CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

See: Minutes of Subcommittee No. 1
8/15/69, p. 2, Vol. X, Tape #80
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ARTICLE ___. JUSTIFICATION

Preliminary Draft No. 1; August 1969

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Reporter: Donald L. Paillette

Subcommittee No. 1

ARTICLE 4. JUSTIFICATION

Preliminary Draft No. 1; August 1969

Section 1. Justification; a defense. In any prosecution for an offense, justification, as defined in sections 2 to 18, is a defense.

COMMENTARY - JUSTIFICATION; A DEFENSE

This section designates justification as a "defense" instead of an "affirmative defense", thereby requiring that justification, when invoked by the defendant, must be negatived by the state beyond a reasonable doubt.

This treatment of the defense continues the Oregon case law doctrine with respect to "self-defense" and is in accord with the majority of states. (See Commentary, Model Penal Code, Tent. Draft No. 8, p. 4 (1958); Hall and Glueck, Cases on Criminal Law (2d ed, 1958) p. 96).

The best statement regarding the burden of proof in such cases appears in State v. Ruff, 230 Or 546, 370 P2d 942 (1962), a prosecution for second degree murder in which the defendant contended that the killing of the victim amounted to excusable homicide as defined in ORS 163.110 and that the trial court erred in denying a motion for a directed verdict of acquittal. Perry, J. in the opinion states:

> "While it is not necessary that the defendant establish that the death was accidental or the defendant acted in self defense to have a jury return a verdict of not guilty, as it is only necessary that the jury entertain a reasonable doubt in these respects, nevertheless, it is for the jury to determine whether or not there is a reasonable doubt." At 551. See, State v. Holbrook, 98 Or 43, 188 P 947, 192 P 640, 193 P 434 (1920).

The Oregon Court also has held that in a homicide case, even if the defendant denies the killing, he is entitled to an instruction on self-defense if the issue is raised by the evidence in the case. State v. Anderson, 207 Or 675, 694, 298 P2d 195 (1956).

State v. Steidel, 98 Or 681, 194 P 854 (1921), held that it is not necessary to plead self-defense in order to raise the issue at trial. See also State v. Mack, 57 Or 565, 112 P 1079 (1911).

Section 2. Justification; generally. (1) Unless inconsistent with other provisions of this Article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by law or by a judicial decree or is performed by a public servant in the reasonable exercise of his official powers, duties or functions.

(2) As used in subsection (1) of this section, "laws and judicial decrees" include but are not limited to:

(a) Laws defining duties and functions of public servants;

(b) Laws defining duties of private citizens to assist public servants in the performance of certain of their functions;

(c) Laws governing the execution of legal process;

(d) Laws governing the military services and conduct of war; and

(e) Judgments and orders of courts.

COMMENTARY - JUSTIFICATION; GENERALLY

A. Summary

Subsection (1) merely provides that statutes or court decisions which impose a duty or grant a privilege to act may be followed without the actor incurring criminal liability thereby.

Subsection (2) sets forth examples of the types of instances in which conduct is to be considered as required or authorized by law.

B. Derivation

The section embodies language that is essentially the same as Michigan Revised Criminal Code Section 601. The last phrase in subsection (1) is taken from New York Revised Penal Law Section 35.05 (amended 1968). The New York Commentary indicates that the original provision has been criticized in some quarters as not being sufficiently comprehensive for its purpose because official conduct of the nature indicated, though accepted as proper, may not always be expressly "required or authorized" by law. An example given is that there may not be any statute or regulation explicitly authorizing officers of a particular police department to buy narcotics for purposes of criminal prosecution and, hence, that such activity might subject the officer to a technical charge of unlawful possession of narcotics. While such a charge would be unlikely, your reporter believes that the New York approach is desirable.

C. Relationship to Existing Law

Oregon has no comparable existing statute, but does have specific provisions relating to duties of public servants, private citizens, executions of legal process, etc:

ORS 133.220. "An arrest may be effected by:

(1) A peace officer under a warrant;

(2) A peace officer without a warrant; or

(3) A private person."

ORS 133.230. "Every person shall aid an officer in the execution of a warrant if the officer requires his aid and is present and acting in its execution."

ORS 133.260. "The defendant shall not be subjected to more restraint than is necessary and proper for his arrest and detention."

ORS 133.280. "If, after notice of intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary and proper means to effect the arrest."

ORS 133.290. "The officer may break open any outer or inner door or window of a dwelling house, or otherwise, to execute the warrant if, after notice of his authority and purpose, he is refused admittance. "

ORS 133.300. "The officer may break open any outer or inner door or window of a dwelling house, or otherwise, for the purpose of liberating a person who, having entered for the purpose of making an arrest, is detained therein, or when necessary for his own liberation."

ORS 133.310. "A peace officer may arrest a person without a warrant:

"(1) For a crime committed or attempted in his presence;

"(2) When the person arrested has committed a felony, although not in his presence;

"(3) When a felony has in fact been committed or a major traffic offense, as defined in subsection (5) of ORS 484.010, has been committed, and he has reasonable cause for believing the person arrested to have committed it; or

"(4) When he is notified by telegraph, telephone, radio or other mode of communication by another peace officer of any state that such peace officer holds in his hands a duly issued warrant for the arrest of such person charged with a crime committed within his jurisdiction."

ORS 133.320. "To make an arrest, as provided in ORS 133.310, the officer may break open any door or window, as provided in ORS 133.290 and 133.300, if, after notice of his office and purpose, he is refused admittance."

ORS 133.350. "A private person may arrest another for causes specified in ORS 133.310 in like manner and with like effect as a peace officer without a warrant."

ORS 141.110. "In the execution or service of a search warrant, the officer has the same power and authority, in all respects, to break open any door or window, to use all necessary and proper means to overcome any forcible resistance made to him or to call any other person to his aid that he has in the execution or service of a warrant of arrest."

ORS 162.530. "(1) Any person who wilfully refuses to assist an officer in the lawful discharge of any duty pertaining to his office when requested to do so by the officer, shall be punished upon conviction by imprisonment in the county jail for not less than 10 days nor

more than 30 days, or by fine of not less than $10 or more than $500, or both.

"(2) Any person who is required by any peace officer or magistrate to assist him in the execution of his office, in the preservation of the peace, the arrest of any person for a breach of the peace or the service of any process, and who neglects or refuses to render such assistance, shall be punished upon conviction by imprisonment in the county jail for not less than one month nor more than six months, or by fine of not less than $25 nor more than $500."

ORS 163.100. "The killing of a human being is justifiable when committed:

"(1) By public officers or those acting in their aid and assistance and by their command:

"(a) When necessarily committed in over-coming resistance to the execution of legal process or to the discharge of a legal duty.

"(b) When necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued.

"(c) When necessarily committed in arresting a person fleeing from justice who has committed a felony.

"(2) By anyperson:

"(c) In the attempt, by lawful ways and means, to arrest a person who has committed a felony or in the lawful attempt to suppress a riot or preserve the peace."

ORS 426.215. "(1) Any peace officer may take into custody any person who he has reasonable cause to believe is dangerous to himself or to any other person and who he has reasonable cause to believe is in need of immediate care or treatment for mental illness. If a peace officer takes a person into custody under this section, he shall remove him forthwith to....

"(5) No peace officer, hospital, physician or judge shall be held criminally or civilly liable for actions pursuant to this section provided he acts in good faith, on probable cause and without malice."

Section 3. Justification; choice of evils. (1) Unless inconsistent with other provisions of this Article defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

(2) The necessity and justifiability of conduct under subsection (1) may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.

(3) Whenever evidence relating to the defense of justification under this section is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

COMMENTARY - JUSTIFICATION; CHOICE OF EVILS

A. Summary

Subsection (1) of this section is designed to allow the balancing of the injury which the actor sought to prevent against the injury which he caused. (See MPC Tent. Draft No. 8, pp. 5-10 (1958)). Examples of its application would

include blasting buildings to prevent a major fire from spreading, breaking into an unoccupied rural house in order to make an emergency telephone call to save a person's life or forcibly restraining a person infected with a highly contagious and dangerous disease.

Subsection (2), however, is intended to ensure that the balancing cannot go to the desirability of the statute itself under which the prosecution is maintained. In other words, the actor cannot "pick and choose" the laws he will obey on the basis of whether he or anyone else deems them advisable. As the Michigan Commentary illustrates, "a person cannot claim that euthanasia ought not be viewed as a crime, or that there is an exemption in a criminal trespass statute in favor of those who invade public offices to protest against Unites States foreign policy."

