# JUSTIFIABLE HOMICIDE, CIVIL DISTURBANCE, AND MILITARY LAW.

A Thesis

Presented To

The Judge Advocate General's School

The opinions and conclusions expressed here are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency. References to this study should include the foregoing statement.

by

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## SCOPE

An exploration of justifiable homicide, imperfect justifiable homicide, and obediance to orders as defenses to murder under military law within the context of performing civil disturbance duties.

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# I

# INTRODUCTION

## A. Recent Developments

With the dispatch of federal troops to Detroit in 1967 began the modern involvement of the U. S. Army with the domestic affairs of this nation on a day to day basis. During 1968 Chicago, Baltimore, and Washington D. C., had thousands of U. S. soldiers deployed to their riot-torn streets, while Cleveland, Newark, St.Louis, Kansas City, Pittsburgh, and others convulsed in violence short of requiring further committment. Having flown into Andrews Air Force Base during April 1968 with a provisional brigade from Fort Knox as its Judge Advocate, the importance of the Army's role in such matters has been of more than theoretical interest to myself, and to anyone else similarly involved.

Since the Martin Luther King riots[1] of April 1968 no subsequent civil disorder has required the use of federal troops.[2] The times, however, do not as yet indicate a return to domestic tranquility and contingency planning on part of the military is both

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[1]For want of a better term.

[2]Deployment of some 5,000 Army troops did occur in September 1968 on the outskirts of Chicago in readiness for disturbances involving the Democratic National Convention. These troops, however, were never committed in the ensuing riots. See Time, 30 Aug., 1968, at 18 and 6 Sep., 1968 at 21.

required and being carried out.[3] Part of this planning should include anticipatory legal analysis of problems likely to arise during any prolonged committment of the Army to suppress civil disorders.

B. Purpose of Thesis

According to one author[4] the Detroit riots generated a number of criminal and civil actions against Michigan National Guardsmen, including one damage suit in the amount of $300,000. Regular Army[5] personnel on civil disturbance duty have so far not been similarly troubled. No serious criminal action has yet arisen during civil disturbance out of acts committed by Regular Army personnel under color of authority.[6] Past experience, however, does not preclude such an occurance in the future.

At some time in the future a Staff Judge Advocate may be confronted with a situation involving the killing of one or more

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[3]Reference the existence of the Director for Civil Disturbance Planning and Operations, Office of the Chief of Staff of the Army.

[4]Crum, The National Guard and Riot Control, 45 J. Urban Law 863 (1968).

[5]The term Regular Army used in this context includes both the Regular and Reserve components on extended active duty, but excludes National Guard personnel, whether on State or federal status. See 10 U. S. C. sec. 3075 (1964) for the official definition of the Regular Army.

[6]Per contact by the author with various Staff Judge Advocates of previously deployed field commands and personnel within the Office of The Judge Advocate General, Department of the Army.

civilians by Army personnel while on civil disturbance duty. The fact that State authorities have not assumed jurisdiction does not in fact or law place the stamp of legality upon the soldier's actions. The purpose of this paper is to provide guidance in determining whether an offense has been committed under the Uniform Code of Military Justice, 1950.[7]

C. Limitations on Thesis

This paper will focus on this problem area from the point of view of homicide under the Uniform Code of Military Justice, hereafter referred to as the Code. Extensive research into State criminal law will be required by necessity, however, as current military law has not yet sufficiently developed, and should additionally provide sound guidance in predicting the results should a State assume jurisdiction. Although limited to the offense of murder, the legal principles involved should be equally applicable to lesser assault type offenses. The defenses of excusable homicide will only be considered when they arise out of imperfect justifiable homicide: mistake of law or fact and obedience of orders. Self-defense and accident will only be touched upon as the civil disturbance situation should have little or no substantive effect upon these well developed areas of military law.

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[7] 10 U. S. C. secs. 801-940 (1964).

Offenses against property will be left aside for evaluation by others, being as a practical matter beyond the scope of this paper.

## II

## BACKGROUND

### A. Historical Use of Federal Troops to Suppress Civil Disorders.

It is in keeping with this country's tradition of civilian control over the military that the military has generally been restricted from exercising authority or responsibility in the realm of civil order and discipline. Yet in spite of this fact there is a long line of historical precedents which in times of internal crisis have required the use of the military to restore internal order. The use of federal troops[8] in suppressing civil disorder and enforcing federal law is nearly as old as the United States itself.

The earliest instance of employment of federal troops in the civil sphere of law and order was the Whiskey Rebellion of 1794. Large numbers of individuals in western Pennsylvania had refused to pay a federal excise tax on whiskey; expressing their refusal by forming into mobs, mistreating federal tax officials and damaging government property. President Washington responded by dispatching the militia of several States to the troubled areas. The rebellion collapsed before the troops arrived.[9]

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[8] The many instances when the State militia (National Guard) was used by the various States to maintain law and order will not be covered in this paper.

[9] See B. Rich, The Presidents and Civil Disorder, 2-20 (1941).

Two more recent occasions of federal troops being dispatched to enforce federal law are Little Rock, Arkansas, in 1957 and the University of Mississippi in 1962.[10]

The furnishing of federal troops to assist a State in suppressing internal disorder is also not new to this country. There have been many requests by various states for such assistance and on 16 occasions they have been granted.[11] In 1874 the Governor of Louisiana requested and received federal troops to restore order in New Orleans, a city racked by mobs of over 10,000 persons who compelled the surrender of the local police and were joined by the State militia in an orgy of racial violence.[12] Two years later the Ku Klux Klan riots occurred in several counties of South Carolina. Again, federal troops were dispatched at State request.[13] The Railroad Strike Riots of 1877[14] generated various State requests

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[10] See Pres. Proc. No. 3,204; 22 Fed. Reg. 7628 (1957); Exec. Order No. 10,730; 22 Fed. Reg. 7628 (1957); Pres. Proc. 3,497; 27 Fed. Reg. 9681 (1962); Exec. Order No. 11,053; 27 Fed. Reg. 9681 (1962).

[11] Examples of when State requests of federal troops were refused are the Buckshot War, Pennsylvania, 1838; Dorr Rebellion, Rhode Island, 1842; San Francisco Vigilance Committee, 1856; Chicago Railroad Riots, 1877. See The Presidents and Civil Disorder, supra, note 9 at 51-54, 54-66, 66-71, and 79-80 respectively. Conversely, federal troops were used in Chicago in 1893 during the Pulman strike over the objection of the Illinois Governor. The Presidents and Civil Disorder, supra, at 91-104.

[12] See Federal Aid in Domestic Disturbances, S. Doc. No. 19, 67th Cong., 2d Sess. 120-139 (1922).

[13] Id. 156-157.

[14] The Presidents and Civil Disorder, supra, note 9, at 72-86.

for help. Federal troops went into West Virginia,[15] Maryland,[16] and Pennsylvania[17] to assist the local governments in restoring order. Next came the Idaho Mining Riots when, at State request, federal troops were dispatched on three different occasions: 1892, 1894, and 1899.[18] During that same period, federal troops were also used in 1894 at Montana's request to suppress a 600 man portion of Coxey's Army under command of "General" Hogan which had stolen a train to aid them in their march to Washington D. C.[19] Mining riots in Nevada (1907),[20] Colorado (1914)[21] and West Virginia (1921)[22] also occasioned State requests for aid and dispatch of federal troops. In 1943 race riots rocked Detroit and federal troops were employed at State request.[23] The most recent examples of federal assistance to the states are Detroit in 1967, and Chicago

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[15] Federal Aid in Domestic Disturbances, supra, note 12, at 164-165 (hereafter cited as Federal Aid).

[16] Federal Aid, supra, note 12, at 164-165.

[17] Federal Aid, supra, note 12, at 166-170.

[18] Federal Aid, supra, note 12, at 190-191, 199-200, 210-213.

[19] The Presidents and Civil Disorder, supra, note 9, at 88-89.

[20] Federal Aid, supra, note 12, at 311.

[21] Federal Aid, supra, note 12, at 312-315.

[22] Federal Aid, supra, note 12, at 320.

[23] See A. Lee & N. Humphrey, Race Riot (1943).

and Baltimore in 1968. A survey of these instances discloses that federal troops were dispatched to assist the various states upon their request whenever civil disorders reached a magnitude where governmental control was lost over at least a large portion of a city or county despite employment of all available State law enforcement resources, including the National Guard.

In addition to rendering assistance to State authorities the federal government has on various occasions sent troops to safeguard federal property, such as during the great Rail Strikes of 1877 in Indiana and Illinois.[24]

B. Legal Basis for Employment of Federal Troops

Contained in the United States Constitution are both the purposes for, and the implimentation of, the commitment of federal troops to quell civil disturbances. Its preamble sets forth as one of its basic purposes: "... insure domestic Tranquility..." Article IV of the Constitution provides that "The United States shall guarantee to every State.... a Republican Form of Government, and shall protect each of them ... against domestic violence" (emphasis added).[25] The XIV Amendment to the Constitution prohibits any State from depriving "any person of life, liberty, or property, without due process

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[24] Federal Aid, supra, note 12, at 171-172 and 173 respectively.

[25] U. S. Const. art IV, sec. 4.

of law" or denying "any person within its jurisdiction the equal protection of the laws." To implement these guarantees Congress is charged with providing for the general welfare of the United States[26] and for calling the militia to execute the laws of the Union and suppress insurrections.[27] The President, in turn, is responsible for the execution of the law[28] and is the Commander-in-Chief of the Army, the Navy, and the Militia when called into federal service.[29]

Within the constitutional framework Congress established by legislation the rules under which federal troops might be committed.[30]

Today these rules are contained in the United States Code which provides for the President's use of the militia and armed forces to suppress insurrections upon proper request by the states; to enforce the laws of the United States or suppress rebellion when ordinary judicial proceedings are impracticable; and to suppress insurrection or domestic violence which results either in a State denial of equal protection of the laws guaranteed by the Constitution to its citizens or an obstruction of the execution of

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[26] U. S. Const. art I, sec. 8, cl 1.

[27] U. S. Const. art I, sec. 8, cl 15.

[28] U. S. Const. art II, sec. 3.

[29] U. S. Const. art II, sec. 2, cl 1.

[30] Act of 28 Feb. 1795, ch. 36, 1 Stat. 424, provided for calling the militia to execute the laws of the Union, suppress insurrections, and repel invasions; Act of 3 Mar. 1807, ch. 39, 2 Stat. 443, allowed the President to also use the Army and Navy.

the laws of the United States.[31] Coupled with these authorizations is the proscription of the so-called Posse Comitatus Act which prohibits the use of the Army or Air Force to execute the law except when expressly authorized by the Constitution or Act of Congress.[32]

C. Judicial Forums Available for Criminal Prosecution

The soldier who commits an act of homicide during civil disturbance duties might be prosecuted for murder either in the State courts, federal district courts, or courts-martial. Soldiers brought before State courts to account for their actions may, by federal statute, either seek removal to a federal district court based on a claim of having acted under color of federal authority when the alleged crime took place,[33] or seek a federal court determination that the State is without jurisdiction under the theory of

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[31] See 10 U.S.C. secs. 331-333 (1964).

[32] 18 U.S.C. sec. 1385 (1964).

[33] 28 U.S.C. sec. 1442a (1964), which applies to both criminal and civil actions. See Tennessee v. Davis, 100 U.S. 257 (1880), upholding the constitutionality of such a removal statute. While "Color of office" is not as broad as "scope of employment", see Allman v. Hanley, 302 F.2d 559 (5th Cir. 1962) and Morgan v. Willingham, 383 F2d 139 (10th Cir. 1967) for varying interpretations of "color of office."

executive immunity via habeas corpus.[34] If removal is granted the soldier would be tried under State substantive law and federal procedural law,[35] while release by habeas corpus subjects the soldier only to federal law.[36]

Lurking in the background is the court-martial. Trial by court-martial, as the law stands today, would not be a bar to trial in a State court.[37] Trial by court-martial may be resorted to even though State proceedings have been instituted or even completed.[38] The same is not true when federal prosecution is instituted by the United States Attorney General's office based on a

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[34] 28 U.S.C. sec. 2241 (1964). See In re Neagle, 135 U.S. 1 (1889) for the landmark case in this area. Also see Hunter v. Wood, 209 U.S. 205 (1907) upholding federal intervention by statute in such circumstances. Norton v. McShane, 332 F.2d 855 (5th Cir. 1964) cert. denied 380 U.S. 981 (1965) is an example of the modern application of executive immunity in a civil case without statutory basis, while In re McShane, 235 F.Supp. 262 (N.D. Miss. 1964) is an example of statutory application in a criminal case. Both removal under 28 U.S.C. sec. 1442a (1964) and executive immunity via habeas corpus exist independently of each other. See In re McShane, supra.

[35] See Fed.R. Crim. P. 54 (b)(1) [and Notes of the Advisory Committee on Rules, 18 U.S.C. Appendix at 3773-3774 (1964)].

[36] Cases cited note 34 supra.

[37] Coleman v. Tennessee, 97 U.S. 509 (1879); United States v. Lanza, 260 U.S. 377 (1922); Bartkus v. Illinois, 359 U.S. 121 (1959).

[38] It is against Army policy to subsequently punish a soldier tried by State court and to do so requires approval of the general courts-martial convening authority. See Army Reg. No. 27-10, ch. 6 (26 Nov. 1968).

violation of federal law.[39] Whether trial by courts-martial, however, would be a bar to a subsequent federal trial, when jurisdiction is based solely upon removal under 28 U.S.C. sec. 1442a, is unknown, with no case or statutory authority existing on point. True, the trial in each case is in the courts of the same sovereign, but in substance the State really represents the prosecution and the federal district court is only the statutory forum.

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[39]See Grafton v. United States, 206 U.S. 333 (1907). Agreement between the Judge Advocate General of the Army and the United States Attorney General provides for which authority has primary jurisdiction when the offense is punishable under both federal/civil and federal/military criminal law. See Army Reg. No. 27-10, ch. 7 (26 Nov. 1968).

