make the first mistake. The official's right, however, was slightly less restrictive.¹⁵ While having a less reasonable basis for the arrest, the officer could do so without fear of liability. In fact, in writings dated as late as 1765 no other distinction was made between private and official persons who arrested when no felony had been committed—both were responsible for the false arrest.¹⁶

Between the years 1780 and 1827, a rule known as the "common law rule" developed.¹⁷ The rule was stated in 1827 as follows:

There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.¹⁸

If the lawful arrest could not be made without the use of deadly force, all citizens at common law were privileged to kill in order to halt the fleeing felon.¹⁹ (As is the law in Pennsylvania today, the privilege arose only when the suspect could not otherwise be taken.)²⁰ There were no exceptions to this rule which dealt punishment to the fleeing felon. It was predicated on the common law punishment for all felonies—death.²¹ But even this "no-exception" rule was modified in the unhappy situation where the party suspected and killed was in fact innocent of having committed the felony. In such situation, the rights of the private person, who could arrest upon reasonable suspicion if a felony had occurred, were decreased. His privilege of using deadly force to effect the arrest existed only if the person arrested had *actually committed* a felony.²² However, the rights of the officer to use deadly force in effecting the arrest were the same as his rights to make the arrest;

14. Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 568 (1936).

15. *Id.* at 569.

16. *Id.* at 570. *Contra*, PERKINS, *supra* note 11, at 874 n.7.

17. Hall, *supra* note 14, at 570-75.

18. *Id.* at 575.

19. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 272 (1940).

20. *Commonwealth v. Micuso*, 273 Pa. 474, 117 A. 211 (1922).

21. See note 19, *supra*.

22. Perkins, *supra* note 19, at 273.

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he had to be acting on the reasonable suspicion of a felony having been committed by the arrestee.²³ There are two reasons for the more liberal rule for officers: (1) They have more expertise on the subject of felonies so they will be inclined to make fewer mistakes; and (2) the officer has a duty to make the arrest.²⁴

Thus the common law came to allow the officer to make both mistakes in effecting an arrest, with or without the use of deadly force, while the private person was permitted only the second mistake as an arresting party, and if he used deadly force neither mistake was tolerated.

In Pennsylvania there is a poverty of case law on the use of deadly force to stop a fleeing felon by either private person or police officer. The *Brooks* case restricted the right to kill a felon by stating that "upon suspicion of felony only he [a private person] cannot . . . kill the suspected person."²⁵ However, the meaning of this dicta is unclear. It would appear obvious that the court did not desire to permit the first mistake, since that error was not allowed a private person when he made an arrest without deadly force. It is not clear, however, whether the court intended to exclude the second mistake also. Such an interpretation as this would be in line with the common law rule.

Whatever *Brooks* did mean, dicta in *Long* established that the private person was entitled to neither mistake,²⁶ however, it did not state what the situation would be when an officer erred. From *Long* it could be inferred that an officer was entitled to make a mistake, but it remained unclear which mistake could be made. Dean Trickett's work also failed to indicate what liability, if any, would attach to an arresting party making a reasonable mistake of fact.²⁷

Thus the question as to what mistake or mistakes a peace officer can make when he uses deadly force to effectuate an arrest was undecided when *Duerr*²⁸ came before the Superior Court. *Duerr* answered that

23. *Id.*

24. W. PROSSER, *THE LAW OF TORTS* 134 (1964).

25. 61 Pa. at 358, where the court in dicta also stated that the law of arrests followed in Pennsylvania is the same as the common law rule.

26. "When a party may be lawfully arrested for felony, and he knowing the cause, flees, so that he cannot be taken otherwise than by killing him, the constable pursuing him will be justified in killing him; or a private person will, in like manner, be justified, if he can prove that the deceased was actually guilty of a felony. . . ." 17 Pa. Super. at 648.

27. TRICKETT, *supra* note 2, at 677, 683-84.

28. 158 Pa. Super. 484, 45 A.2d 235 (1946).

question, and established the rule in Pennsylvania. The *Duerr* case is therefore worthy of examination since the Supreme Court in *Chermansky* appeared to affirm it without question or discussion.