Subsection (3) is procedural in nature and directs the trial judge to screen the evidence offered by the defense before the jury hears it, and is written into the section to control possible misuse of the "choice of evils" concept.

B. Derivation

The section is derived from Model Penal Code Section 3.02, New York Revised Penal Law Section 35.05 (2) and Michigan Revised Criminal Code Section 605.

C. Relationship to Existing Law

There is no counterpart of this section in present Oregon law.

Section 4. Justification; use of physical force generally.

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(1) A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, or a teacher or other person entrusted with the care and supervision of a minor for a special purpose, may use physical force, but not deadly physical force, upon such minor or incompetent person when and to the extent he reasonably believes it necessary to maintain discipline or to promote the welfare of the minor or incompetent person.

(2) An authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use such physical force as is authorized by law.

(3) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use physical force when and to the extent that he reasonably believes it necessary to maintain order, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious physical injury.

(4) A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon that person to the extent that he reasonably believes it necessary to thwart the result.

(5) A duly licensed physician, or a person acting under his direction, may use physical force for the purpose of administering a recognized form of treatment which he reasonably believes to be adapted to promoting the physical or mental health of the patient if:

(a) The treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian or other person entrusted with his care and supervision; or

(b) The treatment is administered in an emergency when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

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

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE GENERALLY

A. Summary

The purpose of section 4 is to set forth the different circumstances in which physical force may be used by a person without committing a criminal offense.

Subsection (1) justifies the use of reasonable, but not deadly, force by parents, teachers, guardians and others entrusted with the care of minors and incompetents for the purpose of maintaining discipline or promoting the welfare of the minor or incompetent person.

Subsection (2) is designed to integrate the criminal code provisions with other applicable statutes governing discipline of prisoners. (See ORS 137.380, 421.105, 421.012, Const. Art. I, section 13).

Subsection (3) permits railroad conductors, bus drivers and others responsible for maintenance of order on common carriers to use reasonable physical force to maintain order.

Subsection (4) allows reasonable physical force to be used to prevent an apparent suicide attempt.

Subsection (5) is designed to protect from criminal prosecution the physician who renders emergency treatment to a stricken person.

Subsection (6) integrates the section with the sections which follow in order to present a complete list of the general types of situations in which the use of physical force is justifiable.

B. Derivation

The section is based on New York Revised Penal Law Section 35.10 and Michigan Revised Criminal Code Section 610.

C. Relationship to Existing Law

Subsection (1). As noted in the MPC:

> "...existing law universally allows a privilege for the exercise of domestic authority, sometimes articulated in the penal statutes, though often without seeking to define its scope." (Tent. Draft No. 8, p. 72 (1958)).

Oregon treats the subject in the statute relating to excusable homicide.

> ORS 163.110. " The killing of a human being is excusable when committed:
>
> "(1) By accident or misfortune in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent. "

No existing statute deals specifically with the matter of the use of physical force against a minor or incompetent person by a teacher or other person entrusted with their care; however, the same considerations that call for a special justification for the use of force by parents would seem to apply. (See ORS 339.250, 260 re discipline of pupils).

Subsection (2) has no existing statutory counterpart.

Subsection (3) is a new statutory proposal.

Subsection (4) also is new, but supports the general policy of the law to discourage and prevent suicides. (See ORS 163.050).

Subsection (5) integrates the Criminal Code with the civil liability limitations on "good Samaritan" acts of physicians embodied in ORS 30.800.

Subsection (6), as noted previously, is intended to tie together the basic section with the subsequent sections in the Article.

Section 5. Justification; use of physical force in defense of a person. Except as provided in sections 6 and 7 of this Article, a person is justified in using physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force, and he may use a degree of force which he reasonably believes to be necessary for the purpose.

Existing Law
ORS
145.110
163.100

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON

See Commentary under section 7 infra.

Section 6. Justification; limitations on use of deadly physical force in defense of a person. Notwithstanding the provisions of section 5 of this Article, a person is not justified in using deadly physical force upon another person unless he reasonably believes that the other person is:

(1) Committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery; or

(2) Using or about to use physical force against an occupant of a dwelling while committing or attempting to commit a burglary in the dwelling; or

(3) Using or about to use unlawful deadly physical force, however, the actor may not use deadly physical force if he knows that he can with complete safety avoid the necessity of using such force by retreating. The actor is under no duty to retreat if he is:

(a) In his dwelling and is not the original aggressor; or

(b) A peace officer or a person assisting a peace officer at his direction, acting pursuant to section 13 of this Article.

COMMENTARY - JUSTIFICATION; LIMITATIONS ON USE OF DEADLY PHYSICAL FORCE IN DEFENSE OF A PERSON

See Commentary under section 7 infra.

Section 7. Justification; limitations on use of physical force in defense of a person. Notwithstanding the provisions of section 5 of this Article, a person is not justified in using physical force upon another person if:

(1) With intent to cause physical injury or death to another person, he provokes the use of unlawful physical force by that person; or

(2) He is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens to continue the use of unlawful physical force; or

(3) The physical force involved is the product of a combat by agreement not specifically authorized by law.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON

JUSTIFICATION; LIMITATIONS ON USE OF DEADLY PHYSICAL FORCE IN DEFENSE OF A PERSON

JUSTIFICATION; LIMITATIONS ON USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON

A. Summary

Taken as a whole, sections 5, 6 and 7 attempt to formulate statutory guidelines to be followed in determining when and to what degree a person is justified in using physical force against another in self-defense.

Section 5 permits one to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force and, subject to the limitations set out in sections 6 and 7, to use a degree of force which he reasonably believes to be necessary. No special relationship between the actor and the third person is required before he can act to protect another.

Section 6 restricts the use of deadly physical force, a term defined in the General Definitions section of Article I, to situations in which the actor reasonably believes that the person is about to commit one of certain forcible felonies, or is about to use physical force against an occupant of a dwelling during a burglary, or is about to use deadly physical force. However, with respect to the latter situation the actor is not privileged to use such force if he knows he can with complete safety avoid the problem by retreating. Paragraph (a) of subsection (3) provides that he is under no duty to retreat, even though he knows it is possible, if he is in his own dwelling and is not the originator of the affray. Paragraph (b) makes it unnecessary to retreat if the actor is a peace officer or a person assisting the officer at his direction.

Section 7 further qualifies the availability of physical force (as contrasted to deadly physical force) by a person acting in self-protection. Subsection (1) prohibits a person from provoking another into using force and later claiming that he employed physical force in self-defense. Subsection (2) prevents the original aggressor from claiming self-defense, unless he withdraws and effectively communicates his withdrawal to the other person. If the original victim still continues the engagement he then becomes the aggressor and the original assailant becomes the victim.

Under subsection (3) neither party to mutually agreeable combat, which is not sanctioned by law, can claim self-defense.

B. Derivation

Sections 5, 6 and 7 are adapted from Michigan Revised Criminal Code Section 615 and New York Revised Penal Law Section 35.15.

C. Relationship to Existing Law

Two existing statutes, ORS 145.110 and 163.100, deal with the matter of using justifiable physical force in self-defense.

> ORS 145.110. "Resistance to the commission of a crime may be lawfully made by a person about to be injured or by any other person in his aid or defense:
>
> "(1) To prevent a crime against his person.
>
> "(2) To prevent an illegal attempt by force to take or injure property in his possession."
>
> ORS 163.100. "The killing of a human being is justifiable when committed:
>
> "(1) By public officers or those acting in their aid and assistance and by their command:
>
> "(a) When necessarily committed in over-coming resistance to the execution of legal process or to the discharge of a legal duty.
>
> "(b) When necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued.
>
> "(c) When necessarily committed in arresting a person fleeing from justice who has committed a felony.
>
> "(2) By any person:
>
> "(a) To prevent the commission of a felony upon him or upon his or her husband, wife, parent, child, master, mistress or servant.
>
> "(b) To prevent the commission of a felony upon his property, or upon property in his possession, or upon or in any dwelling house where he is.

"(c) In the attempt, by lawful ways and means, to arrest a person who has committed a felony or in the lawful attempt to suppress a riot or preserve the peace."

ORS 145.110, the general "self-defense" statute, provides two bases for lawful resistance by a person "about to be injured" or by any third person in his defense: (1) To prevent a crime against his person, and (2) To prevent an illegal attempt by force to take or damage property. The statute is silent on the question of the degree of force that may be used under either of the circumstances.