III

## LEGAL JUSTIFICATION AS A DEFENSE TO MURDER

### A. The General Nature of Legal Justification

The Manual for Court-Martial, United States, 1969,[40] specifically recognizes justification as an affirmative defense[41] to murder.[42] The Manual provision is in accord with the general status of the law in this country that when necessary, a killing is justifiable in the performance of a legal duty,[43] but it neglects to include the second half of justifiable homicide, concerning those situations in which a person has a legal right to kill.[44] This latter half is broad enough to include self-defense, but as we shall see later it encompasses much more. It would appear to be the difference between a duty imposed upon law enforcement personnel and the right conferred

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[40]Para. 216a.

[41]See Manual for Courts-Martial, United States, 1969, para. 214 (hereinafter cited as M.C.M., 1969); and United States v. Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955); United States v. Weems, 3 U.S.C.M.A. 469, 13 C.M.R. 25 (1953); United States v. Lee, 3 U.S.C.M.A. 501, 13 C.M.R. 57 (1953), which hold that justifiable homicide is an affirmative defense to be raised by the accused.

[42]M.C.M., 1969, para. 197, discusses the offense of murder in the military.

[43]Stinnett v. Commonwealth, 55 F.2d 644 (4th Cir. 1932); Dyson v. State, 28 Ala. App. 549, 189 So. 784 (1939); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); Wimberly v. City of Paterson, 75 N.J. Super. 584, 183 A.2d 691 (1962).

[44]See Viliborghi v. State, 45 Ariz. 275, 43 P.2d 210 (1935); Williams v. State, 70 Fa. 10, 27 S.E.2d 109 (1943); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965); McKee v. State, 118 Tex. Crim. 479, 42 S.W.2d 77 (1931); Dodson v. Commonwealth, 159 Va. 976, 167 S.E. 260 (1933).

upon private citizens. Although not contained in the 1951 or 1969 Manual for Courts-Martial, the right of a private citizen to use deadly force under circumstances not involving self-defense has been recognized to a certain degree in the military.[45] Before these legal definitions will be of any service several questions will have to be answered. What legal duties may be accomplished when necessary by deadly force? Finally, what objectives give a private citizen a legal right to kill when he has no legal duty to accomplish the particular objective? Before going further, several other related legal concepts should be considered and distinguished. The first broad category is excusable homicide. In the military excusable homicide could be raised by the various defenses of accident or misadventure, self-defense, obedience to apparently lawful orders, entrapment, and coercion or duress.[46] Of particular interest is the concept of self-defense. As shall be seen later some of the elements required in self-defense are applicable in justifiable homicide while others are not. The primary difference is that the person availing himself to the defense of justifiable homicide may be the

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[45] United States v. Hamilton, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959), held that a serviceman, acting as a private citizen, could use force to prevent a felony committed in his presence, but in the particular case only a misdemeanor had been committed and Hamilton was not entitled to that defense to a charge of assault with a dangerous weapon.

[46] M.C.M., 1969, para. 216b-f.

aggressor[47] either by duty or right. The reasonableness of the force he uses to accomplish his legitimate goal will, however, be subject to scrutiny. Certain jurisdictions divide self-defense into two categories, justifiable and excusable homicide, depending upon what is being defended, the former eliminating the proscription of non-aggression.[48]

The defenses of mistake of fact and mistake of law also enter into the area of justifiable homicide, but they do not stand by themselves. There must be either a mistake as to the existence of a required factual element of a legal proposition or a misconstruction of the legal proposition itself.[49]

Entwined in this area would be the concept, novel to the military, of obedience to orders. Therefore, the next step must be an analysis of those legal principles which give a person the duty or right, aside from self-preservation, to use deadly force.

## B. Justified Use of Deadly Force

### 1. Prevention of Criminal Offenses

The rule at common law and in most jurisdictions is that deadly

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[47]"Unless the accused had withdrawn in good faith, he is generally not entitled to this defense [self-defense] if he was an aggressor..", M.C.M., 1969, para 216c. Also see United States v. Sandoval, 4 U.S.C.M.A. 61, 15 C.M.R. 61 (1954).

[48]See Dodson v. Commonwealth, 159 Va. 976, 167 S.E. 260 (1933).

[49]See discussion in Section C, Chapter VII below.

force may be used when necessary to prevent a forcible or atrocious felony committed by violence or surprise.[50] This rule has been adopted by the military with minor variances in the adjectives used from case to case.[51] Analysis of the cases discloses three elements which must be present: a forcible or atrocious felony, an attempt or commission by violence or surprise, and a necessity for deadly force to terminate or prevent it.[52] Of particular importance concerning courts-martial is that the United States Court of Military Appeals in United States v. Hamilton,[53] when applying the general rule, defined a felony as being an offense punishable by more than one year's imprisonment under the Manual for Courts-Martial.

The right to use deadly force to prevent a violent felony is not restricted to law enforcement officers. In most jurisdictions

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[50]Gill v. Commonwealth, 235 Ky. 351, 31 S.W. 2d 608 (1930); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965); Dodson v. Commonwealth, 159 Va. 976, 167 S.E. 260 (1933); State v. Nyland, 47 Wash 2d 240, 287 P. 2d 345 (1955); also see In re Neagle, 135 U.S. 1 (1889), which supports such a conclusion without discussing this particular rule.

[51]United States v. Hamilton, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959); United States v. Lee, 3 U.S.C.M.A. 501, 13 C.M.R. 57 (1953); United States v. Weems, 3 U.S.C.M.A. 469, 13 C.M.R. 25 (1953).

[52]The term "absolute necessity" has been used by some courts: State v. Nodine, 198 Ore. 679, 259 P.2d 1056 (1953); State v. Beal, 55 N.M. 382, 234 P.2d 331 (1951), while other courts use such terms as "apparent necessity"; State v. Couch, 52 N.M. 127, 193 P.2d 405 (1948), and "reasonable necessity"; State v. Sorrentino, 31 Wyo. 129, 224 P. 420 (1924). The use of these adjectives in these and other cases have not been to modify the word "necessity" but only to reenforce its normal meaning, thus precluding convenience being used as the standard.

[53]10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959).

a private citizen may resort to deadly force under the same circumstances as a peace officer.[54] The right of a serviceman to so act as a private citizen has been recognized in the military.[55]

Closely akin to prevention of violent felonies is the justified use of deadly force in the protection of a person's home.[56] The offenses of arson and robbery, whether committed in a person's home or elsewhere, would be covered by the general rule governing violent or forcible felonies.

As the serviceman on riot control duty would not be protecting his home, and as arson and robbery are likely to confront him, no further discussion of this area of the law is necessary.

Defense of others against criminal attack will justify the use of deadly force when necessary to repel the attack.[57] This particular

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[54]State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965); Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A.2d 568 (1945); McKee v.State, 118 Tex. Crim. 479, 42 S.W. 2d 77 (1931); State v. Nyland, 47 Wash. 2d 240, 287 P. 2d 345 (1955).

[55]United States v. Hamilton, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959).

[56]See generally Viliborghi v. State, 45 Ariz. 275, 43 P. 2d 210 (1935); State v. Fair, 45 N.J. 77, 211 A. 2d 359 (1965); State v. Couch, 52 N.M. 127, 193 P. 2d 331 (1951); Moore v. State, 91 Tex. Crim. 118, 237 S.W. 931 (1922).

[57]Williams v. State, 70 Ga. 10, 27 S.E. 2d 109 (1943); Gill v. Commonwealth, 235 Ky. 351, 31 S.W. 2d 608 (1930); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965); Dodson v. Commonwealth, 159 Va. 976, 167 S. E. 260 (1933).

rule of law is important to the serviceman on riot control duty. If, however, he mistakenly comes to the defense of the wrong party he may find himself in legal difficulties. The court in State v. Fair[58] sets forth the majority and minority tests for criminal liability. The former protects the honest and reasonable, though mistaken, rescuer while the latter does not.

As violent felonies may be prevented by deadly force, conversely non-violent felonies[59] and misdemeanors[60] may not. Not all cases are in agreement, however, and in the California case of People v. Siler[61] the court, based on statute, extended justifiable homicide to include the prevention of all felonies. The opposite conclusion was reached by the

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[58] 45 N.J. 77, 211 A. 2d. 359 (1965). Accord, Williams v. State, 70 Ga. 10, 27 S.E. 2d 109 (1943); State v. Robinson, 213 N.C. 273, 195 S. E. 825 (1938). See McIntire v. Commonwealth, 191 Ky. 299, 230 S.W. 41 (1921) for the minority view. See Dodson v. Commonwealth, 159 Va. 976, 167 S.E. 260 (1933), which uses both rules depending on the person being defended.

[59] Commonwealth v. Beverly, 237 Ky. 35, 34 S.W. 2d 941 (1931); State v. Turner, 190 La. 198, 182 So. 325 (1938); Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A. 2d 568 (1945); State v. Nyland, 47 Wash. 2d 240, 287 P. 2d 345 (1955).

[60] Viliborghi v. State, 45 Ariz. 275, 43 P 2d 210 (1935); State v. Turner, 190 La. 198, 182 So. 325 (1938).

[61] 6 Cal.2d 714, 108 P. 2d 4 (1940).

Oregon[62] and Washington[63] courts when interpreting statutes apparently covering all felonies. In these two cases the courts simply wrote in the common law requirement that the felony be violent or forceful.

The problem will arise, however, when the slayer turns out to be mistaken either in his belief that a violent felony was in process or that deadly force was necessary to prevent it. Under State law his mistaken acts will more often be excused if he acted in good faith upon an honest and reasonable belief.[64] Should he, however, act unreasonably, dishonestly, or in ignorance of the law, the criminal charge may vary from murder to manslaughter.[65] Relevancy of these State rules will be considered in Chapters VI and VII below.

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[62]State v. Nodine, 198 one. 679, 259 P. 2d 1056 (1953).

[63]State v. Nyland, 47 Wash. 2d 240, 287 P. 2d 345 (1955).

[64]Viliborghi v. State, 45 Ariz. 275, 43 P. 2d 210 (1935); Williams v. State, 70 Ga. 10, 27 S.E. 2d 109 (1943); State v. Beal, 55 N.M. 382, 234 P. 2d 331 (1951). But see State v. Law, 106 Utah 196, 147 P. 2d 324 (1944), which held that State statute applied the honest and reasonable test to protecting oneself and certain relatives, but in all other cases the person slain must have actually attempted to inflict great bodily harm upon the person being protected.

[65]For the varying results for those who acted so unwisely see cases cited note 51 supra and Commonwealth v. Beverly, 237 Ky. 35, 34 S.W. 2d 941 (1931); Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A. 2d 568 (1945); State v. Nyland, 47 Wash. 2d 240, 287 P. 2d 345 (1955).

2. Arrest and Prevention of Escape

Under common law and statute both a peace officer and a private citizen[66] may arrest or prevent the escape of a felon. When he is without a warrant the peace officer, in a majority of jurisdictions, must be acting upon a reasonable belief that a felony has been committed and that the person to be arrested committed it.[67] Some States additionally require that a felony actually has been committed.[68] For the private citizen attempting to apprehend a felon, the minority view becomes for him the majority rule, requiring that a felony actually has been committed.[69]

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[66] A State jurisdiction may require that the felony be committed in the presence of the citizen before he may make a citizen's arrest. See People v. McGurn, 341 Ill. 632, 173 N.E. 754 (1930); State v. Parker, 355 Mo. 916, 199 S. W. 2d 338 (1947); Martin v. Houck, 141 N.C. 317, 54 S.E. 291 (1906).

[67] Martyn v. Donlin, 151 Conn. 402, 198 A. 2d 700 (1964); State v. Autheman, 47 Idaho 328, 274 P. 805 (1929); Palmer v. Maine Cent. R. Co., 92 Me. 399, 42 A. 800 (1889); Martin v. Houck, 141 N.C. 317, 54 S. E. 291 (1906); Allen v. Lopinsky, 81 W. Va. 13, 94 S. E. 369 (1917).

[68] The courts in Adair v. Williams, 24 Ariz. 422, 210 P. 853 (1922); People v. McGurn, 341 Ill. 632, 173 N.E. 754 (1930); Kennedy v. State, 139 Miss. 579, 104 So. 449 (1925), discuss their State statutes which vary from the common law by requiring that the felony actually have been committed if the peace officer attempts to arrest without warrant for an alleged felony committed out of his presence.

[69] People v. Score, 48 Cal. App. 2d 495, 120 P. 2d 62 (1941); Croker v. State, 114 Ga. App. 492, 151 S. E.2d 846 (1966); Pilos v. First Nat. Stores, 319 Mass. 475, 66 N.E. 2d 576 (1946); Ross v. Leggett, 61 Mich. 445, 28 N. W. 695 (1886); Commonwealth v. Burke, 378 Pa. 344, 106 A.2d 587 (1954); Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W.2d 638 (1944).

Once the peace officer or private citizen legally attempts to effect an arrest of a "felon," deadly force may be used if no other reasonable means are available to effect it.[70] Thus, a fleeing felon may be shot when no other method is available to prevent his escape.[71]

A contradiction occurs as to the private citizen. If his property is stolen, assuming the criminal act amounts to a felony, he may not use deadly force to prevent the theft, but if he attempts to arrest the felon who flees, he may slay him if no other reasonable means are available to prevent escape. This dilemma has seldom

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[70] Peace officer: Wiley v. State, 19 Ariz. 346, 170 P. 869 (1918); Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964); Lee v. State, 179 Miss. 122, 174 So. 85 (1937); Wimberly v. Paterson, 75 N.J. Super. 584, 183 A.2d 691 (1962); Askay v. Maloney, 85 Ore. 333, 166 P. 29 (1917); Hendricks v. Commonwealth, 163 Va. 1102, 178 S.E. 8 (1935). Private citizen: Crawford v. Commonwealth, 241 Ky. 391, 44 S. W. 2d 286 (1931); State v. Parker, 355 Mo. 916, 199 S.W. 2d 338 (1947); State v. Nodine, 198 Ore. 679, 259 P. 2d 1056 (1953); Scarbrough v. State, 168 Tenn. 106, 76 S. W. 2d 106 (1934).