Duerr was a police officer who was convicted of involuntary manslaughter after he shot two innocent men thinking they were fleeing felons.²⁹ While acting on a tip given by a person previously arrested for larceny of an automobile, *Duerr* was stationed at an alleged rendezvous point with other officers where they were waiting for the felon's two accomplices. At about the appointed time for the rendezvous two men arrived and stopped their car, and as the police moved in to make an arrest, the men fled. They were chased to the inside of a building, where *Duerr* shot and killed both. The trial court charged that an officer is not privileged to use deadly force unless a felony has actually been committed by the deceased, and this was excepted to. On appeal, the Superior Court cited no Pennsylvania law to support the lower court's charge. The court did cite secondary authorities, but they seemed to stand for the proposition that deadly force may be used to effectuate an arrest only if a felony has in fact been committed.³⁰ The extra-state cases cited in *Duerr* also seemed to stand for that same proposition.³¹ Among the authorities relied upon was the *Restatement of Torts*.³² After referring to secondary and out-of-state authorities which were not on point, the court finally turned to the issue of whether an officer, knowing that a felony has been committed, is justified in using deadly force to arrest a person whom he reasonably suspects of having committed the felony, provided the use of such force is necessary to effectuate the arrest? The court answered that question in four sentences:

[1] The appellant strongly asserts that authorities to which we have referred are not applicable as he [the officer] knew a felony in the form of larceny of certain automobiles had been committed, so that he brought himself within the rule that where a felony has been committed the killing by an officer of one who has attempted to flee arrest, is justified homicide. [2] The fallacy of that

29. 158 Pa. Super. at 486, 45 A.2d at 236.

30. *Id.* at 492-93, 45 A.2d at 239.

31. *Id.*

32. RESTATEMENT OF TORTS § 131 (1934), provides:

The use of force against another for the purpose of effecting an arrest of the other by means intended or likely to cause death is privileged, if (a) the arrest is made for treason or a felony which normally causes or threatens death or serious bodily harm, or which involves the breaking and entry of a dwelling place, and (b) the actor reasonably believes that the arrest cannot otherwise be effected.

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argument is quite apparent. [3] The felony in question must have been committed by the person whom the officer is presently seeking to arrest. [4] Otherwise, if a felony has been committed in the community an officer could shoot and kill an entirely innocent person, whom he might suspect of being a felon as in this case.³³

These four sentences constituted the *Duerr* court's entire analysis of the problem. The sentences are interesting examples of judicial craftsmanship. The first sentence stated the defendant's contention, which was a restricted version of the applicable common law rule. The second sentence added nothing. The third merely stated as a conclusion that rule which the court was seeking to decide, and the last sentence stated only the effect of the rule. What the court did was to establish by secondary and out-of-state authorities that the first mistake was not permitted, and then without any analysis, excluded the second mistake. In addition, it seems that one of the *Duerr* court's authorities, upon analysis, was contra to the final decision and would permit the second mistake. In referring to the *Restatement of Torts*, the court quoted the applicable section,³⁴ but apparently ignored the comments, illustrations and references to other sections. A comment to section 131 provides:

This Section states the rule which determines the existence of a privilege to use force intended or likely to cause death for the purpose of effecting *any arrest which is privileged*. It applies as fully to an arrest made without a warrant by a private person or a peace officer as to an arrest made under a warrant. (Emphasis added.)³⁵

As to what arrests are allowed, section 121(b) of the *Restatement* indicates that the privilege extends to peace officers:

although no act or omission constituting a felony has been committed, [when] the officer *reasonably suspects* that such an act or omission has been committed and that the other has committed it. . . . (Emphasis added.)³⁶

Thus the *Restatement of Torts* permits the police officer to make both mistakes. Therefore it seems that this authority which was cited by the *Duerr* court to support its position was clearly contra to the hold-

33. 158 Pa. Super. at 493, 45 A.2d at 239.

34. See note 32, *supra*.

35. RESTATEMENT OF TORTS § 131, comment c (1934).

36. RESTATEMENT OF TORTS § 121(b) (1934).

ing. The *Restatement (Second) of Torts*, issued subsequent to *Duerr*, also provides that deadly force may be used when necessary if the arresting party "reasonably believes" that the suspect has committed a felony, which had to have occurred.³⁷ The *Restatement (Second)* and its predecessor use an example for section 131 that is similar, except that in the later version the arresting officer shoots an innocent person he reasonably suspects after a felony was in fact committed, while in the original *Restatement* the officer only reasonably suspects that a felony was committed.³⁸

Because *Chermansky* deals with a private person, unlike *Duerr* which involved a police officer, the Supreme Court could later limit its approval of the earlier case to the facts of *Chermansky*. Thus, the Supreme Court has yet to hold that a police officer is not entitled to either mistake.

The rule of *Duerr* would be specifically overruled with the passage of the Proposed Crimes Code for Pennsylvania, which provides that "this section [307] is intended to overrule *Commonwealth v. Duerr*, . . . and to establish rational guidelines to govern use of force in law enforcement."³⁹

The proposed act first provides that force—deadly or non-deadly—may only be used if "the actor believes that such force is immediately necessary to effect a lawful arrest."⁴⁰ Non-deadly force would be per-

37. RESTATEMENT (SECOND) OF TORTS § 131 (1965).

38. Illustration 4 in the original *Restatement* and illustration 2 in *Restatement (Second)* provide that "A is privileged to shoot B if the arrest cannot otherwise be effected. . . ." The facts in the original *Restatement* provide that "A, an officer in uniform, attempts to arrest B for the murder of C, reasonably suspecting that C has been murdered and that B has murdered him." The facts in *Restatement (Second)* state that "A, an officer in uniform, attempts to arrest B for the murder of C, reasonably suspecting that B is the murderer. C has been murdered."

