

TO: COMMISSION MEMBERS AND EX-OFFICIO MEMBERS  
NEW YORK STATE TEMPORARY COMMISSION ON  
REVISION OF THE PENAL LAW AND CRIMINAL CODE

FROM: RICHARD J. BARTLETT, CHAIRMAN

February 14, 1964

Upon the Commission's request, certain of the sections of the Justification article have been re-drafted.

In view of the closeness of the Study Bill's timetable, it would be appreciated if you would telephone your comments, if any, to Mr. Denzer or Mr. Torcia no later than Wednesday, February 19, 1964.

§45.00 Justification generally

No change from supplementary material dated January 3, 1964.

§45.05 Justifiable use of physical force generally

No change from supplementary material dated January 3, 1964, except as follows:

In subdivision 2, last line, delete "section one hundred thirty-nine of".

Subdivision 6 has been changed to read as follows:

6. A person may use physical force upon another in defending himself or a third person, in defending property, in resisting an unlawful arrest, in making an arrest, or in preventing an escape, as hereafter prescribed in this article.

§45.10 Justifiable use of physical force in defense of a person

1. Except as provided in subdivisions two and three of this section, a person is justified in using physical force upon another when and to the extent that he reasonably believes it necessary to defend himself or a third person against such other person's imminent use of unlawful physical force.

2. Except as provided in subdivision three of this section, a person is justified in using deadly physical force upon another only when he reasonably believes it necessary to prevent the imminent use of unlawful deadly physical force upon himself or a third person, or to prevent the imminent commission of a kidnapping, robbery, forcible rape or forcible sodomy; but the use of deadly physical force is not justifiable if the actor knows that he can avoid the necessity of using such force with complete safety (a) by retreating, except that the actor is not required to retreat (i) if he is in his dwelling and was not the initial aggressor, or (ii) if he is a peace officer or a private person assisting him at his direction, and was acting

pursuant to section 45.30, or (b) by surrendering the possession of property to a person asserting a claim of right thereto, or (c) by complying with a demand that he abstain from performing an act which he is otherwise not obligated to perform.

3. A person is not justified in using the physical force prescribed by subdivision one or two of this section: (a) if with intent to cause physical injury or death to another and to provide himself with an excuse therefor, he provoked the use of unlawful physical force by such other person; or (b) if he was the initial aggressor, except that his use of physical force upon another under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues or threatens the use of unlawful physical force; or (c) if the physical force involved was the product of a combat by agreement.

§45.15 Justifiable use of physical force in defense of real property

A person in possession or control of real property or a person who is licensed or privileged to be thereon is justified in using physical force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate such other person's criminal trespass in or upon such real property; but he may use deadly physical force only when he reasonably believes it necessary to prevent such other person from committing arson.

§45.20 Justifiable use of physical force in defense of personal property

No change from supplementary material dated January 3, 1964.

§45.25 Justifiable use of physical force in resisting unlawful arrest

A person is justified in using physical force to resist an arrest which he knows is being made by a peace officer or by a private person assisting him at his direction only when he believes the arrest is unlawful and the arrest in fact is unlawful.

§45.30 Justifiable use of physical force in making an arrest and in preventing an escape.

1. Except as provided in subdivisions two and three of this section, a peace officer or a private person assisting him at his direction, or a private person acting on his own account, is justified in using physical force upon another when and to the extent that he reasonably believes it necessary:

(a) to make an arrest which he reasonably believes to be lawful, or to defend himself or a third person against physical injury while attempting to make such arrest; or

(b) to prevent the escape of an arrested person from a custody which he reasonably believes to be lawful, or to defend himself or a third person against physical injury while attempting to prevent any such escape.

2. A peace officer or a private person assisting him at his direction is justified in using deadly physical force for a purpose specified in subdivision one of this section only when he reasonably believes it necessary:

(a) to prevent the use of deadly physical force upon himself or a third person; or

(b) to prevent the defeat of an arrest, or an escape from custody, of a person (i) who has committed or attempted to commit a felony involving the use or threatened use of deadly physical force, or (ii) who is attempting to escape by <sup>the</sup> use of a deadly

weapon, or (iii) who otherwise indicates that he is likely to endanger human life or to inflict serious physical injury unless apprehended without delay; provided that nothing contained in this subdivision shall be deemed to constitute justification for reckless or criminally negligent conduct by such peace officer or private person amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

3. A private person acting on his own account is justified in using deadly physical force for a purpose specified in subdivision one of this section only when he reasonably believes it necessary to prevent the use of deadly physical force upon himself or a third person.

4. A reasonable belief in the lawfulness of an arrest or of the custody of an arrested person means a reasonable belief in the existence of facts or circumstances which justify an arrest or the custody. If the believed facts or circumstances do not legally justify the arrest or custody, an erroneous though not unreasonable belief or opinion that the law is otherwise does not render justifiable the use of physical force to make the arrest or to prevent an escape from custody. A peace officer who has made or is making an arrest pursuant to a warrant is justified in using the physical force prescribed in subdivisions one and two of this section unless the warrant is invalid and is known by the actor to be invalid.

5. A guard or other peace officer employed in a jail, prison or correctional institution is justified in using physical force, including deadly physical force, when and to the extent that he reasonably believes it necessary to prevent the escape from such jail, prison or correctional institution of a prisoner detained therein under sentence for an offense or to await trial or commitment for an offense.

§45.35 Justifiable use of physical force to prevent escape

Entire section as set forth in supplementary material dated