[71] In Hendricks v. Commonwealth, 163 Va. 1102, 178 S.E. 8 (1935), the court adhered to the rule that deadly force may be used if it is the only effective way to stop a fleeing felon, but held that the jury could find that the evidence did not reasonably support the need to kill in effecting the arrest of the suspected felon in a moving automobile.

been squarely faced by the courts,[72] perhaps due to the lack of imagination by defense counsel.[73] Since the case law forbidding deadly force to prevent non-violent felonies is firmly established it is more likely that the opposite theory concerning arrests would give way in some manner when the actual issue arises.

In the area of misdemanors the use of deadly force to effect an arrest is severely curtailed. Both peace officer[74] and private citizen[75] may arrest without a warrant for a misdemeanor amounting to a breach of the peace committed in their presence, but neither may

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[72]In Williams v. Clark, 236 Miss. 423, 110 So.2d 365 (1959), the court was faced with a proprietor attacking a person he suspected of earlier stealing over $300.00 from his cash box. After the assault and retrieving of some $70.00 the proprietor turned the suspect over to the police. The appellate court upheld a lower court declination to instruct on citizen's arrest, based on two grounds: that the proprietor's sole purpose (as he had earlier stated) was to reclaim his money; and that he did not inform the suspect of the object and cause of the arrest. Although in this case the application of an "intent" rule proved satisfactory, it is not hard to imagine that in most instances the only real evidence as to intent would be the in-court testimony of the assaultor, which is not particularly reliable.

[73]In Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A.2d 568 (1945), it was held that a woman had no right to shoot a person fleeing with her automobile because the felony was not violent or atrocious. The result might have been in doubt had her counsel raised the issue of attempting to arrest a fleeing felon.

[74]Adair v. Williams. 24 Ariz. 422, 210 P. 853 (1922); Commonwealth v. Gorman, 288 Mass. 294, 192 N.E. 618 (1934); State v. Lutz, 85 W.Va. 330, 101 S.E. 434 (1919); Allen v. State, 183 Wis. 323, 197 N.W. 808 (1924).

[75]Palmer v. Maine Cent. R. Co., 92 Me. 399, 42 A. 800 (1889); Fitscher v. Rollman & Sons Co., 31 Ohio App. 340, 167 N.E. 469 (1929); Radloff v. National Food Stores Inc., 20 Wis.2d 224, 123 N.W.2d 570 (1963).

use deadly force to arrest or prevent escape.[76] The common law restrictions that neither could arrest without a warrant for a misdemeanor which was not a breach of the peace[77] or for any misdemeanor committed out of their presence[78] have been eliminated by statute and judicial decision in various states. Research of a State's Code and case law would be necessary in each instance.

The question which automatically arises is, if deadly force is not authorized to arrest for any misdemeanor why is the authority to arrest set forth above in such detail? Because, at least in the case of a peace officer, resistance to such legal arrest may be overcome by any degree of force reasonably

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[76] State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); Siler v. Commonwealth, 280 Ky. 830, 134 S.W.2d 945 (1939); People v. Cash, 326 Ill. 104, 157 N.E. 77 (1927); Durham v. State, 199 Ind. 567, 159 N.E. 145 (1927); Wimberly v. Paterson, 75 N.J. Super. 584, 183 A.2d 691 (1962).

[77] Peace officer's right to arrest for any misdemeanor is set out in Croker v. State, 114 Ga. App. 492, 151 S.E.2d 846 (1966); Palmer v. Maine Cent. R. Co., 92 Me. 399, 42 A. 800 (1889); City of St. Paul v. Webb, 256 Minn. 210, 97 N.W. 2d 638 (1959). People v. Score, 48 Cal. App.2d 495, 120 P.2d 62 (1941), extends the right to arrest without warrant to anyone for a "public offense" committed in his presence, while in People v. Santiago, 53 Misc.2d 264, 278 N.Y.S.2d 260 (1967), the right was extended to a "crime". Martin v. Castner-Knott Dry Goods Co., 27 Tenn.App. 421, 181 S.W.2d 638 (1944) allows a citizen's arrest for a public offense committed in one's presence. Malley v. Lane, 97 Conn. 133, 115 A. 674 (1921), allows a citizen's arrest for any misdemeanor.

[78] Reasonable grounds to believe a misdemeanor has been committed on the part of a peace officer was substituted for the in his presence rule in Smith v. State, 228 Miss. 476, 87 So.2d 917 (1956); Taylor v. Commonwealth, 274 Ky. 702, 120 S.W.2d 228 (1938); People v. McGurn, 341 Ill. 632, 173 N.E. 754 (1930).

necessary.[79] The peace officer so engaged has a duty to overcome the resistance and need not retreat.[80] Thus, a peace officer is legally the aggressor and may use deadly force to overcome resistance even in the case of a misdemeanor. If the peace officer, however, lacks authority to effect the arrest, his duty does not exist and in all likelihood neither does his shield of legal justification.[81]

Whether a private citizen may use deadly force to overcome resistance when legally attempting to arrest for a misdemeanor is an open question.[82]

One final area in the law of arrest which could affect the serviceman is the manner and procedure required to make an arrest. When possible under the circumstances, a person attempting to make an arrest should announce his official capacity (a uniform will put

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[79] People v. Cash, 326 Ill. 104, 157 N.E. 77 (1927); Durham v. State, 199 Ind. 567, 159 N.E. 145 (1927); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); Siler v. Commonwealth, 280 Ky. 830, 134 S.W.2d 945 (1939); State v. Ford, 344 Mo. 1219, 130 S.W.2d 635 (1939); Broquet v. State, 118 Neb. 31 223 N.W. 464 (1929); Wimberly v. Paterson, 75 N.J. Super. 584, 183 A.2d 691 (1962); State v. Vargas, 42 N.M. 1, 74 P.2d 62 (1937); State v. Murphy, 106 W.Va. 216, 145 S.E. 275 (1928).

[80] Cases cited note 79 supra.

[81] See Taylor v. Commonwealth, 274 Ky. 702, 120 S.W.2d 228 (1938).

[82] Courts have in the past by way of dicta stated a private citizen, unlike a peace officer, may rely only upon the doctrine of self-defense (which should include the duty to retreat when practicable?) and may not be an aggressor. See State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); State v. Stockton, 97 W.Va. 46, 124 S.E. 509 (1924); Mercer v. Commonwealth, 150 Va. 588, 142 S.E. 369 (1928).

one on notice[83]), and cause for the arrest.[84] Failure to comply with the above, however, is not usually fatal to its legality.[85] It may though give a suspect the right to resist an arrest which appears to be an unexplained assault.[86]

3. Application to the Military.

Though somewhat varied, the law of the various States concerning prevention of crimes is remarkably uniform. They allow for the use of force to prevent violent crimes, two of which the serviceman on riot control duty is likely to encounter: arson and assault with a firearm. Further, whatever the legal status of the serviceman while on such duty, peace officer, private citizen, or special status, his right of action is the same. The primary problem area will be whether the force used, including deadly force, was reasonably necessary to prevent the crime. As previously pointed out, this area of justifiable use of force has been recognized by the military courts.[87]

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[83]State v. Evans, 161 Mo. 95, 61 S.W. 590 (1901).

[84]Presley v. State, 75 Fla. 434, 78 So. 532 (1918); Kennedy v. State, 139 Miss. 579, 104 So. 449 (1925); Bennett v. State, 136 Tex. Crim. 192, 24 S.W.2d 359 (1939).

[85]Elliott v. Haskins, 20 Cal. App.2d 591, 67 P.2d 698 (1937).

[86]Presley v. State, 75 Fla. 434, 78 So. 532 (1918).

[87]Cases cited note 51 supra.

Greater in complexity for the serviceman is the subject of arrest. In United States v. Evans[88] the United States Court of Military Appeals specifically recognized that deadly force, when necessary, may be used to overcome forcible resistance by one being arrested or to prevent the escape of a felon. Not resolved in the Evans case is whether a serviceman may make a citizen's arrest, to include all the rights and liabilities incurred while engaged in such an endeavor. The very concept of citizen's arrest has yet to be recognized by the Manual for Courts-Martial or military appellate courts.

A fair reading of Articles 7 and 9 of the Uniform Code of Military Justice[89] and paragraph 19, Manual for Courts-Martial, 1969, could lead to the conclusion that there is no such thing as a citizen's arrest of one serviceman by another. As a policy matter it is a prudent conclusion. The military structure is not geared for the spectacle of a company commander being arrested by his enlisted men for public drunkeness at a company party.

Army Regulation 633-1,[90] reenforces the conclusion that the right

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[88] 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967). The case involved the apprehension of a Marine deserter in Vietnam by the accused. No issue of citizen's arrest was raised as the court found the accused was lawfully authorized to apprehend by reason of his company commander's orders and his being a noncommissioned officer; the court citing 10 U.S.C. sec, 807 (1964). Also see Brown v. Cain, 56 F. Supp. 56 (1944), where the Federal District Court found that a serviceman had the right to arrest a civilian in the performance of his duties as a naval yard guard.

[89] 10 U.S.C. secs. 807, 809 (1964).

[90] 13 Sept. 1962, Apprehension and Restraint.

of citizen's arrest does not generally exist intra-service, and that the authority to apprehend (military equivalent to civil arrest) is restricted to those categories of personnel enumerated in the Manual and the Code. Paragraph 8, of that Regulation does purport to establish when military personnel may "apprehend" (arrest) persons not subject to the Code. The question raised by the regulation's language is whether a felony must be committed in the serviceman's presence before he may attempt to arrest.

Conceding the serviceman's right to apprehend civilians during a domestic disturbance, either as a type of peace officer or private citizen, what law will determine its validity? The local law of the State in which it occurs? A federal-military standard ultimately constructed by the United States Court of Military Appeals perhaps based on Army Regulation 633-1 with universal application? The federal rule is that when federal officers arrest without warrant for federal offenses, and no federal statute sets forth the standards for such arrest, the State law of arrest governs.[91] As the problem of what law will govern in courts-martial cuts across several areas of law, its consideration will be taken up in detail in a later chapter.

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[91] United States v. DiRe, 332 U.S. 581 (1948); Johnson v. United States, 333 U.S. 10 (1948). Although in these cases State officials made the arrests accompanied by federal agents, the court did not, in stating the rule, restrict its application to such instances.

After the above consideration of the law of arrest and prevention of crimes, the next question which must be answered is whether a federal soldier on riot control duty enjoys the status of a civilian peace officer, a private citizen, or a special status under the law. The latitude of justifiable action would appear to vary to a certain extent with the status conferred.

## IV

## LEGAL STATUS OF THE U. S. SOLDIER

### A. Importance of Status Under State Law

If the serviceman were to be completely cast adrift upon the sea of State law to justify his acts during civil disturbance duty, he would find it extremely important whether he was classified as equivalent to a peace officer or to a private citizen. Due to the lack of federal cases on point, State law is of further importance to him as a court-martial may look to either the particular State law or the general law of the States to determine his status.

As has been seen, there is remarkably little difference between the rights of a peace officer and a private citizen in many areas of law enforcement, but those areas which do distinguish can be of vital importance. In the area of apprehending or preventing the escape of a felon, the law is unclear as to whether a private citizen may resort to any reasonable degree of force, particularly deadly force, to effect apprehension or prevention of escape. Of equal importance is the question of whether a private citizen may, as the peace officer, use deadly force to overcome the resistance of a felon or misdemeanant in making a citizen's arrest. To the soldier on the street, these could be further restrictions upon his performance of duty based upon legal concepts and definitions he could not reasonably be expected to understand or successfully apply.

Specifically as to the offense of riot itself no case law or

specific statutory authority exists for the private citizen to act on his own in a law enforcement capacity. It could be legitimately argued that he still possessed the common law right to prevent violent felonies and make certain citizen's arrests. The trouble with this concept is twofold. First, because of its very nature, there is a strong policy argument against any private citizen acting on his own in attempting to quell a riot and thereby adding to the confusion. Second, and of greater importance, is the fact that nearly all the State justifiable homicide statutes dealing with riot suppression refer to the private citizen only when he is directly arresting the law enforcement authority.[92] From the statutes at least, it cannot be said with any certainty that private citizens, acting on their own, except in self-defense, have any right to engage in law enforcement activities in a riot. A serviceman on riot control duty who stood no better than a private citizen would be in a very uncomfortable position.

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[92] Conn. Gen. Stat. Ann. sec.53-171 (1960); Fla. Stat. Ann. sec.870.05 (1965); Mass. Ann. Law ch.296 sec.6 (Supp. 1966); Neb. Rev. Stat. sec.28-807 (1947); N.J. Stat. Ann. sec.2A:126-6 (1952); Ohio Rev. Code Ann. sec.3761.15 (Page 1953); R.I. Gen. Laws Ann. sec.11-38-2 (1956); Vt. Stat. Ann. tit.13 sec.904 (1959); Va. Code Ann. sec.18.1-254.9 (Supp. 1968); Wash. Rev. Code sec.9.48.160 (1961); W.Va. Code Ann. sec.15-1D-5, 61-6-5 (1961). However, Me. Rev. Stat.Ann. tit.17 sec.3357 (1964) and Mo. Rev. Stat. sec. 559.040(3) (1959) apparently do not require that the citizen be assisting or under the direction of official law enforcement personnel.

B. The State Militia

Because of the lack of federal cases on point it is well worthwhile to investigate the views of the various States as to the status of their militia (National Guard) while on duty to suppress riots and insurrections, or otherwise enforce State law, because of the analogy to be drawn to the federal situation. An analysis of State court decisions produces two conflicting theories, neither of which can be said to be prevailing.

The first group of decisions support the conclusion that the militia has the same status as a peace officer. The Michigan Supreme Court held that the militia has no more power than the civil authorities when called out to enforce the law.[93] The court found that the manner in which the Guardsmen executed their duties in apprehending bootleggers exceeded the authority that peace officers would have under the same circumstances and thus subjected the Guardsmen to civil damages.[94] The Michigan court left two distinct questions open in its decision: whether Guardsmen really even had the status of peace officers, unnecessary to decide as they exceeded even that standard, and whether their status and authority would change in the event of domestic disturbance requiring martial rule. In State v.

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[93]Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924).

[94]Vehicles on a public highway at night which refused to halt for the sentries to be searched were confronted on down the road with an unannounced log blocking their path.

