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Comments

JUSTIFICATION UNDER THE PROPOSED CRIMINAL CODE

I. INTRODUCTION

Justification is one of the most misunderstood and least codified areas of criminal law. Recently, some states have recognized justification as a separate concept of law and included it in their criminal codes.¹ Missouri's Proposed Code contains a separate chapter on the defense of justification.² This article will examine the meaning of justification and compare the Proposed Code provisions with other approaches and the present law in Missouri. This will illustrate the current trends and ideas that have been incorporated into the Code.

II. JUSTIFICATION DISTINGUISHED FROM EXCUSE

Justification is often confused with other concepts that, although related, are separate areas of law. Often equated with justification are necessity, excuse, mitigation, duress, and coercion. Of these, only necessity can truly be said to be synonymous. The others relate more closely to the separate concept of excuse.

Justification has been defined as "maintaining or showing a sufficient reason in court why the defendant did what he is called upon to answer. . . ."³ This description, although accurate, does not fully explain the concept nor distinguish it from excuse. The distinction between the two is further clouded when justification is given a secondary definition of "just cause or excuse,"⁴ and self-defense is cited as an example of both justifiable and excusable homicide.⁵ Although both are defenses to what would otherwise be an unlawful act and both result in a not guilty verdict for the defendant, they arise from different theories. Conduct that is excused is defensive or involuntary, and may result from duress, coercion, and compulsion. Usually, the actor had no choice but to act as he did. The act committed is unlawful but the actor is excused because of the circumstances. For example, the plea of insanity as a defense to murder is an excuse. The murder is unlawful, but due to the defendant's mental aberration he is unable to choose between right and wrong, and thus is excused from criminal liability.

In contrast, justification involves offensive or voluntary conduct and the act committed is not considered unlawful due to the circumstances. For example, although killing another person is usually a crime, the in-

1. See, e.g., PROP. CAL. CRIM. CODE div. 6 (Staff Draft 1971) [hereinafter CAL. DRAFT]; MICH. REV. CRIM. CODE ch. 6 (Final Draft 1967) [hereinafter MICH. DRAFT] (the Michigan Code is a proposal); MODEL PENAL CODE art. 3 (PROP. OFF. DRAFT 1962) [hereinafter M.P.C.]; N.Y. PENAL LAW § 35.00-30 (McKinney 1967) [hereinafter N.Y. CODE].

2. PROP. NEW MO. CRIM. CODE ch. 8 (1973).

3. Black's Law Dictionary 1004 (4th ed. 1968).

4. *Id.*

5. *Id.* at 867.

tentional execution of a criminal under a lawful death sentence is justifiable homicide. One writer addressed the distinction between justification and excuse by saying:

Justifying and excusing claims bear different relationships to the rule of liability. To justify conduct is to say that in the future, conduct under similar circumstances will not be regarded as wrongful or illegal. Excusing conduct, however, leaves intact the imperative not to engage in the excused act.⁶

The Proposed Code acknowledges that insanity and duress are distinguishable from justification and deals with them in separate sections of the Code.⁷

At common law, justification, or the defense of necessity as it is often called, was recognized despite the absence of a statutory formulation. By its nature it arose in unusual situations and therefore the cases do not furnish precise or systematic rules.⁸

III. CURRENT STATUS IN MISSOURI

Currently, Missouri deals with justification by statute, but only in the area of justifiable homicide.⁹ The statute justifies the use of deadly force in self-protection, in protection of other persons with whom the actor holds a special relationship, to prevent a felony within one's dwelling, and in law enforcement under certain circumstances. Missouri common law has developed justification of nondeadly force in these areas. The major weakness of the Missouri statute is that it lacks a clause of general validity and thus is restricted to deadly force in these specific situations. Although these

6. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 558 (1972).

7. PROP. NEW MO. CRIM. CODE § 7.130 (Duress), 7.160 (Lack of Responsibility Because of Mental Disease or Defect) (1973). The Model Penal Code also deals with insanity and duress separately from justification. M.P.C. § 4.01 (Mental Disease or Defect Excluding Responsibility), § 2.09 (Duress).