The pertinent parts of ORS 163.100 for the purposes of these sections are paragraphs (a) and (b) of subsection (2) which justify the killing of another by a person to prevent the commission of a felony upon him or upon the spouse, parent, child, master, mistress or servant or to prevent a felony upon his property.

Two related statutes which should be noted are the following:

ORS 163.110. "The killing of a human being is excusable when committed:

"(1) By accident or misfortune in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent.

"(2) By accident or misfortune in the heat of passion, upon a sudden and sufficient provocation, or upon a sudden combat, without premeditation or undue advantage being taken, and without any dangerous weapon or thing being used, and not done in a cruel or unusual manner."

ORS 163.140. "Whenever, on a trial of a person indicted for murder or manslaughter, it appears that the alleged killing was committed under circumstances or in cases where it is justifiable or excusable, the jury must give a general verdict of not guilty."

In addition to the foregoing, the statute that defines the crime of pointing a firearm at another contains a self-defense exception:

ORS 163.320. "Any person over the age of 12 years who, with or without malice, purposely points or aims any loaded or empty pistol, gun, revolver or other firearm, at or toward any other person within range of the firearm, except in self-defense, shall be fined upon conviction in any sum not less than $10 nor more than

> $500, or be imprisoned in the county jail not less than 10 days nor more than six months, or both. Justices of the peace and district courts have jurisdiction concurrent with the circuit court of the trial of violations of this section. When any person is charged before a justice of the peace with violation of this section, the court shall, upon motion of the district attorney, at any time before trial, act as a committing magistrate, and if probable cause be established, hold such person to the grand jury.

Draft sections 5, 6 and 7 attempt to describe more precisely than do the existing statutes those situations in which force and the degree thereof may be employed in defense of a person. The provisions of the sections, except for subsection (3) of section 6, relating to the duty to retreat in the face of deadly force, are basically a codification of Oregon case law doctrines.

The Oregon Reports abound in self-defense opinions, particularly homicide cases. Probably the leading cases in this area are State v. Gray, 43 Or 446, 74 P 927 (1904), and State v. Rader, 94 Or 432, 186 P 79 (1919).

In Gray, the defendants, Woodson and Wade Gray, were indicted for first degree murder, and Woodson was convicted of manslaughter for the fatal shooting of one Hallgrath during a fight upon a public road. The evidence showed that the deceased was the initial aggressor, but was unarmed, and that the defendant drew a pistol and warned the deceased to desist. The latter continued and in the ensuing scuffle he was shot.

The Gray trial court instructed the jury on self-defense in the following language:

> "But such right of self-defense as will justify the taking of life of the assailant can only be exercised to defend his life or defend his person from great bodily harm. But danger of a battery alone will not be sufficient to justify the taking of the life of his assailant." At 454.

The refusal of the court to give the following requested instruction was one of the errors urged successfully on appeal:

> "It is not necessary that the assault made by the deceased at the time upon the defendant Woodson Gray, if you find that an assault was made, should have been made with a deadly weapon. An assault with the fist alone, if there was an apparent purpose and the ability to inflict death or serious bodily injury by the deceased upon the defendant Woodson Gray, is sufficient to justify the

killing in self-defense, if the defendant, Woodson Gray, at the time he shot and killed the deceased, had reason to believe and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased." At 454.

In reversing the Gray judgment, the Oregon Supreme Court held that the requested instruction should have been given, noting that the evidence tended to show that the deceased was a blacksmith in the prime of life and a large, powerful man, while the defendant, although a large man also, was much older and in ill health. The reasons given for the holding were:

"A mere assault, or the danger of a battery alone, without any real or apparent danger of life or limb, or the infliction of great bodily harm, will not, it is true, justify the taking of human life. In such a case the assailed may withstand the attack and meet force with force, but not kill his assailant. The law does not require that he, being in a place where he has a lawful right to be, and not being himself the aggressor, shall retreat to the wall, but it is his duty to retreat or otherwise avoid further conflict if he can reasonably do so without danger to his life or subjecting himself to great bodily harm, rather than take the life of his aggressor; that is to say, retreat or avoidance of further conflict to prevent the taking of human life is only required where the assault is not accompanied with imminent danger to life or great bodily injury, real or apparent. Where, however, the assault is attended with such demonstration, and the present ability to execute it, whether the assailant is armed with a deadly weapon or not, as to indicate to the assailed, acting reasonably upon appearances, that he is in imminent danger of being beaten and maltreated, and probably disfigured or maimed, or his life imperiled, he has a right to withstand the assault, even to the taking of the life of the aggressor." At 454-455. (Emphasis supplied.)

The Rader case is quite similar on its facts to Gray in that the defendant was indicted for second degree murder and convicted of manslaughter; was armed with a gun and fatally shot an unarmed, but larger, more powerful adversary. In reversing the judgment of conviction the Oregon Supreme Court discussed several different aspects of self-defense:

"Although many expressions have been used to the effect that a man rightfully may defend himself against a felonious attack, yet it is not reasonable or just to say that the attack must in all cases be a felonious one before the defendant is allowed to repel it with

sufficient force to prevent not only danger to his life but also great bodily harm, irrespective of whether the latter is effected by felonious means or not.

"...It is not the intent of the assailant which harms the one he attacks, neither is the latter bound by it nor required to ascertain it....It is the imminent danger, real or apparent, of great bodily harm to himself which justifies a defendant in protecting himself. At 456

"It is essential that the defense must not be excessive nor disproportionate to the force involved in the attack upon the defendant, all to be judged by the jury from the standpoint of a reasonable man in the situation of the defendant at the time, under all the circumstances surrounding him." At 458.

The Rader Court also approved the doctrine of retreat laid down in State v. Gray.

Subsection (3) of section 6 qualifies the Gray-Rader retreat doctrine to the extent of requiring retreat by a person in the face of unlawful deadly physical force, if the actor knows that he can with complete safety avoid the necessity of using deadly physical force against another. However, the result in a given situation would probably be no different under the proposed "complete safety" test before retreat becomes necessary than under the case law formulation which requires retreat "only where the assault is not accompanied with imminent danger to life or great bodily injury" inasmuch as it seems impossible that the former could exist without the latter.

The proposed sections are consistent with the holdings in the following additional self-defense cases:

Where a woman slapped defendant for calling her a dirty dog, he was justified in striking back only if necessary for self-protection. Silfast v. Matheny, 171 Or 1, 136 P2d 260 (1943).

If a policeman not known to be such to the defendant was recklessly firing his pistol and endangering by-standers force could be used to disarm him. State v. Steidel, 98 Or 681, 194 P 854 (1921).

A defendant may not justify himself in doing more for the defense of another than the latter could do for himself. State v. Yee Guck, 99 Or 231, 195 P 363 (1921); Linkhart v. Savely, 190 Or 484, 227 P2d 187 (1951); State v. Young, 52 Or 227, 96 P 1067 (1908).

If a man, being upon his own premises, or a place where he has a right to be, is assailed without provocation by a person with a deadly weapon, and apparently seeking his life, is not obliged to retreat, or consider whether he could safely do so, but may stand his ground and meet the attack in such a way and with such force as, under the circumstances, he at the moment honestly believes, and has reasonable ground to believe is necessary to save his own life or protect himself from great bodily harm. State v. Gibson, 43 Or 184, 73 P 333 (1903). (The duty to retreat would be modified to the extent hereinbefore noted.)

A homicide cannot be justified on the ground of self-defense unless it is made to appear that the accused had been put in imminent danger by another, and that the killing was done to prevent the apparent commission of a felony by the other on the accused. State v. Smith, 43 Or 109, 71 P 973 (1903).

When a man is armed, and seeks another for an affray, the law will not permit him to provoke and urge on the difficulty to a point where there is an appearance of an attempt to use weapons, and then justify the aggressor in taking life simply on the ground of apparent danger. In such case he is the aggressor, and the cause of the danger which menaces him, and he must abide by the condition of things which his own lawless conduct has produced. State v. Hawkins, 18 Or 476, 23 P 475 (1890); State v. McCann, 43 Or 155, 72 P 137 (1903); State v. Joseph, 230 Or 585, 371 P2d 689 (1962).

The term "self-defense" is used in ORS 163.320 in a broad sense, and includes the right to kill in defense of one's child or to prevent the commission of a felony. State v. Nodine, 198 Or 679, 259 P2d 1056 (1953).