McPhail[95] the Mississippi Supreme Court apparently conferred peace officer status upon Guardsmen called up to enforce State anti-gambling and liquor laws. Two cases which unequivocably state that the Guardsman has the status of peace officer are Commonwealth v. Shortall[96] and Frank v. Smith.[97] In the Shortall case[98] the court's rationale is founded upon the theory of self-defense by the State coupled with the duty of the militia to effect that goal. The court in the Frank case,[99] on the other hand, concluded the Guardsman had peace officer status based both on the common law and Kentucky statute.

The second line of decisions gives the Guardsman a greater latitude of action than normally attributed to the peace officer. In Re Moyer[100] arose out of the Colorado Mining Strikes at the turn of the century when Moyer brought suit for damages against the former Governor for his lengthy "preventive" detention without charges by State troops under the direction of the Governor. The suit was dismissed on appeal by the Colorado Supreme Court. The United States Supreme Court denied an appeal on Constitutional grounds.[101] Both State and federal courts believed that since the

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[95]182 Miss. 360, 180 So. 387 (1938).

[96]206 Pa. 165, 55 A. 952 (1903).

[97]142 Ky. 232, 134 S.W. 484 (1911).

[98]206 Pa. 165, 55 A. 952 (1903).

[99]142 Ky. 232, 134 S.W. 484 (1911).

[100]35 Colo. 159, 85 P. 190 (1904).

[101]Moyer v. Peabody, 212 U.S. 78 (1909).

militia had the authority to use deadly force to suppress armed riots and insurrections it was fully justified in the less severe action of detaining a leader and incitor of the rioters. In another western case, Herlihy v. Donohue[102] the Montana Supreme Court opinion appears to give the Guardsman greater latitude of action when overriding necessity requires it.[103] The most sweeping standard for judging a Guardsman's conduct during great internal disorder was announced by the Iowa Supreme Court, which held that liability would attach only if the acts were done with malice, or wantonly and without any belief that such acts were necessary or appropriate to accomplish the object which the officer was under a duty to attain.[104]

C. The Federal View

Although various Army publications in this area stress, at least in part, the military's assistance to civil authorities,[105] this concept can be misleading. It can confuse the means with the end and

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[102] 52 Mont. 601, 161 P. 164 (1916).

[103] In this case the court could find no overriding necessity to destroy the liquor of a saloon which stayed open past closing hours. In my opinion, a different result should occur under the overriding necessity rule when the problem of quickly disposing of unsecured liquor in package goods stores occurs during riots similar to the recent ones, and the Montana court indicated the same.

[104] O'Connor v. District Court, 219 Iowa 1165, 260 N.W. 73 (1935).

[105] U.S. Dep't of Army, Pamphlet No. 360-81, To Insure Domestic Tranquility (1968); U.S. Dep't of Army, Pamphlet No. 27-11, Military Assistance to Civil Authorities (1966).

give the false impression that federal troops engaged in riot control duty are enforcing State law. One of the purposes of our federation is to insure domestic tranquility,[106] and it is the Federal Government's responsibility to protect the States against domestic violence.[107] Through Congressional action the President of the United States is impowered to use the Armed Forces to suppress insurrections in the States and enforce the laws of the United States.[108] It is not difficult to conclude that Armed Forces personnel when so employed are enforcing federal law based on Constitutional rights and duties. It is true that the mechanism for restoring order is enforcement of State law, but this is simply the means to the end of enforcing federal Constitutional law. It is preserving for the State its republican form of government.[109] Attaining this goal by assisting in the enforcement of local law is the most facile way to obtain that end plus preserving the concepts of federalism as no large body of federal criminal law exists.

The soldier in a civil disturbance mission is engaged in the enforcement of federal law. He is so engaged not as a volunteer or interloper but as a soldier under orders. He is under a duty to so act and the consequences of his failure to do so in a proper manner

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[106] U.S. Const., Preamble.

[107] U.S. Const. art. IV, sec. 4

[108] See 10 U.S.C. sec.331-334 (1964).

[109] As provided for in U.S. Const. art. IV, sec. 4.

subject him to the penalties of the Uniform Code of Military Justice.[110] As the common law created rights and protection for the peace officer performing his duty there is no compelling reason why a statute would be required to insure the serviceman the same protections while performing his law enforcement duties. The fact that the serviceman is enforcing the law and has a duty to do so should be sufficient. On riot control duty he is a federal law enforcement officer in every sense of the word.

D. Observations and Conclusions.

The conclusion that the U. S. soldier on civil disturbance duty is a law enforcement officer does not settle whether his latitude of action will be restricted to that of a civilian peace officer or extended. Once again State authorities must be resorted to because of lack of federal cases on point.[111] What few State cases there are fall at first glance into three categories. The first, as announced by the Kentucky Supreme Court in Frank v. Smith,[112] would strictly limit the serviceman to the role of civilian peace officer, with all its rights and restrictions. The second would limit the serviceman

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[110] Among the offenses he might commit under the Code are disobediance of orders, 10 U.S.C. secs. 890,891,892 (1964), and dereliction of duty, 10 U.S.C. sec. 892 (1964).

[111] Permissible latitude of action in line of duty has been reviewed by the federal courts, but these cases normally deal with intra-service actions. See Chapter VII, Section B2 below.

[112] 142 Ky. 232, 134 S.W. 484 (1911).

to the role of civilian peace officer except during time of martial rule.[113] The third would limit the serviceman only to those means necessary to obtain the ends desired.[114] In applying this test, the courts split on whether it is objective (reasonable) necessity[115] or subjective (honest belief without malice) necessity.[116] Perhaps both views apply the objective test as to legality, but the latter will excuse illegal acts done honestly and without malice. It should be noted that in each instance a court has announced the necessity doctrine the Governor had declared martial rule or a state of insurrection.[117]

It is submitted that the above categories are artificial and misleading. Instead they really stand for a completely different proposition in the law. When considered, it is inconceivable that the Colorado court deciding In re Moyer[118] would have held that State militia acting under the direction of the Governor could implement

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[113] Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924).

[114] See In re Moyer, 35 Colo. 159, 85 P. 190 (1904); O'Connor v. District Court, 219 Iowa 1165, 260 N.W. 73 (1935); Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916). Commonwealth v. Shortall, 206 Pa. 165, 55 A. 952 (1903), appears to support this approach with the court's talk of quasi-martial law.

[115] Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916).

[116] O'Connor v. District Court, 219 Iowa 1165, 260 N.W. 73 (1935).

[117] Cases cited note 114, supra.

[118] 35 Colo. 159, 85 P. 190 (1904) affirmed Moyer v. Peabody, 212 U.S. 78 (1909).

preventive detention while State police under similar direction could not. The distinction would make no sense. It is more likely that the mantle of legal justification was cast over the acts of these Guardsmen because Guardsmen happened to have been involved, rather than because they were Guardsmen.[119]

Conceding this observation, then another rationale must be sought to explain the extended latitude of action upheld by various State courts. Perhaps the answer lies in the situation giving rise to these cases: riot.

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[119]See cases cited notes 113, 114, and 118 supra, for those cases dealing with the State militia. See Norton v. McShane, 332 F.2d 855 (5th Cir. 1964) and In re McShane, 235 F.Supp. 262 (N.D. Miss. 1964) for federal approval of civilian law enforcement authority's actions during a riot situation in excess of normal latitude of action.

V

RIOT

A. The Legal Nature of Riot

1. Its Definition

Riot is a common law offense[120] incorporated into statute in most States. Being a common law offense, courts look to the great body of the common law when interpreting a particular State statute, particularly when the term "riot" is used as a statutory work of art.[121] It may be defined as a tumultuous disturbance of the public peace by an assembly of three or more persons in the execution of some objective. If the objective itself is lawful, but carried out or attempted in a violent and turbulent manner to the terror of the people the offense of riot occurs.[122] If the objective is unlawful, it need be executed only in a violent or turbulent manner.[123] The number of people required may be increased by specific statutory provision. A slightly different definition requires an assembly of three or more persons with the intent to forcibly and violently

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[120]Symonds v. State, 66 Okla. Crim. 49, 89 P.2d 970 (1939); Commonwealth v. Hayes, 205 Pa. Super. 338, 209 A.2d 38 (1965); State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934).

[121]Symonds v. State, 66 Okla. Crim. 49, 89 P.2d 970 (1939).

[122]State v. Abbadini, 38 Del. 322, 192 A. 550 (1937); Commonwealth v. Hayes, 205 Pa. Super 338, 209 A.2d 38 (1965); State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934).

[123]Cases cited note 122 supra.

disturb the peace and to mutually assist one another against any who oppose them in the execution of their purpose. The assembly is forceful, violent, and tumultuous, to the terror of the people.[124] Both definitions arise from the common law. The latter, however, appears to place more stress on mutual intent by the assembly and requires public terror in all instances. Again, it is cautioned that the riot statute, if one exists, of the particular State involved must be checked to ascertain if a statutory definition exists.

In the military the elements of riot are set forth in paragraph 195a, Manual for Courts-Martial, 1969. It is the common law definition, though more akin to the latter variation set forth above than the former, more common variation.

Closely related to riot is the misdemeanor offense of breach of the peace, which in the military is also prohibited by Article 116 of the Uniform Code of Military Justice and is defined as "an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature."[125] The difference between it and riot is in part one of degree; riot requiring three or more participants, plus in certain jurisdictions the acts of the mob must be such as would cause public terror. Additionally, some common purpose must be intended by the rioters. Thus it has been held that a public fight between members of two rival work gangs was a breach of the peace and not

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[124] United States v. Fenwick, 25 F. Cas. 1062 (No. 15,086) (D.C. Cir. 1836).

[125] M.C.M., 1969, para 195b.

a riot.[126]

2. Particular Problems in Riot and Insurrection.

As noted above riot requires some common purpose or intent by its participants. The immediate question which comes to mind is what is the legal nature of the intent and whether we are dealing with a legal fiction. The language used by the courts does not prove particularly helpful. It has been said that riot involves execution of an express or implied agreement,[127] that conspiracy is not required[128] but there must be the intent to join or encourage the acts constituting the riot.[129]

Courts-martial cases have added little clarity. Boards of Review have stated on various occasions that the specific intent required was satisfied by a common purpose by the rioters to execute an enterprise by concerted action;[130] that overt agreement is not required, only inferred intent[131]

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[126]Plaza v. Government of Guam, 156 F. Supp. 284 (D.C. Guam 1957).

[127]Perkins v. State, 35 Okla. Crim. 279, 250 P. 544 (1926).

[128]Trujillo v. People, 116 Colo. 157, 178 P.2d 942 (1947).

[129]People v. Bundte, 87 Cal. App.2d 735, 197 P.2d 823 (1948) cert denied 337 U.S. 915 (1949).

[130]C.M. 360562, Pugh, 9 C.M.R. 536 (1953).

[131]A.C.M. 6582, Ragan, 10 C.M.R. 725 (1953) petition denied 11 C.M.R. 248 (1953).

or purpose;[132] that the common purpose may arise independently among the rioters;[133] and that the common purpose in a riot is evidenced by the voluntary assistance of the rioters to each other in carrying out a certain purpose.[134]

Except in cases of overt agreement, the riot can often only be viewed in retrospect to discover some general purpose, effect or result. It may be very general or very specific. In my opinion, the specific intent held by one member of the mob may vary considerably from those of other members, and perhaps all vary from the particular result which occurs. An attempt to apply a specific intent standard is not workable. Specific intent in an individual is a tangible thing, though difficult to prove. Common intent or purpose of a mob is an abstract concept or conclusion. If a standard of specific intent is imposed, the jury system in its infinite wisdom would probably in fact apply a presumption in place of the legal inference. In my opinion, though its acceptance is quite doubtful, riot should be a general intent offense, complete after the mob action moves towards effecting some purpose by violent disorderly means, and the actions of a particular member contribute toward that purpose unless his motive is pure and his acts based upon honest, reasonable assumptions which later prove false.

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[132] N.C.M. 350, Davis, 17 C.M.R. 473 (1954); N.C.M. 63-00468, Wampole, 33 C.M.R. 641 (1963).

[133] A.C.M. 6758, Lawrence, 10 C.M.R. 767 (1953) petition denied 12 C.M.R. 248 (1953).

[134] C.M. 410361, Murphy, 34 C.M.R. 551 (1964).

Therefore, a person who runs along with a mob out of curiosity, but whose mere presence encourages or assists the mob in its objective would be a rioter unless he was acting reasonably upon his specific intent to extracate one of his relatives who had joined the mob.

The above argument does not wholly square with present rule of law that mere presence at the scene of a riot does not make one a rioter,[135] although it may give rise to the inference.[136] Only one State by statute makes an individual a rioter as a matter of law after remaining on the scene after an official call to disperse.[137]

The problem of who is a rioter is raised here not for the purpose of prosecuting rioters, but to clarify the position of a soldier claiming to have justifiably killed a rioter. Assuming the right to use deadly force exists, it is difficult to determine the validity of his claim if we do not know what a rioter is. The solution to this problem probably lies in the defense of mistake upon the part of the soldier[138] and the procedural requirement of

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[135] N.C.M. 63-00468, Wampole, 33 C.M.R. 641 (1963); People v. Bundte, 87 Cal. App.2d 735, 197 P.2d 823 (1948) cert denied 337 U.S. 915 (1949); State v. Moe, 174 Wash. 303, 24 P.2d 638 (1933).

[136] State v. Abbadini, 38 Del. 322, 192 A. 550 (1937); Commonwealth v. Brletic, 113 Pa. Super. 508, 173 A. 686 (1934).

[137] Fla Stat Ann sec. 870.04 (Supp 1968). Two States make a person present at a riot a felon if he refuses to help disperse the rioters: S.D. Code sec. 34.0201-0201 (1939); Utah Code Ann sec. 77-5-3 (1953). West Virginia makes an original rioter a felon if he refuses to help disperse fellow rioters: W.Va. Code Ann sec. 15-1D-4 (1961).