8. See, e.g., *The William Gray*, 29 F. Cas. 1300 (No. 17,694) (C.C.D. N.Y. 1810); *U.S. v. Ashton*, 24 F. Cas. 873 (No. 14,470) (C.C.D. Mass. 1834); *Surocco v. Geary*, 3 Cal. 70 (1853); *Sheehan v. Sturges*, 53 Conn. 481, 2 A. 841 (1885); *Ollet v. Pittsury Ry.*, 201 Pa. 361, 50 A. 1011 (1902); *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912).

9. § 559.040, RSMo 1969, provides:

JUSTIFIABLE HOMICIDE—

Homicide shall be deemed justifiable when committed by any person in either of the following cases:

(1) In resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or

(2) When committed in the lawful defense of such person, or of his or her husband or wife, parent, child, brother, sister, uncle, aunt, nephew, niece, master, mistress, apprentice or servant, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished; or

(3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving

are the most common instances of justified conduct, the defense should be applicable generally to cover less common cases. For example, the defense should be available to one who breaks into an unoccupied rural house for the purpose of making a telephone call vital to someone's life, assaults a person who has a virulent contagious disease in order to prevent him from exposing others, or burns real property of another to prevent a forest fire from spreading into a populated area.¹⁰ Relief in these cases has been given administratively through nonprosecution.

In Missouri, justification is limited to cases in which the harm sought to be avoided is an immediate and physical one,¹¹ the actor has a reasonable belief that force is necessary,^{11a} and the exercise of force is reasonable.^{11b}

IV. THE PROPOSED CODE ALTERNATIVE FOR IMPROVEMENT

The Proposed Code covers justification in one comprehensive chapter.¹² Section 8.040 contains a definition of justification generally, a so-called choice of evils test, that makes the defense one of general validity and not limited to deadly force.¹³ The section is intended to provide a

10. These are the examples given in PROP. NEW MO. CRIM. CODE § 8.040, Comment (1973), which are based on R. DENZER & P. McQUILLAN, PRACTICE COMMENTARY, N.Y. CODE § 35.05 (McKinney 1967).

11. G. WILLIAMS, CRIMINAL LAW 729 (2d ed. 1961). See also State v. Huett, 340 Mo. 934, 950, 104 S.W.2d 252, 261 (1937), in which it was said that danger, in order to justify homicide on grounds of self-defense, "must be or must reasonably appear to the person claiming the defense to be imminent."

11a. In State v. Huett, 340 Mo. 934, 104 S.W.2d 252 (1937), the court approved an instruction stating that

It is not necessary that the danger should have been actual or real, or that the danger should have been impending or about to fall. It is necessary only that the defendant had reasonable ground for believing and did honestly believe the danger to be so.

Id. at 950, 104 S.W.2d at 261. See note 25 *infra*.

11b. "If a power is exercised unreasonably, as, for instance, if the force used is excessive, there can be no justification." Beale, *Justification For Injury*, 41 HARV. L. REV. 553, 562 (1928).

12. PROP. NEW MO. CRIM. CODE ch. 8 (1973).

13. *Id.* § 8.040 provides:

(1) Unless inconsistent with other provisions of this Chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute any crime other than a Class A Felony is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the crime charged.

(2) The necessity and justifiability of conduct under Subsection (1) may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this Section is offered, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

(3) The defense of justification under this Section is an affirmative defense.

defense in unusual situations in which an "emergency" warrants deviation from the general rule that transgression of the criminal law will not be tolerated.¹⁴ Other sections describe specific instances of justification, such as justification in the execution of public duty,¹⁵ in self-protection and the protection of others,¹⁶ in the protection of property,¹⁷ and in law enforcement.¹⁸ In every case the defendant has the burden of injecting the defense of justification.

The blueprint for the Proposed Code, and many other codes, is article 3 of the Model Penal Code. Section 3.02 states the principle applicable to all conduct. The core of this section is the choice of evils test:

Conduct which the actor believes to be necessary to avoid an evil to himself or to another is justifiable, provided that:

(a) the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; . . .