The terms "justifiable" and "excusable" homicide are often used synonymously. State v. Trent, 122 Or 444, 252 P 975 (1927).

See also, Goodall v. State, 1 Or 333 (1861); State v. Remington, 50 Or 99, 91 P 473 (1907); State v. Barnes, 150 Or 375, 44 P2d 1071 (1935); State v. Doherty, 52 Or 591, 98 P 152 (1908); State v. Morey, 25 Or 241, 35 P 655 (1894); State v. Finch, 54 Or 482, 103 P 505 (1909); State v. Young, 52 Or 277, 96 P 1067 (1908); State v. Walsworth, 54 Or 371, 103 P 516 (1909).

Section 8. Justification; use of physical force in defense of premises. (1) A person in possession or control of premises, or a person who is licensed or privileged to be thereon, is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of a criminal trespass by the other person in or upon the premises.

(2) A person may use deadly physical force under the circumstances set forth in subsection (1) of this section only:

(a) In defense of a person as described in section 6 of this Article; or

(b) When he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson in any degree.

(3) As used in this section, "premises" includes any building as defined in Article ___ and any real property.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES

A. Summary

Section 8 allows the use of non-deadly force whenever there is a criminal intrusion into premises, or the reasonable appearances of such an intrusion. Premises, as defined in subsection (3) incorporates the definition of the term that appears in the Article on Burglary and Criminal Trespass and includes real property and any vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein.

Deadly physical force, as defined in the general definitions, can only be used in circumstances which fall under the provisions of section 6 of the Article, or in which it is reasonably believed necessary to prevent what is reasonably believed to be an attempt to commit arson in any degree. The listing of arson takes care of the only other serious felony not included in the listing in subsection (1) of section 6.

B. Derivation

The section is based on Michigan Revised Criminal Code Section 620.

C. Relationship to Existing Law

As observed earlier in commentary to this Article, one of the grounds for justifiable homicide is "To prevent the commission of a felony upon his property, or upon property in his possession, or upon or in any dwelling house where he is." (ORS 163.100 (b)). (Emphasis supplied.) To the extent that the statute authorizes the use of deadly force against a burglar in the absence of danger to an occupant therein (if in fact it does) the law would be tightened so as to prohibit the use of deadly force in defense of a dwelling except where a person reasonably believes the intruder is using or about to use physical force against an occupant while committing a burglary in the dwelling or to prevent what a person reasonably believes to be an attempt by the trespasser to commit arson.

In connection with the use of deadly force against a burglar, the New York commentators make a sound observation:

> "It would seem that anyone seeking to check a burglar from committing his crime, and having reasonable cause to believe deadly force necessary for that purpose, would also have reasonable cause to fear some physical force by the burglar." (Commentary, New York Revised Penal Law § 35.20 (1968 Amendment)).

The proposed section, in allowing a greater degree of physical force to be used by a person in defense of a dwelling or in defense of an occupant in a dwelling than would be justifiable in defense of a person generally or in defense of property generally, is consistent with the traditional concept of a man's habitation as his "castle" that has long been favored by the law. However, the section recognizes the social interest in human life and does not authorize the use of deadly force to prevent a mere trespass.

The draft section attempts to strike a balance between these conflicting social interests by placing defense of habitation on a higher plane than mere defense of other property, and defense of a person in a dwelling on a higher plane than would otherwise be justified. This approach is in accord with the views of one noted authority, who observes:

> "Defense of the dwelling may be for the purpose of saving the house itself from damage or destruction, or it may be to preserve its character as a place of refuge and repose by preventing the unlawful intrusion of outsiders. The dweller is privileged to use reasonable nondeadly force to prevent any unlawful harm or injury to his place of abode and if a malicious attack is made for the purpose of destroying it by fire, explosion or in some other manner, he is privileged to use deadly force if this reasonably seems necessary to defend his 'castle' against such threatened harm.
>
> "If the defense is for the purpose of preventing an unlawful intrusion it becomes necessary to inquire into the nature or apparent nature of the threatened invasion. There is a strong social interest in preventing any unlawful entry of the dwelling and the dweller is privileged to use reasonable nondeadly force in the effort to prevent such an entry regardless of its nature or purpose, but the social interest in human life is too great to permit the use of deadly force for the prevention of a mere civil trespass even in the dwelling itself, as mentioned above. On the other hand deadly force is privileged if it is necessary or reasonably seems to be necessary to prevent an unlawful entry attempted for the purpose of committing burglary, or of killing or inflicting great bodily injury upon the dweller or some member of his household.
>
> "The point of difficulty has been in regard to an unlawful entry attempted for the purpose of a personal attack of a *nonfelonious* nature upon the dweller or some member of his household. The rule mentioned above in the discussion of self-defense, which prohibits the use of deadly force in defending against an obviously nondeadly attack, has induced some courts to make a similar limitation to the privilege of defending the habitation against an unlawful entry. Such courts hold that the privilege to use deadly force to prevent an unlawful entry of the dwelling is limited to cases of entry with intent to commit a felony and does not apply to an entry attempted for the mere purpose of making a personal assault which is neither intended nor likely to kill or to inflict great bodily injury. On the other hand there are strong reasons for recognizing the dwelling as a place of refuge in which the dweller may expect to be free from personal attack even of a nondangerous character, and the trend has been in the direction of holding that an unlawful entry of the dwelling for the purpose of an assault upon some person therein may be resisted by deadly force if this reasonably seems necessary for the purpose "although the circumstances may not be such as to justify a belief that there was actual peril of life or great bodily harm."

Perkins on Criminal Law (2d ed, 1969) pp. 1023-1024.

The limitations on the use of physical force against a trespasser are in accord with Oregon case law, [e.g., Schenfele v. Newman, 187 Or 263, 210 P2d 573 (1949); Eldred v. Burns, 182 Or 394, 188 P2d 154 (1948); Penn V. Henderson, 174 Or 1, 146 P2d 760 (1944)].

Section 9. Justification; use of physical force in defense of property. A person is justified in using physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes it to be necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by the other person of theft or criminal mischief of property.

COMMENTARY - USE OF PHYSICAL FORCE IN DEFENSE OF PROPERTY

A. Summary

This section covers the use of physical force by a person, who is not present or defending a dwelling and who is not in fear of physical injury, to prevent theft or criminal mischief of property.

B. Derivation

The language of the section is taken from New York Revised Penal Law Section 35.25 (1968 Amendment) and resembles Michigan Revised Criminal Code Section 625.

C. Relationship to Existing Law

A literal reading of the "justifiable homicide" statute would lead one to believe that a person now may kill another to prevent the commission of a felony upon his property:

> "The killing of a human being is also justifiable when committed: ....By any person....To prevent the commission of a felony upon his property or upon property in his possession...." ORS 163.100 (2) (a).

As defined in ORS 161.010 (11): "'Property' includes both real and personal property."

Perkins on Criminal Law (1957) states at page 917:

> "In the absence of statutory authority the use of force intended or likely to cause death or great bodily injury is never authorized for the defense of property (as such)."

Interestingly enough, Perkins, in a footnote to this statement, cites ORS 163.100 as an example of statutory authority for the use of such force in defense of property in Oregon.

However, a careful reading of the recent case of State v. Weber, 246 Or 312, 423 P2d 767, cert. denied, 389 US 863 (1967), indicates that the Oregon Supreme Court would undoubtedly hold to the contrary. In that case the defendant was convicted of the crime of assault while being armed with a dangerous weapon committed during an attempt to retrieve from a police officer an automobile belonging to defendant's son. The defendant contended that he was entitled to an instruction on the law of self-defense and on the law of justification as it applied to the recaption of personal property. Both claims were rejected by the Court, which, speaking to the question of use of force in protection of property, said:

> "The defendant in his brief concedes that the use of a dangerous weapon is, as a matter of law, excessive force when used solely in the defense of property. This proposition is supported by the authorities." At 319. (The Court lists among the authorities cited the previously quoted passage from Perkins.)

The Weber opinion also approves this statement from 1 Wharton, Criminal Law & Procedure, p. 709:

> "The use of a deadly weapon in protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable criminally for the assault...." At 319-320.

The Court then concludes by saying:

> "The 'extreme cases' ordinarily are those in which either the home is intruded upon or in which there is an imminent threat to person as well as property." At 320.