[138] See discussion in Chapter VII, Section D, below.

burden of proof/going forward with the evidence. As to the latter, once evidence has been introduced tending to establish that a riot occurred and that the deceased was killed in the vicinity of the riot, then the burden of proving the deceased was not a rioter should fall upon the government. If the government should prove beyond a reasonable doubt that the deceased was not a rioter, perhaps a mere spectator, this should not deprive the defense of the second string to its bow. In Goins v. State[139] a group of Negroes were attacked by a mob outnumbering them perhaps 20 to one. The court held that not only would a killing in resisting the mob constitute self-defense, but that a defender under the circumstances was not required to distinguish antagonist from mere spectator. It was further pointed out by the court that an innocent spectator's mere presence expanded the apparent number of the mob and their threat. If such facts may excuse homicide they should in turn justify it if one has a duty to disperse the rioters. This conclusion still leaves to the jury the issue of whether the degree of force was warranted under the facts.[140]

B. Felony or Misdemeanor

1. Importance

The importance of whether participation in a riot constitutes a felony or misdemeanor cannot be underrated. Unless there is an

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[139] 46 Ohio St. 457, 27 N.E. 476 (1889).

[140] See Goins v. State, 46 Ohio St. 457, 27 N.E. 476 (1889).

exception to the general rule, the categorizing of this offense by a court could largely determine the legal bounds within which a serviceman being tried for murder committed during riot control duty may effectively raise the defense of justifiable homicide. As will be remembered, deadly force is not authorized to prevent the commission of a misdemeanor.[141] On the other hand a forcible felony committed by violence may be prevented by deadly force when necessary.[142] As riot by its very nature is forcible and violent, the question is whether it is a felony. Likewise in arrest, disregarding for the moment the serviceman's legal status during such duty, the nature of the offense is of great importance. Neither peace officer nor private citizen is privileged to use deadly force to arrest for a misdemeanor[143] unlike a felony[144] and should the serviceman enjoy only the status of a private citizen his right to use force to overcome resistance is quite questionable.[145]

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[141] See discussion in Chapter III, subsection B1 above, and cases cited note 60 supra.

[142] See discussion in Chapter III, subsection B1 above, and cases cited note 50 supra.

[143] See discussion in Chapter III, subsection B2 above, and cases cited note 75 supra.

[144] See discussion in Chapter III, subsection B2 above, and cases cited note 70 supra.

[145] See discussion in Chapter III, subsection B2 above, and cases cited note 82 supra.

2. State Law and Statute

All but four States in the Union have statutes prohibiting the offense of riot.[146] Using the standard that only offenses which carry a maximum penalty of over one year's imprisonment are felonies,[147] only eight States classify riot as a felony.[148] Therefore, what shall be called simple riot is a misdemeanor in an overwhelming number of jurisdictions.

In twenty-one State jurisdictions the offense of aggravated[149] riot has been created by statutes which all carry penalties of over one year imprisonment and up to as much as 20 years.[150] Certain States provide for increased punishment if the particular accused committed certain acts during the rioting: carrying a weapon,[151]

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[146] Four States, Maryland, Michigan, Mississippi, and North Carolina, do not have anti-riot statutes or their equivalent, and violations are apparently prosecuted under the common law.

[147] The military standard as announced in United States v. Hamilton, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959).

[148] Ariz. Rev. Stat. Ann. sec. 13-631 (1956); Cal. Pen. Code Sec. 405 (West 1956); Hawaii Rev. Laws. sec. 305-2 (1955); Ky. Rev. Stat. sec. 437.012 (Supp. 1968); Mont. Rev. Code Ann. sec. 94-35-182 (1947); Pa. Stat. Ann. tit. 18 sec. 4401 (1957) (although referred to by the statute as a misdemeanor); Utah Code Ann. sec. 76-52-3 (1953); Wyo. Stat. Ann. sec. 6-108 (1957).

[149] For lack of a better term.

[150] Okla Stat. Ann. tit. 21 sec. 1312(4) (1961).

[151] Alaska Stat. sec. 11.45.010(2) (1962); Minn. Stat. Ann. sec. 609.71 (1963); N.Y. Pen. Law Ann. sec. 2091 (1) (McKinney 1967); Okla. Stat. Ann. tit. 21 sec. 1312(3) (1961); Ore. Rev. Stat. sec. 166.050(2) (1960); S.D. Code sec. 13.1404(3) (1939); Wash. Rev. Code sec. 9.27.050(1) (1961).

encouraging or soliciting others to commit violence,[152] wearing a mask or disguise.[153] Others provide increased penalties for participation in riots where certain offenses occur: destruction of property or personal injury,[154] destruction or damage to buildings,[155] or looting.[156] Four States prescribe additional penalties when the purpose of the riot is to resist the execution of State or federal law.[157] Finally, three States provide by statute that a person participating in a riot where such offenses as murder, maiming, robbery, rape, arson, and certain other offenses are committed shall

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[152] Alaska Stat, sec. 11.45.010(2) (1962); N.Y. Pen. Law Ann. sec. 2091(2) (McKinney 1967); Okla. Stat. Ann. tit. 21 sec. 1312(4) (1961); Ore. Rev. Stat. sec. 166.050(2) (1960); Wash. Rev. Code sec. 9.27.050(2) (1961).

[153] Ind. Ann. Stat. sec. 10-1506 (1956); Minn. Stat. Ann. sec. 609.71 (1963); N.Y. Pen. Law Ann. sec. 2091(1) (1961); Okla. Stat. Ann. tit. 21 sec. 1312(3) (1961); S.D. Code sec. 13.1404(3) (1939).

[154] Ill. Ann. Stat. ch. 38 sec. 25-1(c) (Smith-Hurd 1961); Iowa Code sec. 743.9 (1966); N.H. Rev. Stat. Ann. sec. 609.A:3 (Supp. 1965); N.J. Stat. Ann. sec. 2A:126-3 (1952); N.Y. Pen. Law sec. 2091.1 (McKinney 1944); N.D. Cent. Code sec. 12-19-04(3) (1960); Texas Pen. Code art. 466a (Supp. 1968-9).

[155] Ala. Code tit. 14 sec. 409 (1958); Fla. Stat. Ann. sec. 870.03 (1965); Mich. Comp. Laws Ann. sec. 750.527 (1967); Vt. Stat. Ann. tit. 13 sec. 905 (1959); W.Va. Code Ann. sec. 61-6-6 (1961).

[156] Tenn. Code Ann. sec. 39-5105 (1955).

[157] N.Y. Pen. Law Ann. sec. 2091(1) (McKinney 1967); Okla. Stat. Ann. tit. 21 sec. 1312(2) (1961); Va. Code sec. 18.1-254.2b (Supp. 1968); Wash. Rev. Code sec. 9.27.050(1) 1961).

be treated as a principal to these offenses,[158] while two others simply make one a principal to any felony or misdemeanor committed during the riot.[159] All statutes referred to above carry a penalty in excess of one year imprisonment.

3. Under the Uniform Code of Military Justice

In the military the offense of riot carries a maximum penalty of dishonorable discharge, 10 years confinement at hard labor, and total forfeitures,[160] clearly a felony. This is far in excess of most other jurisdictions in the country for simple riot. It may be argued that riot occuring in the military is a more serious offense than in civilian life, excluding the horrendous riots of the near past. The Code, however, makes riot an offense regardless of where military personnel engage in such activities. Better reasoning would appear to be that if a serviceman may be punished by courts-martial as a felon for participating in a riot on the civilian economy, then when tried before a courts-martial for an offense arising out of riot control duties the serviceman should be able to avail himself to all the protections the law might allow by classifying riot as a felony.

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[158] Okla. Stat. Ann. tit. 21 sec. 1312(1) (1961); N.D. Cent. Code sec. 12-19-04(1) (1960); S.D. Code sec. 13.1404(1) (1939).

[159] Alaska Stat. sec. 11.45.010(1) (1962); Ore. Rev. Stat. sec. 166.050(1) (1960).

[160] 10 U.S.C. sec. 916 (1964) establishes the offense and M.C.M., 1969, para. 127c, Table of Maximum Punishments, prescribes the maximum punishment.

C. Use of Deadly Force to Suppress Riots

In a riot situation it could be concluded from the previous discussion of justifiable homicide that deadly force may be used only when necessary to overcome resistance to arrest, and possibly only then when the arrest is attempted by a peace officer. The basis for this conclusion lies in the legal fact that in most jurisdictions riot is only a misdemeanor amounting to a breach of the peace. Precedent, however, questions this conclusion.

1. Legal Precedent.

Various State courts have by dicta announced the principle that deadly force may be used when necessary to suppress a riot.[161] In upholding preventive detention of a civilian by the Colorado militia the United States Supreme Court, in a decision written by Justice Holmes, went on to declare that there was immunity to fire into a mob during an insurrection.[162] Legal authorities such as Warren on Homicide[163] have announced similar propositions.

Cases on point are few and often decided in part on other grounds.

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[161] Mitchell v. State, 43 Fla. 188, 30 So. 803 (1901); State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); State v. Turner, 190 La. 198, 182 So. 325 (1938); State v. Couch, 52 N.M. 127, 193 P.2d 405 (1948).

[162] Moyer v. Peabody, 212 U.S. 78 (1909) affirming In re Moyer, 35 Colo. 159, 85 P. 190 (1905).

[163] I Warren, Homicide sec. 146 (Perm. Ed. 1938).

In an early Michigan case[164] the accused, his family, and servants were set upon in a building by a mob of three violent men. In reversing the accused's conviction the court enumerated three separate theories upon which Pond could rely in defense to murder. First was the defense of the building containing himself and family from violent attack; second was prevention of a felony; third was suppression of riot. The court specifically recognized that riot was not necessarily a felony but the terror it generates and the number of people it involves make it an exception to the general rule regarding misdemeanor and deadly force. The facts of the case, however, more closely correspond to the other two defense theories.

In Goins v. State[165] the right of collective self-defense against a mob far superior in number was recognized. No mention of riot and its suppression was made by the court, and understandably so as the pistol shots were clearly fired with self-preservation in mind rather than law enforcement. The decision does infer that a misdemeanor may rise to the intensity of threatened feloneous assault and in such a situation deadly force may be used.

In Higgins v. Minaghan[166] the defendant was sued by a rioter he had shot after his house had been surrounded for three nights by a mob firing off guns, beating on pans, and generally creating a ruckus.

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[164] Pond v. People, 8 Mich. 150 (1860).

[165] 46 Ohio St. 457, 21 N.E. 476 (1889).

[166] 78 Wis. 602, 47 N.W. 941 (1891).

The court held that good faith coupled with reasonable apprehension of a felony or great personal harm by one who cannot otherwise defend himself may authorize the use of deadly force. The court further held that the jury should have been instructed that "a riot is regarded in law, always as a dangerous occurrence..."[167] because of its normally violent consequences.

During the year 1901 a National Guardsman of Pennsylvania shot a civilian during the great and violent strikes of that period. The accused was a member of a detail sent to guard a previously dynamited house to protect its occupants, a mother and four children, from further violence. The detail was under orders to use their weapons to prevent prowlers. As fate would have it, the accused shot and killed a civilian who came into the yard at night after being called upon several times to halt. No evidence indicated any criminal purpose on the part of the deceased. The accused was freed by writ of habeas corpus by the Pennsylvania Supreme Court, which held, as a matter of law, insufficient evidence existed to support any criminal charge.[168] From the decision it is unclear as to the exact basis the court used to reach its findings. The court stated that when a riot reaches such proportions that it cannot be quelled by ordinary means a militiaman has the same right as a peace officer to subdue it by deadly force. The court also stated that a soldier acting under

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[167] 78 Wis. 602, 47 N.W. 941, 943 (1891).

[168] Commonwealth v. Shortall, 206 Pa. 165, 55 A. 952 (1903).

military orders is immune from prosecution if he did not, and a man of ordinary understanding would not, know the act of killing in compliance with orders was illegal. In the instant case it is unknown if the killing was justified in and of itself or merely excused by reason of a not so apparent illegal order. The court certainly held that under certain circumstances use of deadly force is justified in suppressing a riot.[169]

From the above cases the impression at least arises that deadly force may be used when necessary to suppress a riot, but no guidelines are really propounded.

### 2. Statutory Authority

There are 16 States which by statute authorize the use of deadly force when suppressing a riot. Nine such States justify killing in

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[169] Although the cases cited pertain to both criminal and civil actions, nothing in their opinions leads one to conclude that the law would vary as to the type legal action involved. If an individual is legally justified in committing a certain act that justification will immunize him equally from criminal or civil process. Somewhat on point are In re McShane, 235 F. Supp. 262 (N. D. Miss. 1964) and Norton v. McShane, 332 F.2d 855 (5th Cir. 1964). It is in the area of legal excuse that a distinction arises. Legal excuse in the criminal sphere may encompass acts committed under a belief in erroneous facts, which if true, would legally justify the acts committed. Whether this mistake would satisfy the reasonable man standard in a civil law suit is another question. The criminal law aspect of legal excuse arising out of legal justification will be discussed in Chapter VII.

overcoming resistance to dispersement or apprehension.[170] Of these nine, three contain the caveat that the killing be necessary and proper; whatever that means. Three States justify the killing of rioters after a declaration to disperse.[171] Three States justify killing while lawfully suppressing riot[172] (West Virginia is included in this category as well as in overcoming resistance to dispersement and apprehension). Two other States justify such force after every effort consistent with the preservation of life has been used to induce or force rioters to disperse.[173] Just because statutory wording purports to give carte blanche to law enforcement personnel during riot it does not necessarily follow that the courts will give it that interpretation. A search of case law discloses no case involving an interpretation.

3. Rules to be Applied.

Two distinct and opposing rules can be formulated to justify

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[170] Conn. Gen. Stat. Ann. sec. 53-171 (1960); Mich. Comp. Laws Ann. sec. 750.527 (1967); Neb. Rev. Stat. sec. 28-807 (1943); N.J. Stat. Ann. sec.2A:126-6 (1952); Ohio Rev. Code Ann. sec. 3761.15 (Page's 1953); R.I. Gen. Laws Ann. sec. 11-38-2 (1956); Vt. Stat. Ann. tit. 13 sec. 904 (1959); Va. Code Ann. sec. 18.1-254.2 (Supp. 1968); W.Va. Code Ann. sec. 15-1D-5 (1961).

[171] Fla. Stat. Ann. sec. 870.05 (1965); Me. Rev. Stat. Ann. tit. 17 sec. 3357 (1964); Mass. Ann.Laws ch. 296 sec. 6 (Supp. 1966).