Thus, the test calls for balancing the two evils, one of which must occur. In light of the special situation, the offense with which the defendant is charged must be the lesser of the two.

The actor's conduct must be based on his belief that it was necessary. The comments to the Model Penal Code indicate that this is not a completely subjective test.¹⁹ It is for determination at trial whether the evil sought to be avoided was in fact greater than that of the actor's conduct. In addition, "questions of immediacy and of alternatives have bearing, of course, on the genuineness of a belief in necessity. . . ."²⁰ Thus, the trier of fact can determine if it was reasonable for the actor to have that belief in the necessity of his actions. The comments also state that the actor must in fact have the belief. "[N]ot even actual necessity suffices unless the actor acted on belief in its existence; under the formulation in the draft, one cannot act by accident from necessity."²¹

The Proposed Code narrows the Model Penal Code's choice of evils test by requiring that the act be "an emergency measure to avoid an imminent public or private injury."²² Other codes and proposed codes contain similar limitations, justifying the conduct only "when such conduct is immediately necessary. . . ."²³ or only to prevent "an imminent public disaster or serious bodily injury to a person or serious damage to

14. PROP. NEW MO. CRIM. CODE § 8.040, Comment (1973). The action taken must be an "emergency" measure to avoid an "imminent" injury. Whether these conditions are satisfied does not depend on the interval of time before the injury will occur. *Id.*

15. *Id.* § 8.030.

16. *Id.* § 8.050.

17. *Id.* § 8.060 (Premises), § 8.070 (Property).

18. *Id.* § 8.080 (Law Enforcement Officer), § 8.090 (Private Person).

19. M.P.C. § 3.02, Comment 1 (Tentative Draft No. 8, 1958).

20. *Id.*, Comment 5.

21. *Id.*

22. PROP. NEW MO. CRIM. CODE § 8.040 (1) (1973), quoted note 13 *supra*.

23. MICH. DRAFT § 695(1); N.Y. CODE § 35.05 (2).

property."²⁴ In all cases, the conduct must be necessary to avoid the greater evil; it is insufficient that the actor thought it was necessary.²⁵

The Model Penal Code requires that the evil to be avoided be greater than that of the conduct of the actor. New York and Michigan require that the evil to be avoided *clearly* outweigh the other evil.²⁶ The Proposed Code follows the Model Penal Code approach. The gravity of the two evils is judged according to "ordinary standards of intelligence and morality." This renders the defense unavailable to, for example, the mercy killer or to those who believe force is a valid method of promoting their political beliefs.²⁷ That such defendants cannot utilize the defense is emphasized in subsection (2), which states that the necessity and justifiability of conduct may not rest on considerations pertaining only to the morality and advisability of the statute, either in general application or with respect to particular cases. Other codes similarly limit the defense.²⁸

The Proposed Code also requires that the evil to be avoided be brought about "through no fault of the actor." This language probably reflects case law from the area of self-defense denying the defense to the original aggressor absent special circumstances of his retreat and withdrawal.²⁹

A further limitation under section 8.040 is that class A felonies are never justified. To be justified, they must be such under another section in chapter 8.

Other sections of the justification chapter deal separately with specific categories of justifiable use of physical force. Section 8.030 involves the use of force in the execution of public duty, rendering conduct that would otherwise constitute an offense justifiable and not criminal when it is required or authorized by statutory provision or judicial decree.³⁰ The justification extends to cases where the actor acts in the reasonable belief that his conduct is required by a judgment or in the lawful execution of legal process or to assist a public officer in the performance of his duties. This section has no complement in the present Missouri statute. Although it could be said that any conduct authorized by a provision of law is obviously not criminal, the section emphasizes that statutes and judicial decrees are to be construed together.

24. CAL. DRAFT § 610 (b).

25. The M.P.C. § 3.02 speaks of conduct the actor *believes* to be necessary. The Proposed Code, CAL. DRAFT (§ 610), MICH. DRAFT (§ 605), and N.Y. CODE § 35.05 speak of conduct that *is* necessary. The comments to these codes do not disclose whether the actor can make a reasonable error in this regard. *But see* notes 11, 11a & b and accompanying text *supra*.