39. PROPOSED CRIMES CODE FOR PENNSYLVANIA § 307, comment at 62 (1967).

40. PROPOSED CRIMES CODE FOR PENNSYLVANIA § 307 (1967), provides that:

(a) Subject to the provisions of this section and section 309, [which precludes justification when the actor has made a mistake of law or has acted recklessly or negligently] the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest. (b) *Limitations* . . . (1) The use of force is not justifiable under this section unless (i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and (ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid. (2) The use of deadly force is not justifiable under this section unless: (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that: (a) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (b) there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

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mitted if the actor makes known the purpose of his arrest (if that is possible) while acting under a warrant believed to be valid. Deadly force, however, is only permitted when a peace officer is arresting for a felony while believing that the crime committed involved the use or threatened use of deadly force, or when there is a "substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed."⁴¹ Such deadly force, however, would not be permitted should the arresting officer believe that its use would create a substantial risk of injury to an innocent person.⁴²

The proposed code would seemingly change the existing law of arrest in three ways. Arrests using deadly force could no longer be effected by *anyone* for non-dangerous felonies; a police officer would no longer be strictly liable if he reasonably erred in killing an innocent person; and the private person would no longer be entitled to use deadly force to effect *any* arrest.

It should be noted that the proposed Pennsylvania code is nearly identical to the Model Penal Code,⁴³ and that code's comments should serve as a guide for interpretation of the proposed code.

The argument for limiting the use of deadly force to situations involving dangerous felonies is quite simple and was used by the Supreme Court in *Chermansky*. Today it could be argued that it is illogical to allow a felon who may never draw a death sentence and has not endangered human life to be taken by deadly force.⁴⁴ The common law reason for the rule—that felons were killed anyway—has been abolished.

In addition, by the proposed code an existing anomalous situation would be removed. As explained in the Model Penal Code,⁴⁵ the common law rules for the use of deadly force in arrests are broader than those which evolved to justify the use of such force to *prevent* felonies. Thus, deadly force may be used only to prevent a *dangerous* felony, while *any* fleeing felon, whether the act committed was dangerous or not, could be justifiably killed.

When strict liability is applied to police officers who kill an in-

41. *Id.* at § 307(b)(2)(iv).

42. *Id.* at § 307(b)(2)(iii).

43. There are minor variations between the two comparable provisos of § 307 of the PROPOSED CRIMES CODE and § 3.07 of the MODEL PENAL CODE (Tent. Draft No. 8, 1958). They are not relevant here.

44. During 1968 there were no executions carried out in the United States. 92 TIME, Jan. 10, 1969, at 38.

45. MODEL PENAL CODE § 3.07, Comment at 57 (Tent. Draft No. 8, 1958).

nocent person reasonably believed to be a felon an unjust situation is believed to exist. The police officer with a sworn duty to arrest is bound to make a difficult decision in a matter of seconds, and to be correct every time. The Model Penal Code calls such strict liability the "very worst way" of limiting the common law privilege for the use of deadly force,⁴⁶ and as mentioned here, the proposed state code is also critical of such liability.⁴⁷

Both the proposed code⁴⁸ and the Model Penal Code⁴⁹ do remove the defense of justification if a police officer is reckless or negligent in his actions.

The decision of the drafters of the proposed state code to exclude private citizens from those privileged to use deadly force to arrest felons in all instances can be criticized. The rule comes from the Model Penal Code, where it is stated that "[i]t has seemed important in an age of firearms to restrict the use of deadly force to official personnel. . . ."⁵⁰ But the drafters were not too heavily in favor of the limitation. The Code reports that the feasibility of such a rule was questioned, except for "well policed urban areas." The Council of the Institute, however, voted 16 to 6 to preserve the limitation.⁵¹ The state of Pennsylvania is far from being a "well policed urban area" and it is submitted that before such a limitation is imposed it should be carefully considered. The ramifications of such a rule would seem unjust. For example, a Pennsylvania resident unable to effect an arrest in any other manner could be indicted for killing the fleeing man who had just violently assaulted and raped his wife.

A question arises under the proposed state code as to which error would be permitted for officers attempting an arrest while using deadly force. Obviously, if the proposed code is aimed at allowing the officer to make a reasonable mistake of fact and use deadly force against innocent persons, the second and most common error would seem to be permitted. However, as to the first mistake, the proposed code gives no indication whether it would be allowed,⁵² it calls only for overruling *Duerr* and establishing "rational guidelines."⁵³ The

46. *Id.*

47. PROPOSED CRIMES CODE FOR PENNSYLVANIA § 307, Comment at 62 (1967).

48. *Id.* at § 309(b) (1967).