[172] Mo. Rev. Stat. sec. 559.040(3) (1959); Wash. Rev. Code sec. 9.48.160 (1961); W.Va. Code Ann. sec. 61-6-5 (1961).

[173] Mont. Rev. Code Ann. sec. 94-5311 (1947); N.D.Cent. Code sec. 12-19-22 (1960). It is uncertain whether "consistent with the preservation of life" refers to the lives of the rioters or others.

deadly force to suppress riot and insurrection. The first, and more conservative view, would allow for its use when necessary to suppress a riot in which felonies, perhaps only violent felonies, are being perpetrated. Grafted onto this rule would be the normal rules of prevention of violent felonies, apprehending felons, and overcoming resistance to arrest. It is hardly more than a restatement of well established law with one possible major exception which will be discussed later in this Chapter. The second rule would allow such force to be used when necessary to suppress any riot in addition to the normal rules relating to prevention of offenses, apprehension, and overcoming resistance to arrest.

Before discussing the merits of each formulation one element must be discussed which bears upon both: necessity. Naturally the use of any degree of force must be reasonably necessary to effect the object to be obtained and would certainly not be mere convenience. But what is the object to be obtained? Is it the suppression and dispersement of the individual rioters or the riot itself? If it is the individual rioter, law enforcement personnel are faced in a large riot with the near impossible task of attempting to cull out the rioter from the camp follower. If the first formulated rule is applied, are they to be doubly harassed by the requirement of differentiating the felonious rioter from the misdemeanant? To argue for the individual approach is to ignore the corporate identity which a mob assumes and place upon its suppressors either an insurmountable task or one froth

with very real legal liabilities. It is not the individual trouble-maker, may he be only a shouter or an arsonist, who presents a great threat to society, but the collective action of all, one of whom may at one moment only be a shouter and the next an arsonist, which constitutes the threat, perhaps greater than the sum of its parts at any given time. To treat a riot only as individual components does not recognize its nature nor contemplate its suppression.

Neither of these two formulated rules best rationalize the various court decisions. The courts have tended to be more conservative in conferring justification upon law enforcement acts during minor disturbances,[174] and more liberal during riots and insurrections of great magnitude.[175] There are various problems engrained in this approach. For one, there is no readily perceptible line which separates the minor riot from the aggravated riot. The seriousness of the riot not only depends upon its number of participants, but also on the forces available to combat it. Additionally, the so-called simple riot is quite capable of turning into an aggravated one within a very brief time span.[176]

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[174] See Frank v. Smith, 142 Ky. 232, 134 S.W. 484 (1911); Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924).

[175] In re Moyer, 35 Colo. 159, 85 P. 190 (1904) affirmed Moyer v. Peabody, 212 U.S. 78 (1909); Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916); Commonwealth v. Shortall, 206 Pa. 165, 55 A. 952 (1903).

[176] As the court pronounced in Higgins v. Minaghan, 78 Wis. 602, 47 N.W. 941 (1891), a riot is always a dangerous occurrence because of its often violent consequences.

Because of riot's inherently dangerous nature, its suppression by deadly force should be justified in law when such force is necessary to obtain that end. This rule harmonizes well with most of the court decisions investigated above.[177] It does not mean that small riots may be quelled in blood, it means that in determining necessity the size and degree of violence of the riot are only two of several factors to be weighed. They go not to the consideration whether this is conduct so intolerable that it must be quelled by any means available, but whether it is of such magnitude that the available means of suppression can only be successful if deadly force is used.

Justifiable homicide during riot or insurrection should equate to reasonable necessity which requires the law enforcement officer to use deadly force when the immediate means of suppression available are balanced with the disorder confronted.

Does justifiable homicide then include only absolute objective hindsight or does it extend to honest and reasonable action upon the part of the officer? Is the latter only some form of excusable homicide? In my opinion this is a question of categorization, the results being the same whichever method is selected. This is best reserved for discussion, however, in Chapter VII.

The above conclusions on the use of deadly force during riot and insurrection do not make irrelevant the various rules already discussed

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[177] See cases cited note 175, supra. For the soldier on riot control duty this problem is probably moot because of the level and magnitude of violence required before federal troops are dispatched.

concerning use of force in preventing criminal offenses or effecting arrests. After commitment of federal troops the mob in the street often reduces itself to smaller groups, at times individuals, committing individual acts of lawlessness. Will these individuals be considered rioters? Despite a Presidential proclamation to disperse as required by statute[178] it appears prudent to conclude that the serviceman may have to rely on the more common legal rules relating to prevention of crimes, arrest, and resisting arrest to justify his actions.[179] As the various jurisdictions are not in complete agreement as to the status of the law in these various areas, including riot, it is also prudent to ask which law will apply.

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[178] 10 U.S.C. sec. 334 (1964).

[179] Commonwealth v. Shortall, 206 Pa. 165, 55 A. 952 (1903), suggests a broader application of justification.

VI

## WHICH LAW TO APPLY

### A. The Choice and Sources of Law.

The choice facing the military judge, Courts of Military Review, and the United States Court of Military Appeals, will be whether to apply the law of the place the offense occurs or construct a body of military law with universal rules and application. Whichever course is picked, the result will be military law, even the former by incorporation. The choice faces the military judiciary simply because the Code, Manual for Courts-Martial, and military judicial decisions do not at present constitute a body of law expressly covering the varied problems which can arise out of the Army's civil disturbance mission.

Should a course be steared towards an independent body of law with universal application within the military, the military judiciary must cast about for precedent to guide it. One body of existing law, though containing various conflicting rules on many issues, is the law of the various States. The military judiciary has in the past referred to State law for guidance in uncharted or dimly illuminated areas of law.[180] Federal rules and court decisions constitute another body of law which the military judiciary has

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[180] United States v. Evans, 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); United States v. Dixon, 17 U.S.C.M.A. 423, 38 C.M.R. 221 (1968); United States v. Sneed, 17 U.S.C.M.A. 451, 38 C.M.R. 249 (1968).

sampled.[181] The final, and principal source in case of conflict, is the body of military law. This would include the United States Constitution, the Uniform Code of Military Justice, the Manual for Courts-Martial, prior military judicial decisions, and a miscellaneous category which includes military writings, Army Regulations and other official Army documents.

B. Arguments on a Solution

The purpose of this section is to investigate the various arguments supporting or contradicting the two choices available.

The first argument is that of universal application, which is a two-edged sword, depending on what you are requiring to be universal. There is the desired result that the soldier subject to judicial scrutiny has his acts judged by the same standards regardless of the particular forum, State or military. The other edge of the sword is the desired result of universal application of one set of rules within the military. Unfortunately, there is no choice which provides for universality of application under both approaches.

The second argument, or consideration, is that the soldier on civil disturbance duty is enforcing federal law.[182] In such a situation it is not illogical to conclude that subjecting the soldier to

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[181] United States v. Evans, 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); United States v. Clayton, 17 U.S.C.M.A. 248, 38 C.M.R. 46 (1967); United States v. Price, 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968).

[182] See Chapter V, Section C above.

scrutiny by State law in a federal court is unfair.[183]

The most potent argument against applying the law of the place is that universal application of State law is impossible within military law. This is particularly true in the area of defenses. An example is the defense of obedience of orders. Under the Manual it is a defense to obey an illegal order that a man of common and ordinary understanding would not recognize as illegal.[184] In certain State jurisdictions this would constitute no defense at all.[185] There is no reason to believe that the degrees of murder and manslaughter in the various States correspond to those in the military. As the defense of mistake, either of fact or law, depends greatly upon whether an offense is one of specific or general criminal intent, State court decisions on the effect of mistake as to a particular offense would be valueless unless the State offense corresponded completely to the military offense and the State law of mistake was the same as the military's.[186] Any attempt to apply the law of the place except when

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[183] See Chapter II, Section C above, however, as it is a possibility.

[184] M.C.M., 1969, para. 216d.

[185] See Frank v. Smith, 142 Ky. 232, 134 S.W. 484 (1911).

[186] See State v. Turner, 190 La. 198, 182 So. 325 (1938), holding that a police officer's use of deadly force to arrest a misdemeanant would be murder if the killing were intentional and manslaughter if not; State v. Parker, 355 Mo. 916, 199 S.W.2d 338 (1947), holding that unreasonable deadly force to effect an arrest is murder unless the killing is without malice, then it is manslaughter; and Siler v. Commonwealth, 280 Ky. 830, 134 S.W.2d 945 (1939), holding that the intent to kill as opposed to injure distinguishes between murder and manslaughter when unjustifiable force is used to effect an arrest. None of these rules and distinctions are of any particular validity under military law. See discussion in Chapter VII, Section D below.

in conflict with military law would generate a system which insures non-universal application of law both between State and military jurisdiction, and between servicemen tried in the military for the same acts committed in different States.

Finally, applying the law of the place would not solve the military judiciary's search for the law. The law on each legal issue which may arise is not settled in each and every State jurisdiction. Therefore the military would in many instances search beyond the law of a particular State to resolve a particular issue.

The far better course to choose is military law which does not incorporate the law of the place the alleged offense occurs. The serviceman on civil disturbance duty is enforcing federal law and unless there is some compelling reason to the contrary, he should be judged when possible under federal law; in the case of courts-martial, military law. There already exists within military jurisprudence a large body of law applicable to the issues which will be generated out of civil disturbance duties: self-defense, mistake of law and fact, obedience of orders, statutory murder offenses, to name a few, which will not easily mesh together with State law. The law of self-defense in the military is of universal application within the military without resort to the law of the place. In fact, with one exception, there is no area in military law where the law of the place does govern.[187] The same treatment should be given offenses arising out of riot control duty.

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[187]Based on 10 U.S.C. sec 934 (1964), M.C.M., 1969, para 213e provides for prosecution of crimes under State law which are not covered by the Uniform Code of Military Justice when those State crimes become federal crimes by adoption under 18 U.S.C. sec. 13 (1964).

C. Unresolved Problems

Assuming that the law of the place will not be applied in trials by courts-martial, but instead a judicial construction of military law with universal application, a rather safe assumption, the question of what the law will be in many areas is still undetermined. These are the areas where no military jurisprudence exists and the civil jurisdictions are in conflict or unresolved.

The status of the soldier on riot control duty must be determined.[188] Fine points concerning prevention of criminal offenses will have to be resolved.[189] The area of arrest and prevention of escape raises many problems. Solutions will have to be reached to such problems as whether an arrest may be based on reasonable belief or whether it must later be proved that the felony was actually committed;[190] whether a serviceman may resort when necessary to deadly force to prevent the escape of a felon;[191] whether arrest may be legally attempted without warrant for a misdemeanor not amounting to a breach of the peace or for any misdemeanor-breach of the peace not committed in the serviceman's presence;[192] and whether the soldier may use deadly force when

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[188] See Chapter IV, particularly Section C.

[189] See Chapter III, Section B1.

[190] See Chapter III, Section B2 and cases cited notes 67, 68, and 69 supra.

[191] See Chapter III, Section B2 and case cited note 72 supra.

[192] See Chapter III, Section B2 and cases cited notes 77 and 78 supra.

necessary to overcome resistance to an arrest.[193] The overall issue of whether a soldier may apprehend a civilian either as a law enforcement officer or private citizen during riot control duty must be resolved.[194]

In my opinion the most difficult problem area which will arise in courts-martial will be the effect of the defense of mistake of law or fact, to include obediance of orders. This defense will cut across the issues of necessity to use deadly force, prevention of certain criminal offenses, and legality of arrest. It is justifiable homicide gone awry.

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[193] See Chapter III, Section B2 and cases cited notes 79 and 82 supra.

[194] See discussion at Chapter III, Section B3 above.

VII

# OBEDIENCE TO ORDERS AND MISTAKE

## A. Peculiar and Important.

The defense of obedience to orders is peculiar to the military. It involves committing an illegal act in compliance with military orders in the belief that the act is lawful because of the orders. Ordinarily, this would sound in mistake of law and at times mistake of fact, but the legal standards are applied differently. As will be seen, the subordinate carrying out the order may rely on the defense of obeying orders while the person issuing them must rely on the more hazardous defense of mistake of law or fact.

Two distinct problem areas are encountered in the doctrine of obedience to orders. The first, as noted above, is the defense raised when one carries out an order and commits an illegal act. The second will present a more unusual problem. It is best stated in an example. The soldier on riot control duty, acting as a peace officer, or for that matter a private citizen, has the legal right to resort to deadly force to prevent arson when no other reasonable means are available.[195] Supposing a soldier under orders not to shoot arsonists disobeys those orders. Among the questions raised is whether he has committed murder or only the military offense of disobedience.[196]

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[195] See discussion at Chapter III, Section B1 and Chapter IV, Section C above.

[196] Depending on the facts, a violation of either sections 890, 891, or 892 of 10 U.S.C. (1964).

B. Defense of Obedience to Orders

1. The State View.

Before directing our attention to the military practice, a brief look at the status of this defense in the State and federal courts is worthwhile. Though not binding upon the military, those decisions may be looked to for clarification of points not previously disposed of by military appellate decisions.

In the Texas case of Manley v. State[197] the court held that the question of whether the commitment of the militia was illegal under statute or constitution could not be raised by the prosecution in an effort to place the defendant/Guardsman in a less favorable status when determining whether the homicide he committed was justifiable. In the Texas courts, at least, the Guardsman is protected by a non-rebuttable presumption of legality of status, though his subsequent acts as law enforcement official may be looked into.

Three State courts have specifically established tests for legal liability for obeying illegal military orders during times of domestic unrest. The first would require the order to be palpably illegal or without authority.[198] The second would require a man of ordinary sense and understanding to know the order to be illegal.[199]

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[197] 62 Tex. Crim. 392, 137 S.W. 1137 (1911).

[198] Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916). Although the court sustained the civil judgement against the officer ordering the liquor supply destroyed, it reversed the judgement against the enlisted men carrying out the destruction under the officer's orders and supervision.

[199] Commonwealth v. Shortall, 206 Pa. 165, 55 A. 952 (1903).