26. MICH. DRAFT § 605 (1); N.Y. CODE § 35.05 (2).

27. PROP. NEW MO. CRIM. CODE § 8.040 (1), Comment (1973), quoted note 13 *supra*.

28. MICH. DRAFT § 605 (2); N.Y. CODE § 35.05 (2).

29. *See* text accompanying notes 33-39 *infra*.

30. The proposed provision sets forth examples of such provisions or decrees:

- (a) Laws defining duties and functions of public servants.
- (b) Laws defining duties of private persons to assist public servants in the performance of their functions.
- (c) Laws governing the execution of legal process.
- (d) Laws governing the military services and the conduct of war.
- (e) Judgments and orders of courts.

PROP. NEW MO. CRIM. CODE § 8.030 (1) (1973).

Section 8.050 deals with justifiable "Use of Force in Defense of Persons."³¹ A person is justified in using force when he reasonably believes such force is necessary to defend himself or a third person against the use or imminent use of unlawful force by another. The use of deadly force is justified only if the actor reasonably believes it necessary to protect himself against death, serious physical injury, rape, sodomy, or kidnapping. Currently, the Missouri statute deems justifiable a homicide committed in resisting murder, great personal injury, or an attempt to commit *any* felony upon the actor.³² The narrower justification in the Proposed Code is based on the common law principle that the amount of force used must bear a reasonable relation to the magnitude of the harm sought to be avoided.

The Proposed Code adopts the common law rule, presently in force in Missouri, that the actor need not retreat before using deadly force in self-defense if he is in a place he has a right to be.³³ But, the defendant's opportunity to retreat may reflect on the reasonableness of his belief in the necessity of using force. The Model Penal Code and the codes of several states³⁴ prohibit the use of deadly force if the actor can retreat with com-

31. PROP. NEW MO. CRIM. CODE § 8.050 (1973) provides:

(1) A person may, subject to the provisions of Subsection (2), use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force by such other person, unless:

(a) The actor was the initial aggressor; except that in such case his use of force is nevertheless justifiable provided

(i) he has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force, or

(ii) he is a law enforcement officer and as such is an aggressor pursuant to Section 8.080 (1), or

(iii) the aggression is justified under some other provision of this Chapter or other provision of law.

(b) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would not be justified in using such protective force.

(2) A person may not use deadly force upon another person under the circumstances specified in Subsection (1) unless he reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping.

(3) The justification afforded by this Section extends to the use of confinement as protective force provided that the actor takes all reasonable measures to terminate the confinement as soon as it is reasonable to do so.

(4) The defendant shall have the burden of injecting the issue of justification under this Section.

32. § 559.040, RSMo 1969, *quoted note 9 supra*.

33. *State v. Bartlett*, 170 Mo. 658, 71 S.W. 148 (1902). In this case the defendant was on a public street when attacked. The same no-retreat doctrine was upheld where defendant was sitting on a porch in front of a store expecting the deceased to come looking for trouble. *State v. Hudspeth*, 150 Mo. 12, 51 S.W. 483 (1899). There is a right to attack when it appears reasonably necessary to protect against an impending attack. *State v. McGee*, 361 Mo. 309, 234 S.W.2d 587 (En Banc 1950).

34. M.P.C. § 3.04 (2) (b) (ii); MICH. DRAFT § 615 (2) (a); N.Y. CODE § 35.15 (2).

plete safety, except that a public officer performing his official duties need not retreat,³⁵ nor must anyone retreat from his own dwelling.³⁶

Under the Proposed Code, the defense of justification is unavailable to the actor who was the aggressor in the encounter, unless the actor withdrew in good faith and effectively communicated the withdrawal to the other person.³⁷ This is presently the law in Missouri. An early Missouri Supreme Court case held that although the accused provokes the confrontation with the intent to kill the deceased, if he later attempts in good faith to withdraw, and the deceased, knowing that the accused is attempting to withdraw, seeks to inflict great bodily harm, then the accused's right of self-defense (justification) is revived.³⁸ Later decisions have stated that complete withdrawal revives the right of self-defense notwithstanding that the defendant began the combat with a felonious or murderous intent.³⁹