The opinion contains no mention of ORS 163.100 (2) (a) and the issue was not raised in the Weber case, nor were any like Oregon cases found in which it was brought up. A reasonable inference certainly can be drawn from the opinion, however, notwithstanding the seemingly broad language of the statute and Perkins' interpretation thereof, that the killing of a person solely to prevent the commission of a felony upon personal property would not be justifiable homicide. Cf., State v. Nodine, 198 Or 679, 259 P2d 1056 (1953).

In effect, then, the proposed section restates the present law with respect to the use of force solely in defense of property.

Section 10. Justification; use of physical force in making an arrest or in preventing an escape. Except as provided in section 11 of this Article, a peace officer is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary:

(1) To make an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(2) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while making or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE

See commentary under section 14 infra.

Section 11. Justification; use of deadly physical force in making an arrest or in preventing an escape. (1) A peace officer is justified in using deadly physical force upon another person for a purpose specified in section 10 of this Article only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To make an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony involving the use or threatened use of deadly physical force.

(2) Nothing in paragraph (b) of subsection (1) of this section constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

COMMENTARY - JUSTIFICATION; USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE

See commentary under section 14 infra.

Section 12. Justification; use of physical force in making an arrest or preventing an escape; basis for reasonable belief.

(1) For the purposes of sections 10 and 11 of this Article, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody.

(2) A peace officer who is making an arrest pursuant to a warrant is justified in using the physical force prescribed in sections 10 and 11 of this Article unless the warrant is invalid and is known by the officer to be invalid.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE IN MAKING AN ARREST OR PREVENTING AN ESCAPE; BASIS FOR REASONABLE BELIEF

See commentary under section 14 infra.

Section 13. Justification; use of physical force by private person assisting an arrest. (1) Except as provided in subsection (2) of this section, a person who has been directed by a peace officer to assist him to make an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that he reasonably believes that force to be necessary to carry out the peace officer's direction.

(2) A person who has been directed to assist a peace officer under circumstances specified in subsection (1) of this section may use deadly physical force to make an arrest or to prevent an escape only when:

(a) He reasonably believes that force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by the peace officer to use deadly physical force and does not know, if that happens to be the case, that the peace officer himself is not authorized to use deadly physical force under the circumstances.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE BY PRIVATE PERSON ASSISTING AN ARREST

See Commentary under Section 14 infra.

Section 14. Justification; use of physical force by private person acting on his own account to make an arrest. (1) Except as provided in subsection (2) of this section, a private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to make an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes has committed a felony and who in fact has committed a felony.

(2) A private person acting under the circumstances prescribed in subsection (1) of this section is justified in using deadly physical force only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE; USE OF DEADLY PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE; BASIS FOR REASONABLE BELIEF; USE OF PHYSICAL FORCE BY PRIVATE PERSONS ASSISTING AN ARREST; USE OF PHYSICAL FORCE BY PRIVATE PERSON ACTING ON HIS OWN ACCOUNT TO EFFECT AN ARREST

A. Summary

Section 10 sets forth the basic justification for using non-deadly force when a peace officer is arresting a person.

Section 11 (1) extends a privilege to use deadly physical force when the officer is met by deadly physical force, or when the arrest is for a felony involving the use or threatened use of deadly physical force.

Section 11 (2) makes it clear that the basis for justification in subsection (1) does not protect the officer from criminal responsibility for reckless or criminally negligent conduct against an innocent person whom he is not trying to take into custody.

Section 12 sets out the standard for what constitutes a reasonable belief by the officer. It requires the officer to know the legal rules which affect his right to interfere with the citizen, and to know the legal gravity of conduct he encounters. For example, his belief that violation of the basic rule is a felony and that he can arrest a person for such an offense committed outside his presence would not constitute an acceptable mistake by the officer. On the other hand, if he is correct on the law, but makes a reasonable misinterpretation of the facts, then the defense is available to him. The officer can rely on the validity of warrants which he executes unless he has specific prior knowledge of their invalidity.

Section 13 (1) protects the citizen who is ordered by a peace officer to assist in making an arrest, provided that the extent of the non-deadly force seems reasonably necessary for the purpose. Subsection (2) limits the citizen's ability to use deadly physical force to cases in which there is the use or reasonably apparent use of deadly physical force by the arrestee against the citizen or a third person, or when he is directed by the officer to use such force and does not know that the officer lacks the authority to employ such force under the circumstances.

Section 14 covers the citizen's right to use physical force to enforce a private citizen's arrest without any demand for assistance by a peace officer. The citizen is allowed to use physical force whenever he is in fact authorized to make an arrest, but he cannot use deadly physical force unless he or a third person is threatened from what he reasonably believes to be the use or imminent use of deadly physical force.

B. Derivation

Sections 10 to 14 are derived from Michigan Revised Criminal Code S. 630.

C. Relationship to Existing Law

See commentary under section 2 supra for a listing of existing statutes related to arrests by peace officers and private persons.

The sections are in accord with the scant Oregon case law in the area:

To justify the homicide of a felon for the purpose of arresting him, the slayer must show that he avowed his object and that the felon refused to submit. State v. Nodine, 198 Or 679, 259 P2d 1056 (1953); State v. Bailey, 179 Or 163, 170 P2d 355 (1946).

When making an arrest, a police officer is presumed to be acting in good faith in determining the amount of force to be used. Rich v. Cooper, 234 Or 300, 380 P2d 613 (1963).

Firing a gun is not justifiable where the arrest can be secured by less dangerous means. Landen v. Miles, 3 Or 35 (1868).

Shooting at an escaping felon was necessary and proper to effect the arrest, Askay v. Maloney, 92 Or 566, 179 P 899 (1919).

Section 15. Justification; use of physical force in resisting arrest prohibited. A person may not use physical force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE IN RESISTING ARREST PROHIBITED

A. Summary

This section prohibits the use of physical force to resist an arrest by a peace officer and adopts a doctrine popularly known as the "no sock" principle.

The rationale of the principle is that to authorize or encourage a person to engage an arresting officer in combat because of a difference of opinion concerning the validity of the arrest produces an unhealthy situation;that orderly procedure dictates peaceful submission to duly constituted law enforcement authority in the first instance; and that if it develops that the officer was mistaken and the arrest unauthorized, ample means and opportunity for remedial action in the courts are available to the person arrested.

B. Derivation

The section is the same as New York Revised Penal Law Section 35.27 (1968 Amendment). See also, MPC Section 3.04 (2) (a) (i).

C. Relationship to Existing Law

Section 15 is a departure from what appears to be existing law in Oregon regarding the right to use force to resist an "unlawful" arrest.

In State v. Meyers, 57 Or 50, 110 P 407 (1910) the court held that where an arrest is made by a known officer without authority and nothing is to be reasonably apprehended beyond temporary detention in jail, resistance cannot be carried to the extent of killing the officer. The implication of the holding is that lesser force would be permissible in resisting such an arrest.

Perkins on Criminal Law, (2d ed, 1969) at page 997 contains this statement:

> "At common law any unlawful arrest was a trespass which could be resisted by whatever nondeadly force reasonably seemed necessary to retain or regain the liberty of the arrestee. It seems, however, that when an arrest is being made by a known peace officer, any disagreement as to the authority to make the arrest should be settled in court rather than by violence on the street. Hence the modern trend is in the direction of some such statutory provision as this: 'If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.' In any event if the unlawful arrest is attempted under circumstances which obviously threaten no more than a very temporary deprivation of liberty, the use of deadly force in resistance is not privileged; but if the unlawful manner of the arrest reasonably leads the arrestee to believe he is the victim of a murderous assault, or of kidnapers, homicide committed by him will not be criminal if he uses no more force than reasonably appears to be necessary under the circumstances."

Section 16. Justification; use of physical force by guard in detention facility to prevent an escape. A guard or other peace officer employed in a detention facility, as that term is defined in section _____, is justified is using physical force when and to the extent that he reasonably believes it necessary to prevent the escape of a prisoner from a detention facility.

COMMENTARY - JUSTIFICATION; USE OF PHYSICAL FORCE BY GUARD IN DETENTION FACILITY TO PREVENT AN ESCAPE

A. Summary

This section provides special coverage to permit guards or other peace officers to use reasonable physical force to prevent the escape of a prisoner from a detention facility.

"Detention facility" is defined in the Article on Escape and Related Offenses (P.D. No. 1, July 1969) as:

> "Any place used for the confinement of a person charged with or convicted of a crime or otherwise confined pursuant to a court order. 'Detention facility' does not include a juvenile training school or a state hospital as defined in subsections (5) and (6) of this section."

B. Derivation

The section is derived from proposed Connecticut Penal Code Section 24 (1969).