The third State decision, however, which is in direct conflict with the above, holds that military orders, no matter how reasonable, will not protect the soldier, at least in a civil suit, who commits an unlawful act in compliance with those orders.[200] Military orders were held to be illegal when they attempted to give the soldier more authority than a peace officer. The decision specifically recognized the dilemma the soldier was in, even conceding he might be court-martialed for disobeying the "illegal" order. This did not sway the Kentucky court although this exact reasoning is the basis for the exculpatory rules in the Herlihy[201] and Shortall[202] cases. Perhaps the State courts are only split on the applicability of this defense in civil actions, but would allow it in any criminal action.

The fact that an order may be legal does not give a serviceman immunity to carry it out in an illegal manner.[203] Neither is the person issuing the orders immune.[204] There is a separate issue involving persons in authority which revolves around the type of means they may use to effect a legitimate end or duty.[205]

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[200]Frank v. Smith, 142 Ky. 232, 134 S.W. 484 (1911).

[201]Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916).

[202]Commonwealth v. Shortall, 206 Pa. 165, 55 A. 952 (1903).

[203]See Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924).

[204]Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916).

[205]See Section D, Chapter IV and Section C, Chapter V above.

2. The Federal View

In a case arising out of the War of 1812 the United States Supreme Court held that a militiaman called into federal service by the President could not question the legality of his call-up, at least by the method of not reporting for duty.[206] The court went on to decide the call-up was legal, based on the President's exclusive authority to decide if Congressional requirements had been met for federalization. Whether so sweeping a statement of the law would be upheld today is open to doubt. The case is, however, some authority for the proposition that an attack on the legality of the serviceman's presence on riot control duty will not effect his status as far as defenses he may raise based on that status.[207]

The defense itself of obedience of orders has been recognized even in the earlier federal court decisions. In McCall v. McDowell[208] the Circuit Court found that a Captain Douglas, acting under the specific orders of Major General McDowell, was immune from suit for damages arising out of the false arrest of one McCall. The court applied the test of whether the order was illegal "at first blush",[209] whether it was apparently and palpably illegal to the commonest

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[206] Martin v. Mott, 6 U.S. (12 Wheat.) 19 (1827).

[207] Manley v. State, 62 Tex. Crim. 392, 137 S.W. 1137 (1911) supports this conclusion.

[208] 15 F. Cas. 1235 (No. 8,673) (C.C.D. Cal. 1867).

[209] 15 F. Cas. 1235, 1240 (No. 8,673) (C.C.D. Cal. 1867).

understanding. This approach was further supported by the subsequent case of In re Fair.[210] The court held that the order to shoot the escaping prisoner had to be so illegal "as to be apparent and palpable to the commonest understanding."[211]

Federal decisions have also ventured into the area of scope of permissible acts and orders designed to carry out a legitimate purpose. Unfortunately, they deal almost exclusively with intra-military matters and it is difficult to assess the weight they would be given in a civil disturbance situation involving civilians.[212] In McCall v. McDowell[213] the court without real discussion concluded that the general's order to arrest civilians expressing approval of President Lincoln's assassination was illegal. This finding of illegality subjected him to damages for false arrests carried out in compliance with his order. Coupled with the decision that one who gives an order to kill is guilty of murder as an accomplice,[214] it could be concluded that a general order to resort to deadly force under certain circumstances, which was illegal, could subject the officer to a

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[210] 100 F. 149 (C.C.D. Neb. 1900).

[211] 100 F. 149, 155 (C.C.D. Neb. 1900).

[212] See United States v. Bevans, 24 F. Cas. 1138 (No. 14,589) (C.C.D. Mass. 1816) reversed for lack of jurisdiction 16 U.S. (3 Wheat.) 336 (1818); Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849); United States v. Carr, 25 F. Cas. 306 (No. 14,732) (C.C.S.D. Ga. 1872).

[213] 15 F. Cas. 1235 (No. 8,673) (C.C.D. Cal. 1867).

[214] United States v. Carr, 25 F. Cas. 306 (No. 14,732) (C.C.S.D. Ga. 1872); Under military law the person giving the order would be termed a principal. See 10 U.S.C. sec 877 (1964); United States v. Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

charge of murder for every killing done. Although McCall is a civil case, this should not effect its application to criminal prosecutions except that the particular criminal intent required or a defense based upon mistake might change the resultant liability.

3. The Military View.

"Obedience to apparently lawful orders.

> An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable...",[215]

is the current Manual for Courts-Martial definition. It varies only slightly from the 1951 Manual[216] definition which also contained the test of a man of ordinary sense and understanding. This is of particular importance because the principle court-martial decisions were decided under the older Manual.

One unfortunate occurrence in Korea gave rise to two cases in the military which reestablished in modern military law the scope and limitations of this defense. An Air Policeman had apprehended a Korean, probably a civilian, in an Air Force bomb dump and transported him to the Air Police Station. Evidence tended to show that at the station the Air Policeman's superior officer, Lieutenant Schreiber,

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[215] M.C.M., 1969, para. 216d.

[216] M.C.M., 1951, para. 197b, discussing the offense of murder.

ordered the Korean taken out and shot. The Air Policeman, Kinder, did just that. In the Kinder case[217] the accused Air Policeman specifically raised the issue of obedience to orders on appeal. The Board of Review decided first that the order was illegal.[218] Next, the Board applied the 1951 Manual provisions to the issue raised by the accused, holding that a good faith compliance with orders would be a defense, but not an order that a man of ordinary sense and understanding would know to be illegal. The Board found that the order was so palpably unlawful that no reasonable doubt as to its legality would be raised on the part of an ordinary man. The trial of the lieutenant was reviewed by the United States Court of Military Appeals which upheld his conviction for murder based on his having issued the fatal order.[219]

On 4 April 1967 events near Bong Son, South Vietnam, produced the most recent military case, to this writer's knowledge, involving obedience to orders as a defense to murder.[220] During the course of providing security for an engineer element in an unsecured area, members of an Army platoon captured an unarmed Vietnamese male. According to the accused, a Staff Sergeant, his company commander by

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[217] A.C.M. 7321, 14 C.M.R. 742 (1954).

[218] Citing U.S. War Dep't, Field Manual No. 27-10, The Law of Land Warfare (1940).

[219] United States v. Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

[220] C.M. 416805, Griffen, __ C.M.R. __ (1968) pet. pending.

telephone and his platoon leader in person ordered the prisoner killed. The witnesses varied as to substantiating the accused's assertion. Regardless, the accused and another soldier took the prisoner, his hands tied behind his back, to an embankment and shot him. The accused asserted the defense of obedience to orders to the charge of unpremeditated murder. The Board of Review, in upholding the conviction, found the orders, if given, to be so obviously beyond the scope of authority of the superiors and so palpably illegal on its face that a man of ordinary sense and understanding would have no doubt as to its unlawfulness.[221]

The opinions in the Kinder[222] and Griffen[223] cases, though in places not as clear as desired, when coupled with the cases from State and federal jurisdictions,[224] do produce certain valid conclusions. It would appear that the defense of obedience to orders can be an exception to the general rule that ignorance of the law is no defense.[225] It is the mistake as to whether the killing is legal, a mistake as to the law of murder, generated by the quasi-status of law an order possesses in the military, that raises this defense. This, and the consequences of disobeying a legal order provide more than a hint as to the rationale

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[221] The Board held that the facts did raise an issue to be submitted to the triers of fact.

[222] A.C.M. 7321, 14 C.M.R. 742 (1954).

[223] C.M. 416805, __C.M.R.__ (1968) pet. pending.

[224] See subsections B1 and 2, this Chapter and cases cited therein.

[225] See Section D, this Chapter.

behind this exception.

The more important question involving obedience to orders is whether the test for this defense roughly corresponds to or departs from the more common reasonable man test in torts. The answer is not certain from the two military Boards of Review decisions, primarily because of the extreme situations involved in each case.

A closer look at the tests applied to the defense of obedience of orders discloses certain probable differences from that of the reasonable man. To begin with, the mythical man in one test is reasonable and prudent, in the other he is ordinary, possessing common understanding. With a knowledge of the results in tort cases you could conclude that an ordinary man is often guilty of negligence which the reasonably prudent man is not. Neither does common understanding appear sufficient to keep one out of tortuous activities. The language of the Board in the Kinder case[226] applies a negative test. It does not require that the subordinate reasonably believes the order to be legal before he acts, but that he has no reasonable doubt as to its legality before he acts. The Board in the Griffen case[227] denied use of the defense because a man of ordinary sense and understanding would have no doubt of the order's unlawfulness.

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[226] A.C.M. 7321, 14 C.M.R. 742 (1954).

[227] C.M. 4168085, __C.M.R.__ (1968) pet. pending.

In McCall v. McDowell[228] the order must have been palpably illegal at first blush to deprive the military subordinate of this defense. Similarly, in In re Fair[229] obedience to an order was a bar to prosecution unless the order was palpably illegal to the commonest understanding. This is not the language normally associated with the reasonable man test.

Considering the above decisions it is impossible to conclude that this defense is reserved only to situations where a reasonably prudent man would erroneously conclude that the order was legal. If there is something akin to the law of torts it would be the reasonable man caught up in a sudden emergency, without opportunity for calm reflection, with the duty to obey unless the order is illegal at first blush. Still, if it was a reasonably prudent man the courts are talking about, why is the term "man of ordinary sense and understanding" used; a term not found in any other area of the law? The ordinary meaning of the terms conveys a difference and the difference is a lower standard of required conduct on the part of the man of ordinary sense and understanding.

C. Disobedience of Orders or Murder

The problem raised here is one unfettered by case law, statute, or writing. May a serviceman subject himself to a murder charge by

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[228] 15 F. Cas. 1235 (No. 8,673) (C.C.D. Cal. 1867).

[229] 100 F. 149 (C.C.D. Neb. 1900).

killing a rioter/arsonist he might otherwise have slain except for military orders not to fire on rioters? The importance to the serviceman is obvious: the difference between a possible five year or less maximum imprisonment or death.[230]

There is no argument that the military may restrict an individual from doing what he might normally do in civilian life, such as quit his employment. It is therefore not questioned that the serviceman could be tried by court-martial for disobediance of orders. It does not necessarily follow that this takes away from him his shield of justifiable homicide. Or does it?

Assuming for the moment that the disobedience of orders does not preclude the defense of justifiable homicide, does the standard for assessing it undergo a change? Although far from conclusive, the more logical answer would appear to be yes. Much of the reasoning behind giving a serviceman on riot control duty the status of a law enforcement officer is based in large part on the concept of the serviceman's duty, plus to a lesser extent the consequences of failing to perform that duty.[231] Under the circumstances of this particular problem the soldier had a specific duty to not do the act committed. Removing this strut should reduce his status to that of a private citizen. As discussed in Chapter III, there are areas in which the

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[230]See M.C.M., 1969, para. 127c, Table of Maximum Punishments, to compare sections 890, 891, and 892 (disobedience of orders) with section 918 (murder) of 10 U.S.C. (1964).

[231]See Chapter V above.

law enforcement officer has a greater freedom of action than the private citizen.

One certain consequence is the effect on the soldier's ability to remove a State prosecution to a Federal District Court for trial or have it dismissed for lack of State jurisdiction. In re Fair[232] resulted in removal of a homicide case to the federal courts on the theory that when an officer or agent of the United States acts within the authority conferred upon him by the laws of the United States it is a matter solely for the concern and control of the United States. This reasoning is basically the same as the United States Supreme Court's in In re Neagle.[233] A much later Federal District Court decision, Brown v. Cain,[234] stressed the point that the Coast Guardsman must have been acting in line of duty, i.e., within his military authority to arrest persons for the offense for which he was attempting to arrest. A soldier who committed homicide in violation of competent orders, no matter how justified, would have a near insurmountable task in removing his case from a State court or seeking a dismissal under either of these two theories.

This brings us back to the original problem. Does the soldier before a courts-martial lose his right to the defense of justifiable homicide simply because he disobeyed an order? I think not, for two

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[232] 100 F. 149 (C.C.D. Neb. 1900).

[233] 135 U.S. 1 (1889).

[234] 56 F. Supp. 56 (E.D. Pa. 1944).

reasons: First, the soldier by his act of disobedience forfeits certain substantial rights; his freedom, if convicted of disobeying an order, his status as a law enforcement officer by which his acts would have been judged in determining justifiable homicide, and his right of removal or dismissal of a State prosecution. Second, in weighing the equities, the possibility of a death penalty appears to be a high price to pay for disobeying an order, particularly if not for that order he would be a free man, When taken in the conjunctive, the better result appears obvious.

D. Mistake of Fact - Mistake of Law.

The obvious conclusion, after reading the 1969 Manual provisions on mistake of fact and mistake of law as defense[235] is that they are not meant to be a definitive restatement of the law or a definitive statement of new legal standards, but rather a general reference to and incorporation of existing military law. Because of the broad expanse of the topic of mistake in military law, no attempt will be made to effect an exhaustive study.[236]

With the above in mind, the following general rules are set forth for guidance and to assist in later discussions, with the proviso that military court decisions be carefully checked in any specific

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[235] M.C.M., 1969, para. 154(4) and (5).

[236] For an in-depth study of the subject in the military see Manson, Mistake as a Defense, 6 Mil. L. Rev. 63 (1959) reprinted in Mil. L. Rev., Vol. 1-10 Selected Reprint 151 (1965).

case. First, ignorance or mistake of fact, to be a defense, need only be honest for a specific intent crime,[237] but both honest and reasonable for a general intent crime.[238] Second, ignorance of the law is generally no defense,[239] but an honest mistake or ignorance of some law other than that charged may be a defense to a specific criminal intent offense.[240]

Logically, but without case authority, it may be concluded that an honest and reasonable mistake of some law other than that charged is a defense to a general intent offense.

With the above general rules in mind an attempt will be made to apply them to the offense of murder in the military,[241] in situations typical of what could arise during civil disturbance duties. The conclusions are my own, derived from theoretical application except when legal authority is cited. This approach is necessitated by the lack of military cases on point. The discussion will concern itself with

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[237]United States v. Rowan, 4 U.S.C.M.A. 430, 16 C.M.R. 4 (1954); United States v. Taylor, 5 U.S.C.M.A. 775, 19 C.M.R. 71 (1955); United States v. Holder, 7 U.S.C.M.A. 213, 22 C.M.R. 3 (1956).