The defense of "imperfect self-defense" is also currently available in Missouri.⁴⁰ It arises when the actor initiates the encounter, but does so without felonious intent, and is obliged to kill during the encounter to save his own life. The defense does not justify the homicide, but reduces the grade of the offense. Under the Proposed Code the defense is handled by the various sections that define the degrees of offenses.⁴¹

The Proposed Code permits the actor to use force for the protection of other persons if, under the circumstances as he reasonably believes them to be, that person would be justified in using such force.⁴² This section makes two important changes from common law. First, the actor no longer steps into the shoes of the person he seeks to protect and hence is not restricted to the use of that amount of force the person himself could have used. Instead, the circumstances as the actor reasonably perceives them determine the amount of force permitted. For example, if *A* attacks *B*, but *B* overcomes the attack and is defeating *A* when *X* (our hero) appears on the scene, *X* will be justified in intervening and using force against *B* to protect *A*. He may even use deadly force if he reasonably believes it is necessary to protect *A* from death or serious bodily harm. *A*, however, is not justified in using force on *B* because he is the original aggressor. Under common law, neither could *X* because he stepped into *A*'s shoes. The present Missouri statute appears to eliminate the common law rule also; it requires that the actor reasonably apprehend that a felony is about to be committed upon the person he seeks to aid.⁴³

A second major change is that a special relationship is no longer

35. M.P.C. § 3.04 (2) (b) (ii) (2); MICH. DRAFT. § 615 (2) (a) (i); N.Y. CODE § 35.15 (2).

36. M.P.C. § 3.04 (2) (b) (ii) (1). This is the common law rule. *People v. Tompkins*, 213 N.Y. 240, 107 N.E. 496 (1914).

37. PROP. NEW MO. CRIM. CODE § 8.050 (1) (a) (i), *quoted note 31 supra*.

38. *State v. Goode*, 271 Mo. 43, 195 S.W. 1006 (1917). *See State v. Spencer*, 307 S.W.2d 440 (Mo. 1958).

39. *See, e.g., State v. Mayberry*, 360 Mo. 35, 226 S.W.2d 725 (1950).

40. *Id.*

41. *See, e.g., PROP. NEW MO. CRIM. CODE* § 10.030 (1) (b) (ii) (manslaughter), § 10.060 (1) (c) (ii) (assault in the second degree) (1973).

42. *Id.* § 8.050 (1) (b).

43. § 559.040 (2), RSMo 1969, *quoted note 9 supra*.

required between the actor and the one he seeks to protect. The Missouri statute currently requires such a relationship, based primarily on family or employment.⁴⁴ The requirement of a special relationship is intended to reduce the possibility of mistakenly intervening to protect the original aggressor. The proposed provision indicates that the right to aid a person should not depend on a relationship.⁴⁵

Justified conduct in the defense of property is covered in two sections in the Proposed Code, one dealing with the defense of premises⁴⁶ and another covering other property.⁴⁷ A person in control or possession of premises, or who is licensed or privileged to be thereon, can use deadly force only when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson or burglary on his *dwelling*. This differs from present Missouri law, which justifies a homicide where the trespasser attempted to "commit any felony . . . in any dwelling house in which such person shall be."⁴⁸ The case of *Morgan v. Durfee*⁴⁹ established the principle that every man has a right to employ such force as may reasonably appear to him to be necessary to defend his premises from intrusion. If, in the use of such force, fatal consequences unexpectedly ensue to the intruding party, the actor is not held criminally liable. In addition, justified defense of one's home has been expanded to include one's place of business.⁵⁰

44. *Id.*

45. PROP. NEW MO. CRIM. CODE § 8.050, Comment (1973).

46. PROP. NEW MO. CRIM. CODE § 8.060 (1973) provides:

(1) A person in possession or control of premises or a person who is licensed or privileged to be thereon, may, subject to the provisions of Subsection (2), use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of the crime of trespass by the other person.