C. Relationship to Existing Law

Existing statutes dealing with this question provide:

> ORS 163.100. "The killing of a human being is justifiable when committed by public officers or those acting in their aid and assistance and by their command ...when necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued."

ORS 133.370. "If a person arrested escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him at any time and in any place in this state."

ORS 133.380. "To retake the person escaping or rescued, the person pursuing may use all the means and do any act necessary and proper in making an original arrest."

Section 17. Duress. (1) The commission of acts which would otherwise constitute an offense, other than murder, is not criminal if the actor engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense of duress as defined in subsection (1) of this section is not available to a person who intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under subsection (1) of this section.

COMMENTARY – DURESS

A. Summary

This section provides for the defense of duress. Subsection (1) permits the defense if the actions of the defendant constitute an offense, other than murder, and his conduct was coerced by the use or threatened imminent use of unlawful physical force upon him or a third person. The standard by which the defendant would be judged would be force or threats of force which "a person of reasonable firmness in his situation would have been unable to resist."

Subsection (2) accepts the view that there should be no exculpation if the actor recklessly or intentionally places himself in a situation in which it is probable that he will be subjected to duress. This subsection is intended to guard against the claim of justification being raised by a criminal acting in concert. (See State v. Ellis infra.)

Subsection (3) abolishes the common law presumption that a woman, acting in the presence of her husband, is coerced.

B. Derivation

The section is based on MPC Section 2.09 but the language in subsections (1) and (2) is adapted from Michigan Revised Criminal Code Section 635. The section differs from both of those codes, however, in that the defense in unavailable in respect to the crime of murder.

C. Relationship to Existing Law

About half of the states now have legislation regarding the defense of duress in a criminal case. Oregon is not one of them. According to the A.L.I., most of the state statutes do not recognize the defense in respect to the most serious crimes and three states do not allow duress as a defense in a murder case. (Commentary, MPC, Tentative Draft No. 10, p.2 (1958)).

The Model Penal Code (Section 2.09), New York Revised Penal Law (Section 35.35) and Michigan Revised Criminal Code (Section 635) contain no exceptions as to crimes to which the defense is available. Illinois Criminal Code of 1961 does not allow the defense in cases of crimes punishable with death (Section 7-11).

The Model Penal Code and the Illinois Statute both specifically abolish the presumption that a woman acting in the presence of her husband is coerced. (See Commentary, MPC, Id. p.11).

Only three reported Oregon criminal cases were found in which the defense of duress or compulsion was raised. Several facets of the defense are discussed in State v. Weston, 109 Or 19,219 P 180 (1923),which held that it was error to instruct that if a witness acted from extreme fear in aiding murder, his testimony would not require the corroboration necessary in the case of an accomplice.

The Weston opinion goes on to state that if the witness did aid or abet in the killing of the victim he could not be excused under the plea of compulsion, necessity or coercion under either the common law or statutory law regarding justifiable or excusable homicide (now ORS 163.100, 163.110).

> "The...sections neither justify nor excuse the killing of an innocent third person by reason of the slayer's fear caused by threats of another." At 34.

> "The authorities seem to be conclusive that, at common law, no man can excuse himself under the plea of necessity or compulsion, for taking the life of an innocent person." At 35.

> "Even in the commission of crimes that may be excused on account of threats or menace sufficient to show that they had reasonable cause to, and did, believe their lives would be endangered if they refused, such danger must be, not one of future violence, but of present, impending and imminent violence at the time of the commission of the crime." At 34. (Emphasis supplied.)

In State v. Patterson, 117 Or 153, 241 P 977 (1926), the defendant was convicted of embezzlement. In answer to the question of whether the fear of prosecution for a former offense is a sufficient compulsion upon the defendant, when threatened with it, to exonerate him from criminal liability the court quoted with approval the rule stated in 16 C.J. 91:

> "An act which would otherwise constitute a crime may also be excused on the ground that it was done under compulsion or duress. The compulsion which will excuse a criminal act, however, must be present, imminent, and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the act is not done. A threat of future injury is not enough. Such compulsion must have arisen without the negligence or fault of the person who insists upon it as a defense." At 156. (Emphasis supplied.) Accord, State v. Ellis, 232 Or 70, 374 P2d 461 (1962).

Subsections(1) and (2) amount to a codification of the doctrines announced in the above cases. Your reporter could discover no Oregon cases involving coercion of a married woman by her husband as a defense to prosecution for a crime committed by her.

Section 18. Entrapment. (1) The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the proscribed conduct because he was induced to do so by a law enforcement official, or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence to be used against the actor in a criminal prosecution.

(2) As used in subsection (1) of this section, "induced" means that the actor did not contemplate and would not otherwise have engaged in the proscribed conduct. Merely affording the actor an opportunity to commit an offense does not constitute entrapment.

COMMENTARY - ENTRAPMENT

A. Summary

The section provides a statutory formulation of the defense of entrapment in subsection (1) and defines the term "induced" in subsection (2).

B. Derivation

The section is a modified form of Michigan Revised Criminal Code Section 640 and New York Revised Penal Law Section 40.05 (1968 Amendment).

C. Relationship to Existing Law

Section 18 restates the doctrines of entrapment which have been recognized in Oregon case law /e.g., State v. Le Brun, 245 Or 265, 419 P2d 948, cert. denied 386 U.S. 1011 (1966); State v. Murray, 238 Or 567, 395 P2d 780 (1964); State v. Beeson, 106 Or 134, 211 P 907 (1923)_/.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

ARTICLE 3. GENERAL PRINCIPLES OF JUSTIFICATION

Section 3.01. Justification an Affirmative Defense; Civil Remedies Unaffected. 1

(1) In any prosecution based on conduct which is justifiable under this Article, justification is an affirmative defense.

(2) The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct which is available in any civil action.

Section 3.02. Justification Generally: Choice of Evils.

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

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

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Section 3.03. Execution of Public Duty.

(1) Except as provided in Subsection (2) of this Section, conduct is justifiable when it is required or authorized by:

(a) the law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties; or

(b) the law governing the execution of legal process; or

(c) the judgment or order of a competent court or tribunal; or

(d) the law governing the armed services or the lawful conduct of war; or

(e) any other provision of law imposing a public duty.

(2) The other sections of this Article apply to:

(a) the use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(b) the use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(3) The justification afforded by Subsection (1) of this Section applies:

(a) when the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) when the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

Section 3.04. Use of Force in Self-Protection.

(1) Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; or

(ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(1) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or

(2) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by Section 3.06; or

(3) the actor believes that such force is necessary to protect himself against death or serious bodily harm.

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(1) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(2) a public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(c) Except as required by paragraphs (a) and (b) of this Subsection, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action.

(3) Use of Confinement as Protective Force. The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

Section 3.05. Use of Force for the Protection of Other Persons.

(1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and

(b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(c) the actor believes that his intervention is necessary for the protection of such other person.

(2) Notwithstanding Subsection (1) of this Section:

(a) when the actor would be obliged under Section 3.04 to retreat, to surrender the possession of a thing or to comply with a demand before using force in self-protection, he is not obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person; and

(b) when the person whom the actor seeks to protect would be obliged under Section 3.04 to retreat, to surrender the possession of a thing or to comply with a

demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to to do so before using force in his protection if the actor knows that he can obtain complete safety in that way; and

(c) neither the actor nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

Section 3.06. Use of Force for the Protection of Property.

(1) Use of Force Justifiable for Protection of Property. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(a) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or

(b) to effect an entry or re-entry upon land or to retake tangible movable property, provided that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession, and provided, further, that:

(i) the force is used immediately or on fresh purusit after such dispossession; or

(ii) the actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or re-entry until a court order is obtained.

(2) Meaning of Possession. For the purposes of Subsection (1) of this Section:

(a) a person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless the property is movable and was and still is located on land in his possession;

(b) a person who has been dispossessed of land does not regain possession thereof merely by setting foot thereon;

(c) a person who has a license to use or occupy real property is deemed to be in possession thereof except against the licensor acting under claim of right.

(3) Limitations on Justifiable Use of Force.

(a) Request to Desist. The use of force is justifiable under this Section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:

(i) such request would be useless; or

(ii) it would be dangerous to himself or another person to make the request; or

(iii) substantial harm will be done to the physical condition of the property which is sought to be protected before the request can effectively be made.

(b) Exclusion of Trespasser. The use of force to prevent or terminate a trespass is not justifiable under this Section if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily harm.