[238]United States v. Holder, 7 U.S.C.M.A. 213, 22 C.M.R. 3 (1956); United States v. Mardis, U.S.C.M.A. 624, 20 C.M.R. 340 (1956); United States v. Pruitt, 17 U.S.C.M.A. 438, 38 C.M.R. 236 (1968).

[239]Reynolds v. United States, 98 U.S. 145 (1878); Winthrop, Military Law and Precedents 291 (2d ed. 1920 reprint).

[240]United States v. Sicley, 6 U.S.C.M.A. 402, 20 C.M.R. 118 (1955); Perkins, Criminal Law 816 (1957).

[241]10 U.S.C. sec.918 (1964).

a serviceman using illegal means in good faith to comply with a legal order or carry out a legal duty.

Let us suppose during an urban riot that a soldier has been posted to guard an abandoned package goods store from theft of the liquor and damage to the building. While discharging his duties a civilian approaches and attempts to throw a rock through the store window. The soldier calls out for the civilian to stop but his order goes unheeded. He then shoots and kills the man just before the rock is thrown. For the purposes of this discussion it will be assumed that the act of throwing the rock through the window does not constitute a felony under State law and that the soldier intended to kill or inflict great bodily harm upon the rock thrower. The facts as stated raise the possibility of premeditated or unpremeditated murder.[242] The next step is an inquiry into the mistakes of fact and law which could favorably effect this possibility as far as the soldier is concerned. If the soldier in the above situation believed that the man he shot was about to throw a fire bomb rather than a rock a completely new element is introduced, for if arson were actually being attempted the soldier could have resorted to deadly force if no other means of

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[242]Premeditated murder in the military requires both a premeditated design and a specific intent to kill. See 10 U.S.C. sec. 918 (1) (1964) and M.C.M., 1969, para. 197b. Unpremeditated murder requires the specific intent to kill or inflict great bodily harm. See 10 U.S.C. sec. 918(2) and M.C.M., 1969, para. 197c.

prevention were available.[243] This honest mistake of fact would be a defense to either of the specific criminal intent offenses of premeditated or unpremeditated murder.[244] As voluntary manslaughter requires the same specific intent as unpremeditated murder,[245] the only lesser included offenses left would be involuntary manslaughter[246] or negligent homicide,[247] depending upon the degree of negligence involved in the soldier's mistake. If the soldier's mistake was not only honest, but reasonable, that reasonableness would rebut either of the degrees of negligence required of involuntary manslaughter or negligent homicide. Although easy to state, the specific intent and mistake of fact, if they exist, are contained within the mind of the soldier and make for thorny problems for the finders of fact.

A more difficult area of mistake is mistake of law. In addition to determining whether the mistake exists, it must be determined whether or not it is a mistake of law as to the offense charged. It seems clear that if our soldier was acting under the mistaken belief that deadly

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[243] See Section B1, Chapter III above.

[244] The conclusion that unpremeditated murder is a specific criminal intent offense is based on an analysis of the following cases: United States v. Thomas, 17 U.S.C.M.A. 103, 37 C.M.R. 367 (1967); United States v. Mathis, 17 U.S.C.M.A. 205, 38 C.M.R. 3 (1967); United States v. Ferguson, 17 U.S.C.M.A. 441, 38 C.M.R. 239 (1968).

[245] 10 U.S.C. sec. 919(a) (1964).

[246] 10 U.S.C. sec. 919(b) (1964).

[247] M.C.M., 1969, para. 213f(12), charged under 10 U.S.C. sec 934 (1964).

force could be used when necessary to prevent a violent misdemeanor his mistake was of the law of the offense charged: murder, and hence no defense. If on the other hand he believed that throwing the rock constituted a forcible felony, it may be argued his mistake did not concern the law of murder, but instead what constitutes a felony. If the latter conclusion is accepted the legal consequences of the mistake would be the same as the mistake of fact previously discussed. Not considered here is the offense of murder committed while engaging in an act inherently dangerous to others which evinces a wanton disregard of human life, commonly referred to as murder III.[248] The prior discussion and conclusions as to mistake do not apply themselves very satisfactorily to this offense, or any other based on negligent type conduct.[249]

There is one other consideration which must be taken up before discussion of this area of mistake of law or fact is complete. In the past the United States Court of Military Appeals has displayed a susceptibility in specific intent offenses to allow what it considers a non-criminal purpose to negate the criminal intent required and

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[248] 10 U.S.C. sec. 918(3) (1964).

[249] See Mistake as a Defense, supra, note 226.

thus rise to the status of a defense.[250] Thus, an accused who takes a friend's wallet to teach him not to leave his possessions unsecured in the barracks does not commit either larceny or wrongful appropriation, both specific intent offenses.[251] Although this approach may prevent what a judge considers an unjust result, it does not produce a very discernible rule of law and in effect stands for the proposition that crime is in the eye of the judicial beholder based on deeply buried moral value judgements unsusceptible to objective ascertainment. Regardless, the possibility of its application in a particularly sympathetic murder case cannot be overlooked.

When dealing with justifiable homicide the universal rule that deadly force may only be used when necessary to effect a legal result[252] must always be kept in mind. The question is whether mistake of fact or law has any relevance as a defense in this rule. Suppose the soldier decides that to prevent arson to the building it is necessary to shoot all unidentified persons who come within ten feet of the building. Is this a mistake of fact, though perhaps unreasonable,

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[250]See United States v. Roark, 12 U.S.C.M.A. 478, 31 C.M.R. 64 (1961) and United States v. Caid, 13 U.S.C.M.A. 348, 32 C.M.R. 348 (1962), where the Court dealt with the specific intent offense of wrongful appropriation and accused who, if believed, had in the court's opinion a wholly innocent, non-criminal, non-evil purpose. But see A.C.M. S-21503, Stinson, 35 C.M.R. 711 (1964) petition denied 35 C.M.R. 478, for a different result. Also see United States v. Heagy, 17 U.S.C.M.A. 492, 38 C.M.R. 290 (1968), for a similar application of the "non-criminal purpose" doctrine.

[251]United States v. Roark, 12 U.S.C.M.A. 478, 31 C.M.R. 64 (1961).

[252]See Section B, Chapter III above.

in regard to what is necessary? If the soldier decides on 100 feet, does it become now a mistake of law and more specifically, of the offense charged: murder? Does it make any difference that he never heard of the doctrine of necessity?

A consideration of these hypotheses results in the conclusion that some difficulty is encountered in applying the doctrine of mistake in this area. The difficulty is that these situations actually raise two issues: First, do the facts disclose imminent danger or arson? Second, what degree of force is necessary to overcome that danger? Concerning both issues, will the standard to be applied be honest belief on the part of the soldier, or an honest and reasonable belief? Again, as in issues, solutions come in pairs, without military case to furnish a positive prediction of choice. The law of mistake could be applied as previously discussed. In which case it would depend upon whether the offense charged required specific criminal intent or general criminal intent; the former requiring honest belief, the latter requiring honest and reasonable belief. Another approach would be to apply by analogy the law of self-defense. The latter solution would require an honest and reasonable belief that the arson was imminent, but only an honest belief that the degree of force was necessary.[253] Both solutions have their merit, the former doing less violence to established legal rules.

Finally, the possible effect of the following Manual provision

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[253] M.C.M., 1969, para. 216c.

must be considered: "An act performed manifestly beyond the scope of authority..., or in a wanton manner in the discharge of a lawful duty, is not excusable."[254] Is it conversely true that an act not manifestly beyond the scope of authority or committed in a wanton manner in the performance of a lawful duty is excusable? There are no military appellate decisions which cast any light on this question.[255] It reminds one of the doctrine of executive immunity,[256] and there are cases which seem to espouse the Manual statement to some degree.[257] Before the converse proposition is accepted as a legal defense, its consequences as to firmly established existing law should be examined. First of all, "manifestly beyond the scope of authority," at least in the executive immunity sense, refers much more to the ends to be accomplished rather than the means in which they are accomplished.[258] Secondly, the only leash placed on the soldier in accomplishing the mission would be the prohibition of wantonness. It is not difficult

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[254] M.C.M., 1969, para. 216d.

[255] CM 416805, Griffin, __C.M.R.__, (1968) pet. pending, does touch on this area.

[256] See Norton v. McShane, 332 F.2d 855 (5th Cir. 1964) cert. denied 380 U.S. 981 (1965) for an example of the doctrine's modern application and its legal-historical analysis.

[257] See O'Connor v. District Court, 219 Iowa 1165, 260 N.W. 73 (1935); Commonwealth v. Shortall, 206 Pa. 165, 55 A. 952 (1903).

[258] See Norton v. McShane, 332 F.2d 855 (5th Cir. 1964) cert. denied 380 U.S. 981 (1965).

to conclude that much of the law as regards mistake of fact, mistake of law, use of force to prevent criminal offenses, arrest, and many other areas would have to be abandoned in many instances, substituting therefor a much looser standard of criminal liability. It does on the other hand provide a judicial tool for correcting what one might conclude to be an unjust result if the more conventional rules of law were applied. The effect, if any, of this Manual provision must be left to future developments.

## VIII

## CONCLUSION

After a journey through the trees it is profitable to stand back and examine the forest. This is particularly important in this paper as it developed from topic to topic based in large part on conclusions of its author which, though founded upon legal principles, are far from conclusive.

Certain unresolved problem areas exist which interact upon each other. Of all the tentative conclusions in this paper, the firmest is that the military courts will not apply the law of the place, but will instead apply a universal military standard. This does not settle what all the rules will be, but instead gives the military courts a wide latitude in picking the best rules from various civilian jurisdictions.

Nearly as certain is the conclusion that military law will confer the status of law enforcement officer, or its equivalent, upon the soldier engaged in riot control duties. This status can be of particular importance in certain areas of prevention of criminal offenses and arrest.

The fact that justifiable homicide is a recognized doctrine in the military as well as in every State is of limited assistance. As has been seen, military law is practically a void in the application of this doctrine and the law of the various State jurisdictions varies considerably on many specific issues. In the military the

whole area of justifiable prevention of criminal offenses and arrest will require instant development if and when cases involving these situations arise. Fortunately there is a well developed body of civil law, though in conflict on certain points, to select from. Whether the riot/insurrection situation creates, or will create, in the law a set of standards for justifiable use of force, broader than the normal legal standards, will also have to be resolved. If the soldier is given even greater latitude of justifiable action in the suppression of riot and insurrection, extending beyond more established legal limitations, a whole new area of law will have to be created, relying on assistance and precedent from only the handful of court decisions which have confronted this problem.

As the military law of murder and various assault type offenses is well established, the military law of what may be called imperfect justifiable homicide is not. The term imperfect justifiable homicide refers to those instances in which the person resorting to deadly force is operating under a mistaken belief that if true would justify his actions. This includes all the various mistakes of law and fact discussed in the preceeding chapter. Only the special mistake of law labeled obedience to orders is somewhat well charted out by past military precedent. Whether the military courts will apply the well established rules relating to mistake to the equally well established rules of murder and its lesser included offenses is open to some question. The particular fact situations to arise

from civil disturbance duties will provide certain difficulties in their practical application, not to mention the possible inequities of holding an honestly motivated soldier to legal standards he is untrained in but forced by duty to cope with, and then pronounce him a murderer. Regardless of which standards may be selected the hardest nut to crack, so to speak, is the concept of necessity, a prerequisite to the use of force. In a situation where the law allows the use of deadly force when necessary, it must first be determined whether the force used was necessary and by what standard this is determined. Only after there is a determination that the degree of force used was not necessary does one arrive at the problem of determining what sort of mistake, if any, will excuse the excess. No application of excusable mistake can be applied until it has been determined that a mistake has been committed.

Perhaps the most perplexing problem for the military establishment is that of variant standards for measuring the legality of conduct between State and military law. The present Army policy or standard of reviewing riot control action in the light of necessity[259] may appear prudent but is not entirely satisfactory. As has been seen, the necessity rule does not solve all problems as the law in the various States forbids the accomplishment of certain legal objectives if only certain means are available for their

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[259]Reference the discussion at pages 25 and 29, U.S. Dep't of the Army Pamphlet No. 27-11, Military Assistance to Civil Authorities, (1966).

accomplishment.[260] Admittedly, the Army has defined "necessity" in terms of prudence,[261] but this could just as easily place extra legal restraint on accomplishing the mission.

The dilemma is whether to establish standards of conduct corresponding to the particular law of the State federal troops are committed to and which may be stricter than the standards of military law and possibly interfere with the mission, or establish standards corresponding to military law which may subject the soldier to prosecution under State law, either in State or federal district court. The problem is further complicated by the fact that neither State nor military law is sufficiently well established to determine in advance all the areas of specific conflict. One solution would be to place the trial of soldiers exclusively within the jurisdiction of the military.[262] In my opinion, this would not be acceptable to the populace and, in turn, Congress. The Office of The Judge Advocate General could be of assistance by compiling the relevant law of the various States and furnishing the results to the various Task Force Staff Judge Advocates for the States their

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[260] An example is that deadly force may not be used to prevent the escape of a misdemeanant as discussed in Chapter III, Section B2 above.

[261] Military Assistance to Civil Authorities, supra, note 247 and U. S. Dep't of the Army Pamphlet No. 360-81, To Insure Domestic Tranquility (1968), plus personal experience of the author during civil disturbance mission briefings.

[262] Removal to federal district courts as a solution still results in prosecution under State law. See Chapter II, Section C and Fed. R. Crim. P. 54(b)(1).

Task Force[263] is likely to operate in.

This paper offers no perfect solutions to the potential problems raised. Congressional enactment is not proposed because the area is too broad for such an approach and from the practical proposition that statutes seldom anticipate problems. The problems, if and when they arise, will be solved by judicial evolutionary development. The quality of this evolutionary development will depend to a large extent upon the quality of approach of the judicial officials involved: counsel, Staff Judge Advocates, and appellate personnel. It is to them, this paper is submitted as a hopefully useful tool.

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[263]A civil disturbance Task Force consists of a headquarters, often provisional, with two or more units attached, normally brigades, with the mission of restoring order in a particular riot torn area.

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