(2) A person may use deadly force under circumstances described in Subsection (1) only

(a) when such use of deadly force is authorized under other sections of this Chapter; or

(b) when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson or burglary upon his dwelling.

(3) The defendant shall have the burden of injecting the issue of justification under this Section.

47. *Id.* § 8.070 provides:

(1) A person may, subject to the limitations of Subsection (2), use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the commission or attempted commission by such person of stealing, property damage or tampering in any degree.

(2) A person may use deadly force under circumstances described in Subsection (1) only when such use of deadly force is authorized under other sections of this Chapter.

(3) The defendant shall have the burden of injecting the issue of justification under this Section.

48. § 559.040 (1), RSMo 1969.

49. 69 Mo. 469 (1879). See also *State v. Pollard*, 139 Mo. 220, 40 S.W. 949 (1897).

50. *State v. Shiles*, 188 S.W.2d 7 (Mo. 1945).

This section of the Proposed Code is intended to deal only with the situation where the actor does not fear physical injury from the intruder, but does fear some other type of felonious conduct.⁵¹ Cases in which the actor fears physical injury are covered by section 8.050.

Section 8.070⁵² deals with the defense of property other than premises and allows the use of reasonable force to prevent the commission of stealing, property damage, and tampering. A person is never justified in using deadly force to protect property under this section, unless, of course, deadly force is justified under another section in the Proposed Code.

Missouri common law has developed the doctrine of recapture of property. When property is taken from its rightful owner without authority, he may recapture it without resorting to legal process. But the right to recapture is restricted to such force as is reasonably necessary to effect that purpose, provided it does not extend to the use of a deadly weapon, or to an assault likely to produce death. This right to recapture property unlawfully taken is not restricted to the immediate time and place of taking, and is not lost, though the property is temporarily taken out of sight, when the pursuit is immediate.⁵³ However, the right to recapture is usually restricted to recapture from a thief or robber. Where there is no felony, but a mere dispute as to legal ownership, the private right of recapture is subordinate to the public peace.⁵⁴ Section 8.070 is sufficiently broad to incorporate the doctrine of recapture into the Proposed Code.⁵⁵

The Proposed Code authorizes a law enforcement officer to use force to the extent he reasonably believes necessary to effect arrest or prevent escape from custody if the arrest is lawful or the officer reasonably believes it to be.⁵⁶ Thus, mistakes of fact, such as that the person arrested is not the

51. PROP. NEW MO. CRIM. CODE § 8.060, Comment (1973).

52. See proposed statute quoted note 47 *supra*.

53. State v. Dooley, 121 Mo. 591, 26 S.W. 558 (1894).

54. Wingate v. Burton, 193 Mo. App. 470, 186 S.W. 32 (K.C. Ct. App. 1916).

55. See proposed statute quoted note 47 *supra*. The M.P.C. codifies the recapture doctrine in specific terms in one section (§ 3.06 (1) (b)), and deals with defense of property in possession in another (§ 3.06 (1) (a)). The Proposed Code apparently incorporates both into one section.

56. PROP. NEW MO. CRIM. CODE § 8.080 (1973) provides:

(1) A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. In addition to the use of physical force authorized under other Sections of this Chapter, he is, subject to the provisions of Subsections (2) and (3), justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

(2) The use of any physical force in making an arrest is not justified under this Section unless the arrest is lawful or the law enforcement officer reasonably believes the arrest is lawful.

(3) A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only

(a) when such is authorized under other sections of this Chapter; or
 (b) when he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

(i) has committed or attempted to commit a felony involving the use or threatened use of physical force against a person; or

one named in the warrant, will not create liability for the use of force if reasonable. This codifies present Missouri law.⁵⁷ A law enforcement officer may use deadly force only in limited circumstances in which there is a threat to life—where he reasonably believes the suspect has committed or attempted to commit a felony involving the use of force against a person, is attempting to escape by use of a deadly weapon, or may otherwise endanger life or inflict serious physical injury unless arrested without delay. The Proposed Code position is that the common law distinction between felonies and misdemeanors is inadequate as a basis for justifying the use of deadly force. Some felonies do not involve a threat to human life, and some misdemeanors may.⁵⁸

The section is primarily directed at situations in which the subject flees to avoid arrest.⁵⁹ Where the subject is resisting arrest, the officer's conduct is gauged by section 8.050, under which the amount of force actually necessary is determined in light of the officer's obligation to press forward with the arrest instead of avoiding the use of force.