(c) Resistance of Lawful Re-entry or Recaption. The use of force to prevent an entry or re-entry upon land or the recaption of movable property is not justifiable under this Section, although the actor believes that such re-entry or recaption is unlawful, if:

(i) the re-entry or recaption is made by or on behalf of a person who was actually dispossessed of the property; and

(ii) it is otherwise justifiable under paragraph (1)(b) of this Section.

(d) Use of Deadly Force. The use of deadly force is not justifiable under this Section unless the actor believes that:

(i) the person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(ii) the person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(1) has employed or threatened deadly force against or in the presence of the actor; or

(2) the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.

(4) Use of Confinement as Protective Force. The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so with safety to the property, unless the person confined has been arrested on a charge of crime.

(5) Use of Device to Protect Property. The justification afforded by this Section extends to the use of a device for the purpose of protecting property only if:

(a) the device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm; and

(b) the use of the particular device to protect the property from entry or trespass is reasonable under the circumstances, as the actor believes them to be; and

(c) the device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(6) Use of Force to Pass Wrongful Obstructor. The use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing the actor from going to a place to which he may lawfully go is justifiable, provided that:

(a) the actor believes that the person against whom he uses force has no claim of right to obstruct the actor; and

(b) the actor is not being obstructed from entry or movement on land which he knows to be in the possession or custody of the person obstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless the circumstances, as the actor believes them to be, are of such urgency that it would not be reasonable to postpone the entry or movement on such land until a court order is obtained; and

(c) the force used is not greater than would be justifiable if the person obstructing the actor were using force against him to prevent his passage.

Section 3.07. Use of Force in Law Enforcement.

(1) Use of Force Justifiable to Effect an Arrest. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) Limitations on the Use of Force.

(a) The use of force is not justifiable under this Section unless:

(i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(b) The use of deadly force is not justifiable under this Section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(iv) the actor believes that:

(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

(3) Use of Force to Prevent Escape from Custody. The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, which he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(4) Use of Force by Private Person Assisting an Unlawful Arrest.

(a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful.

(b) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that (i) he believes the arrest is lawful, and (ii) the arrest would be lawful if the facts were as he believes them to be.

(5) Use of Force to Prevent Suicide or the Commission of a Crime.

(a) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily harm, damage to or loss of property or a breach of the peace, except that:

(i) any limitations imposed by the other provisions of this Article on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

(ii) the use of deadly force is not in any event justifiable under this Subsection unless:

(1) the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily harm to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(2) the actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

(b) The justification afforded by this Subsection extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

Section 3.08. Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others.

The use of force upon or toward the person of another is justifiable if:

(1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation; or

(2) the actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:

(a) the actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and

(b) the degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under Subsection (1)(b) of this Section; or

(3) the actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person; and:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of his misconduct, or, when such incompetent person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in such institution; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death,

serious bodily harm, disfigurement, extreme or unnecessary pain, mental distress, or humiliation; or

(4) the actor is a doctor or other therapist or a person assisting him at his direction, and:

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

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

(5) the actor is a warden or other authorized official of a correctional institution, and:

(a) he believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution, unless his belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the administration of the institution; and

(b) the nature or degree of force used is not forbidden by Article 303 or 304 of the Code; and

(c) if deadly force is used, its use is otherwise justifiable under this Article; or

(6) the actor is a person responsible for the safety of a vessel or an aircraft or a person acting at his direction, and

(a) he believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order, unless his belief in the lawfulness of the order is erroneous and his error is due to ignorance or mistake as to the law defining his authority; and

(b) if deadly force is used, its use is otherwise justifiable under this Article; or

(7) the actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train or other carrier or in a place where others are assembled, and:

(a) he believes that the force used is necessary for such purpose; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, bodily harm, or extreme mental distress.

Section 3.09. Mistake of Law as to Unlawfulness of Force or Legality of Arrest; Reckless or Negligent Use of Otherwise Justifiable Force; Reckless or Negligent Injury or Risk of Injury to Innocent Persons.

(1) The justification afforded by Sections 3.04 to 3.07, inclusive, is unavailable when:

(a) the actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest which he endeavors to effect by force is erroneous; and

(b) his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Section 3.10. Justification in Property Crimes.

Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances which would establish a defense of privilege in a civil action based thereon, unless:

(1) the Code or the law defining the offense deals with the specific situation involved; or

(2) a legislative purpose to exclude the justification claimed otherwise plainly appears.

Section 3.11. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "unlawful force" means force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force. Assent constitutes consent, within the meaning of this Section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily harm.

(2) "deadly force" means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force;

(3) "dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging.

Section 2.09. Duress.

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman, acting in the presence of her husband, is coerced is abolished.]

(4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.

Section 2.13. Entrapment.

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

Text of New York Revised Penal Law

§ 35.00 Justification; a defense

In any prosecution for an offense, justification, as defined in sections 35.05 through 35.30, is a defense. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 35.05 Justification; generally

Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or

2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 35.10 Justification; use of physical force generally

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

1. A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, and a teacher or other person entrusted with the care and supervision of a minor for a special purpose, may use physical force, but not deadly physical force, upon such minor or incompetent person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such minor or incompetent person.

2. A warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use such physical force as is authorized by the correction law.

3. A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use physical force when and to the extent that he reasonably believes it necessary to maintain order, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious physical injury.

4. A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon such person to the extent that he reasonably believes it necessary to thwart such result.

5. A duly licensed physician, or a person acting under his direction, may use physical force for the purpose of administering a recognized form of treatment which he reasonably believes to be adapted to promoting the physical or mental health of the patient if (a) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian or other person entrusted with his care and supervision, or (b) the treatment is administered in an emergency when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent. L.1965, c. 1030, eff. Sept. 1, 1967.

6. A person may, pursuant to the ensuing provisions of this article, use physical force upon another person in defense of himself or a third person, or in defense of premises, or in order to prevent larceny of or criminal mischief to property, or in order to effect an arrest or prevent an escape from custody. Whenever a person is authorized by any such provision to use deadly physical force in any given circumstance, nothing contained in any other such provision may be deemed to negate or qualify such authorization.
As amended L.1968, c. 73, § 3, eff. March 21, 1968.

§ 35.15 Justification; use of physical force in defense of a person

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

(a) The latter's conduct was provoked by the actor himself with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case his use of physical force is nevertheless justifiable if he has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) He reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating; except that he is under no duty to retreat if he is:

(i) in his dwelling and not the initial aggressor; or

(ii) a peace officer or a person assisting a peace officer at the latter's direction, acting pursuant to section 35.30; or

(b) He reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery; or

(c) He reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.

Added L.1968, c. 73, § 4, eff. March 2, 1968.

§ 35.20 Justification; use of physical force in defense of premises and in defense of a person in the course of burglary

1. Any person may use physical force upon another person when he reasonably believes such to be necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by such other person of a crime involving damage to premises. He may use any degree of physical force, other than deadly physical force, which he reasonably believes to be necessary for such purpose, and he may use deadly physical force if he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of arson.

2. A person in possession or control of any premises, or a person licensed or privileged to be thereon or therein, may use physical force upon another person when he reasonably believes such to be necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by such other person of a criminal trespass upon such premises. He may use any degree of physical force, other than deadly physical force, which he reasonably believes to be necessary for such purpose, and he may use deadly physical force in order to prevent or terminate the commission or attempted commission of arson, as prescribed in subdivision one, or in the course of a burglary or attempted burglary, as prescribed in subdivision three.

3. A person in possession or control of, or licensed or privileged to be in, a dwelling or an occupied building, who reasonably believes that another person is committing or attempting to commit a burglary of such dwelling or building, may use deadly physical force upon such other person when he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of such burglary.

4. As used in this section, the following terms have the following meanings:

(a) The terms "premises," "building" and "dwelling" have the meanings prescribed in section 140.00;

(b) Persons "licensed or privileged" to be in buildings or upon other premises include, but are not limited to, peace officers acting in the performance of their duties.

Added L.1968, c. 73, § 5, eff. March 21, 1968.

§ 35.25 Justification; use of physical force to prevent or terminate larceny or criminal mischief

A person may use physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by such other person of larceny or of criminal mischief with respect to property other than premises.

As amended L.1968, c. 73, § 6, eff. March 21, 1968.

§ 35.27 Justification; use of physical force in resisting arrest prohibited

A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a peace officer.

Added L.1968, c. 73, § 7, eff. March 21, 1968.