49. MODEL PENAL CODE § 3.09(2) (Tent. Draft No. 8, 1958).

50. *Id.* at § 3.07, Comment at 58.

51. See n.5, at 58 of the MODEL PENAL CODE (Tent. Draft No. 8, 1958).

52. PROPOSED CRIMES CODE FOR PENNSYLVANIA § 307, Comment at 62-63 (1967).

53. *Id.* at 62.

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Model Penal Code, however, appears to allow both mistakes. As a limitation to only the second mistake, it provides; "also creates the possibility of absolute liability."⁵⁴

It is submitted that the proposed code represents long overdue progress; *Duerr* has been the law for too long. However, query whether the policy of excluding such privilege from private citizens under all circumstances is wise.

It is also submitted that the primary holding of *Chermansky*, which limits private arresting parties who use deadly force to situations involving the enumerated dangerous felonies, was dicta. This conclusion is based upon the fact that the jury could have found that the victim in *Chermansky* was a common law burglar.⁵⁵ Nevertheless, there is no reason to believe that the dicta would not be followed by the court in a later case, and with wide ramifications. For instance, since the court specifically stated that only a common law burglary⁵⁶ is an applicable felony, a citizen would be unable to use deadly force to arrest a felon fleeing from any daytime (and therefore statutory) burglary⁵⁷ of his home. In addition, a businessman would be unable to use such force to stop a fleeing burglar, whether it be daytime or night. A hypothetical fact situation can be used to illustrate the possible effects of the *Chermansky* rule. A person walks into a bank, reaches over a counter, grabs a handful of money and runs. The bank manager, who is not knowledgeable in the law, pursues the person who is a possible statutory burglar. Unable to otherwise make the arrest, the manager shoots and kills the running person. Under *Chermansky* the manager could be indicted for homicide.

In addition, it is submitted that the instant case opens the door for a similar holding in respect to police. How would peace officers be distinguished from private persons? Generally, the policeman's privilege to use deadly force is broader because the officer is better qualified to determine if a particular act is a crime, and because he has a sworn duty to arrest. It would appear, however, that neither of these factors would be a proper basis for allowing the police officer to use deadly force against all felons, while the citizen is limited to certain dangerous ones. What relation does the officer's diagnostic judgment have to the

54. MODEL PENAL CODE § 3.07, Comment at 57 (Tent. Draft No. 8, 1958).

55. Brief for Appellant at 8b, *Commonwealth v. Chermansky*, 430 Pa. 170, 242 A.2d 237 (1968).

56. "Common-law burglary is the *nocturnal* breaking into the dwelling house of another with intent to commit a felony." (Emphasis added). PERKINS, *supra* note 11, at 149.

57. See note 8, *supra*.

policy question of whether deadly force should be allowed against those who commit statutory burglary and larceny and other non-dangerous felonies? If this logical extension of *Chermansky* were to be made, it would put Pennsylvania peace officers in a position where they could use deadly force to arrest only for certain enumerated dangerous felonies, and if they made any mistake in judgment, they would be criminally liable.

The *Chermansky* rule, especially with its possible extension to police officers, also has practical ramifications insofar as it would limit police in their use of force during civil disturbances. As the rule now stands, private citizens cannot use deadly force to arrest looters, who are statutory burglars (unless they happen to be looting a house at night). If *Chermansky* were extended, police officers would be similarly restricted. Thus, following such an extension, mayors of large cities would be in a position where they would not have to make any decision as to whether deadly force should be used to arrest looters. Judicial decision would dictate that none should be used.

In summary it is submitted that the court's use of *Duerr* to hold a private citizen criminally liable for the mistaken use of deadly force was not prudent. In so doing, the court approved for the first time the *Duerr* rule, but without benefit or arguments on the merits of the Superior Court holding. In *Chermansky* there were no specific questions of law appealed,⁵⁸ and the fact situation of the case did not require a rule as strong as *Duerr*. Instead, the court could have relied on dicta from *Long*,⁵⁹ or pointed out that its affirmation of *Duerr* was limited to the facts of *Chermansky*. By so doing, the poorly rationalized holding of *Duerr* would have lost some of its import and the way would have been paved for a more realistic rule to cover this important area. Instead, the court breathed new life into the often criticized rule.

David J. Brightbill

58. The questions appealed were: Was the verdict against the weight of the evidence? Do the interests of justice require a new trial? Brief for Appellant at 2, Commonwealth v. Chermansky, 430 Pa. 170, 242 A.2d 237 (1968).

59. See note 26, *supra* and accompanying text.