The Missouri statute presently permits the use of deadly force to effect arrest for *any* felony, to lawfully suppress a riot, or lawfully keep the peace.⁶⁰ One case allowed the use of deadly force in all arrest situations as necessary to effect the law enforcement officer's purpose.⁶¹ Further, the statute extends the defense to all persons and is not limited to law enforcement officers.

The Proposed Code permits a private person acting on his own account to use physical force to effect arrest or prevent escape from custody if he reasonably believes the person committed an offense and the person in fact did so.⁶² This replaces the requirement, arguably in

- (ii) is attempting to escape by use of a deadly weapon; or
- (iii) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

(4) The defendant shall have the burden of injecting the issue of justification under this Section.

57. *State v. Nolan*, 354 Mo. 980, 192 S.W.2d 1016 (1946); *City of Gallatin ex rel. Dixon v. Murphy*, 217 S.W.2d 400 (K.C. Mo. App. 1949). *See also State v. Havens*, 177 S.W.2d 625 (Mo. 1944); *State v. Rose*, 142 Mo. 418, 44 S.W. 329 (1898).

58. PROP. NEW MO. CRIM. CODE § 8.080, Comment (1973).

59. *Id.*

60. § 559.040, RSMo 1969, *quoted* note 9 *supra*.

61. *State v. Havens*, 177 S.W.2d 625 (Mo. 1944). *But see Manson v. Wabash R.R.*, 338 S.W.2d 54 (Mo. 1960), the court excluded the use of deadly force to apprehend misdemeanants; the actor was a private watchman, however, and it was a civil action. The *Manson* position is supported by dicta in other cases indicating that deadly force is restricted to felons. *See, e.g., State v. Nolan*, 354 Mo. 980, 192 S.W.2d 1016 (1946).

62. PROP. NEW MO. CRIM. CODE § 8.090 (1973) provides:

(1) A private person who has been directed by a person he reasonably believes to be a law enforcement officer to assist such officer to effect an arrest or to prevent escape from custody may, subject to the limitations of Subsection (3), use physical force when and to the extent that he reasonably believes such to be necessary to carry out such officer's direction unless he knows or believes that the arrest or prospective arrest is not or was not authorized.

(2) A private person acting on his own account may, subject to the limitations of Subsection (3), use physical force to effect arrest or prevent es-

force in Missouri currently,⁶³ that the offense be committed in the actor's presence. A private person may use deadly force if directed to do so by a law enforcement officer or acting on his own account when the suspect committed a Class A felony *in his presence*⁶⁴ or is attempting to escape by means of a deadly weapon.

A guard or other law enforcement officer may use force to prevent an escape from confinement, but he may use deadly force only when there is a substantial risk that the escapee will endanger human life or cause serious physical injury.⁶⁵ This section is inapplicable to the use of force in penal institutions.⁶⁶

Section 8.110 deals with the "Use of Force by Persons with Respon-

cape only when and to the extent such is immediately necessary to effect the arrest, or to prevent escape from custody, of a person whom he reasonably believes to have committed an offense and who in fact has committed such offense.

(3) A private person in effecting an arrest or in preventing escape from custody is justified in using deadly force only

- (a) when such is authorized under other Sections of this Chapter; or
- (b) when he reasonably believes such to be authorized under the circumstances and he is directed or authorized by a law enforcement officer to use deadly force; or
- (c) when he reasonably believes such use of deadly force is immediately necessary to effect the arrest of a person who at that time and in his presence

- (i) committed or attempted to commit a Class A Felony, or

- (ii) is attempting to escape by use of a deadly weapon.