§ 35.30 Justification; use of physical force in making an arrest or in preventing an escape

1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

2. The fact that a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

3. A person who has been directed by a peace officer to assist such peace officer to effect an arrest or to prevent an escape from custody may use physical force, other than deadly physical force, when and to the extent that he reasonably believes such to be necessary to carry out such peace officer's direction, unless he knows that the arrest or prospective arrest is not or was not authorized and he may use deadly physical force under such circumstances when:

(a) He reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by such peace officer to use deadly physical force unless he knows that the peace officer himself is not authorized to use deadly physical force under the circumstances.

4. A private person acting on his own account may use physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense and who in fact has committed such offense; and he may use deadly physical force for such purpose when he reasonably believes such to be necessary to:

(a) Defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) Effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible sodomy and who is in immediate flight therefrom.

5. A guard or peace officer who is charged with the duty of guarding prisoners in a detention facility, as that term is defined in section 205.00, or while in transit to or from a detention facility, may use physical force when and to the extent that he reasonably believes such to be necessary to prevent the escape of a prisoner from a detention facility or from custody while in transit thereto or therefrom.

Added L.1968, c. 73, § 8, eff. March 21, 1968.

§ 35.35 Duress

1. In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.

2. The defense of duress as defined in subdivision one of this section is not available when a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 35.40 Entrapment

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 35.45 Renunciation

1. In any prosecution for an offense, other than an attempt to commit a crime, in which the defendant's guilt depends upon his criminal liability for the conduct of another person pursuant to section 20.00, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof.

2. In any prosecution for criminal facilitation pursuant to article one hundred fifteen, it is an affirmative defense that, prior to the commission of the felony which he facilitated, the defendant made a substantial effort to prevent the commission of such felony.

3. In any prosecution pursuant to section 110.00 for an attempt to commit a crime, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

4. In any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime.

5. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (a) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose, or (b) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code

[Justification: Execution of Public Duty]

Sec. 601. (1) Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by a provision of law or by a judicial decree.

(2) A "provision of law" and a "judicial decree" in subsection (1) include but are not limited to (a) laws defining duties and functions of public servants, (b) laws defining duties of private citizens to assist public servants in the performance of certain of their functions, (c) laws governing the execution of legal process, (d) laws governing the military services and conduct of war, and (e) judgments and orders of courts.

[Justification: Choice of Evils]

Sec. 605. (1) Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

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

Text of Michigan Revised Criminal Code (Cont'd.)

[Justification: Use of Physical Force Generally]

Sec. 610. The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(a) A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person, and a teacher or other person entrusted with the care and supervision of a minor for a special purpose, may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent that he reasonably believes it necessary and appropriate to maintain discipline or to promote the welfare of the minor or incompetent person.

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

(c) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use physical force when and to the extent that he reasonably believes it necessary to maintain order, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious physical injury.

(d) A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical injury upon himself may use physical force upon that person to the extent that he reasonably believes it necessary to thwart the result.

(e) A duly licensed physician, or a person acting under his direction, may use physical force for the purpose of administering a recognized form of treatment which he reasonably believes to be adapted to promoting the physical or mental health of the patient if:

(i) The treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent, guardian or other person entrusted with his care and supervision; or

(ii) The treatment is administered in an emergency when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

(f) A person may use physical force upon another person in defending himself or a third person, in defending property, in making an arrest or in preventing an escape, as hereafter prescribed in this chapter.

Text of Michigan Revised Criminal Code (Cont'd.)

[Justification: Use of Physical Force in Defense of a Person]

Sec. 615. (1) Except as provided in subsections (2) and (3), a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for the purpose. However, deadly physical force may not be used unless the actor reasonably believes that the other person is:

(a) Using or about to use unlawful deadly physical force; or

(b) Using or about to use physical force against an occupant of a dwelling while committing or attempting to commit a burglary of the dwelling; or

(c) Committing or about to commit a kidnapping, robbery, forcible rape or forcible sodomy.

(2) Notwithstanding the provisions of subsection (1), a person is not justified in using deadly physical force upon another person if he knows that he can avoid the necessity of using that 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 original aggressor, or (ii) if he is a peace officer or a private person assisting him at his direction, and was acting pursuant to section 630; or

(b) By surrendering possession of property to a person claiming a right thereto; or

(c) By complying with a demand that he abstain from performing an act which he is not obligated to perform.

(3) Notwithstanding the provisions of subsection (1), a person is not justified in using physical force if:

(a) With intent to cause physical injury or death to another person, he provoked the use of unlawful physical force by that other person; or

(b) He was the initial aggressor, except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force; or

(c) The physical force involved was the product of a combat by agreement not specifically authorized by law.

Text of Michigan Revised Criminal Code (Cont'd.)

[Justification: Use of Physical Force in Defense of Premises]

Sec. 620. (1) A person in possession or control of premises, or a person who is licensed or privileged to be thereon, is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of a criminal trespass by the other person in or upon the premises. However, he may use deadly physical force under these circumstances only (a) in defense of a person as described in section 615, or (b) when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson in any degree.

(2) "Premises" includes any building as defined in section 2601(a) and any real property.

[Justification: Use of Physical Force in Defense of Property]

Sec. 625. A person is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the other person to commit theft, criminal mischief or criminal tampering involving property, but he may use deadly physical force under these circumstances only in defense of a person as prescribed in section 615.

[Justification: Use of Physical Force in Making an Arrest or in Preventing an Escape]

Sec. 630. (1) Except as provided in subsection (2), a peace officer is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary:

(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) only when he reasonably believes that it is necessary:

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

Text of Michigan Revised Criminal Code (Cont'd.)

[Justification: Use of Physical Force in Making an Arrest or in Preventing an Escape]

Sec. 630 (Cont'd.).

(b) To effect an arrest or to prevent the escape from custody of a person whom he reasonably believes (i) has committed or attempted to commit a felony involving the use or threatened use of deadly physical force, or (ii) is attempting to escape by the use of a deadly weapon, or (iii) otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious physical injury unless apprehended without delay.

(3) Nothing in subsection (2) (b) shall be deemed to constitute justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

(4) For purposes of this section, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody. A peace officer who is effecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subsections (1) and (2) unless the warrant is invalid and is known by the officer to be invalid.

(5) Except as provided in subsection (6), a person who has been directed by a peace officer to assist him to effect an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that he reasonably believes that force to be necessary to carry out the peace officer's direction, unless he knows or believes that the arrest or prospective arrest is not or was not authorized.

(6) A person who has been directed to assist a peace officer under circumstances specified in subsection (5) may use deadly physical force to effect an arrest or to prevent an escape only when:

(a) He reasonably believes that force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by the peace officer to use deadly physical force and does not know, if that happens to be the case, that the peace officer himself is not authorized to use deadly physical force under the circumstances.

Text of Michigan Revised Criminal Code (Cont'd.)

[Justification: Use of Physical Force in Making an Arrest or in Preventing an Escape]

Sec. 630 (Cont'd.).

(7) A private person acting on his own account is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes has committed a felony and who in fact has committed that felony; but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

(8) A guard or peace officer employed in a detention facility is justified:

(a) In using deadly physical force when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner from the maximum or medium security portion of any detention facility, or from armed escort or guard,

(b) In using physical force, but not deadly physical force, in all other circumstances when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner from a detention facility.

(9) "Detention facility" as used in subsection (8) means any place used for the confinement, pursuant to law, of a person:

(a) Charged with or convicted of an offense; or

(b) Charged with being or adjudicated a neglected minor or juvenile delinquent; or

(c) Held for extradition; or

(d) Otherwise confined pursuant to an order of a court.

[Duress]

Sec. 635. (1) The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.

(2) A person does not benefit from the defense in subsection (1) if he intentionally or recklessly placed himself in a situation in which it was probable that he would be subjected to the force or threatened force described in subsection (1).

Text of Michigan Revised Criminal Code (Cont'd.)

[Entrapment]

Sec. 640. The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the proscribed conduct because he was induced to do so by a law enforcement official, or by a person acting in cooperation with a law enforcement official, seeking to obtain evidence against him for the purpose of criminal prosecution, and if the methods used to obtain that evidence were such as to create a substantial risk that the acts would be committed by a person not otherwise disposed to commit them. Inducement to commit an offense means active inducement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Burden of Injecting Issues of Justification

Sec. 645. The burden of injecting the issue of justification under the preceding sections of this chapter is on the defendant, but this does not shift the burden of proof.