(4) The defendant shall have the burden of injecting the issue of justification under this Section.

63. *State v. Parker*, 378 S.W.2d 274, 282 (Spr. Mo. App. 1964), announced the rule:

The private citizen is limited in the power of arrest; but he does have the right, without warrant or other process, to arrest for certain crimes, such as the commission of a felony or the commission of petit larceny in the presence. But he should be sure of the crime and the person.

The rule has not been strictly followed. *See State v. Keeney*, 431 S.W.2d 95 (Mo. 1968). The comments to § 8.090 state that the requirement that the actor reasonably believe the person sought to be arrested committed the offense and did in fact do so eliminates the need for the "in presence" requirement.

64. This means that the actor must have personally detected the crime. *PROP. NEW MO. CRIM. CODE* § 8.090, Comment (1973).

65. *Id.* § 8.100 provides:

(1) Except as provided in Section 216.445 RSMo, a guard or other law enforcement officer may, subject to the provisions of Subsection (2), use physical force when he reasonably believes such to be immediately necessary to prevent escape from confinement or in transit thereto or therefrom.

(2) A guard or other law enforcement officer may use deadly force under circumstances described in Subsection (1) only

- (a) when such use of deadly force is authorized under other sections of this Chapter; or
- (b) when he reasonably believes there is a substantial risk that the escapee will endanger human life or cause serious physical injury unless the escape is prevented.

(3) The defendant shall have the burden of injecting the issue of justification under this Section.

66. Section 8.100 does not limit § 216.445, RSMo 1969, relating to the use of force in state penal institutions.

sibility for Care, Discipline or Safety of Others."⁶⁷ A parent or guardian of a minor is justified in using physical force if he acts with the purpose of promoting the child's welfare and acts reasonably. Extreme force is never justified. This is consistent with present Missouri authority.⁶⁸

Those entrusted with the care of minors for a special purpose, like teachers, must act with the belief that the force is necessary to further the special purpose. One responsible for the operation of a vehicle or other carrier of passengers can use force when he believes it is necessary to maintain order in the carrier, and may use deadly force when necessary

67. PROP. NEW MO. CRIM. CODE § 8.110 provides:

(1) The use of physical force by an actor upon another person is justifiable when the actor is a parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person or when the actor is a teacher or other person entrusted with the care and supervision of a minor for a special purpose, and

(a) the actor reasonably believes that the force use is necessary to promote the welfare of a minor or incompetent person, or, if the actor's responsibility for the minor is for special purposes, to further that special purpose or to maintain reasonable discipline in a school, class or other group; and

(b) the force used is not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or extreme emotional distress.

(2) A warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use whatever physical force including deadly force, that is authorized by law.

(3) The use of physical force by an actor upon another person is justifiable when the actor is a person responsible for the operation of or the maintenance of order in a vehicle or other carrier of passengers and the actor reasonably believes that such force is necessary to prevent interference with its operation or to maintain order in the vehicle or other carrier, except that deadly force may be used only when the actor reasonably believes it necessary to prevent death or serious physical injury.

(4) The use of physical force by an actor upon another person is justified when the actor is a physician or a person assisting at his direction, and

(a) the force is used for the purpose of administering a medically acceptable form of treatment which the actor reasonably believes to be adapted to promoting the physical or mental health of the patient; and

(b) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of the parent, guardian, or other person legally competent to consent on his behalf, or the treatment is administered in an emergency when the actor reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

(5) The use of physical force by an actor upon another person is justifiable when the actor acts under the reasonable belief that

(a) such other person is about to commit suicide or to inflict serious physical injury upon himself; and

(b) the force use is necessary to thwart such result.

(6) The defendant shall have the burden of injecting the issue of justification under this Section.

68. See *State v. Black*, 360 Mo. 261, 227 S.W.2d 1006 (1950). Unlawful assault and battery by a parent against his child is codified in § 559.340, RSMo 1969. Section 559.050, RSMo 1969, deems excusable a homicide committed by "accident or misfortune" in disciplining a child "without unlawful intent" if "usual and ordinary caution" is used.