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When Should Force Directed Against a Police Officer Be Justified Under the Maine Criminal Code? - Toward a Coherent Theory of Law Enforcement Under the Code's Justification Provision

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WHEN SHOULD FORCE DIRECTED AGAINST A POLICE OFFICER BE JUSTIFIED UNDER THE MAINE CRIMINAL CODE?—TOWARD A COHERENT THEORY OF LAW ENFORCEMENT UNDER THE CODE'S JUSTIFICATION PROVISION

I. INTRODUCTION: FORCE DIRECTED AGAINST POLICE OFFICERS IN STATE V. CLISHAM

II. THE CLISHAM COURT AUTHORIZES RESISTING FORCE BY A PERSON WHO BELIEVES THAT THE POLICE SEARCH IS UNLAWFUL

III. THE THEORY OF THE JUSTIFICATION DEFENSE

IV. COMPARISON OF THE CLISHAM RESULT TO THE LAW COURT'S TREATMENT OF RESISTING FORCE BY A PERSON WHO BELIEVES THAT AN ARREST IS UNLAWFUL

A. Section 108: Physical Force in Resisting an Arrest and State v. Austin

B. The Hegarty Incident: The Potential Consequences of Resisting

V. THE NEED TO RECONCILE JUSTIFIED FORCE TO RESIST AN ARREST AND JUSTIFIED FORCE TO RESIST A SEARCH OR A SEIZURE

VI. A PROPOSAL FOR STATUTORY RECONCILIATION

VII. CONTROLLING POLICE CONDUCT: ALTERNATIVES TO AUTHORIZING A VIOLENT RESPONSE TO POLICE AUTHORITY

A. Returning to the Hegarty Incident: Focusing Attention on the Integrity of the System

B. Seeking To Inspire Confidence in the System: The Task Force Report

VIII. CONCLUSION

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I. INTRODUCTION: FORCE DIRECTED AGAINST POLICE OFFICERS IN STATE V. CLISHAM

On June 25, 1992, the Hampden Police received a phone call from a woman who claimed that Andrew Clisham had told her that he had killed his wife, Ida Clisham. Two Hampden police officers went

to Clisham's residence to investigate. Upon arriving, the police
knocked at the door and asked permission to search the residence
for Ida Clisham. The officers did not have a warrant to enter the
premises. When Mr. Clisham denied them entry, they retreated and
waited for more officers to arrive.2

With additional officers on the scene, the police were able to cover
the front door and all of the other exits. The chief of police knocked
on the front door and threatened to break it down if Clisham would
not let them enter to determine whether Ida had been harmed. In-
side, Andrew Clisham armed himself with two knives and opened
the door. He told the police that he would not allow them to search
for his wife and that he would use the knives to prevent them from
entering his home. The police drew their weapons and aimed them
at Clisham. Over the course of the next hour, the officers attempted
to persuade Clisham to allow them to enter. Clisham alternately
picked up the knives and put them down, threatening at times that
he had used them against others and that he was proficient in
throwing them accurately.3 Finally, Clisham surrendered his knives
and allowed the police to enter the house. Mrs. Clisham was not on
the premises.4 The police arrested Clisham and charged him with
criminal threatening.5

At trial in district court and on appeal before the superior court,
Clisham based his defense on section 104(3)(B) of the Maine Crimi-
nal Code, justifying the use of deadly force.6 However, on appeal
before the Maine Supreme Judicial Court, sitting as the Law Court,
the relevant provision was determined by the court to be section
104(1), which provides, in pertinent part:

[a] person in possession or control of premises or a person who is
licensed or privileged to be thereon is justified in using nondeadly
force upon another when and to the extent that he reasonably be-
lieves it necessary to prevent or terminate the commission of a
criminal trespass by such other in or upon such premises.7

Prior to Clisham, the issue of the applicability of section 104 in
connection with a police entry onto a private dwelling had not been

2. Id.
4. Although the opinion in Clisham does not indicate where, or if, Mrs. Clisham
was found, she was unharmed. Telephone Interview with Jeffrey M. Silverstein, As-
sistant District Attorney, Penobscot County (Apr. 13, 1993).
5. ME. REV. STAT. ANN. tit. 17-A, § 209 (West 1983) provides:
   1. A person is guilty of criminal threatening if he intentionally or know-
      ingly places another person in fear of imminent bodily injury.
   2. Criminal threatening is a Class D crime.
6. ME. REV. STAT. ANN. tit. 17-A, § 104 (West 1983). See infra note 97 for the
   relevant language of § 104.
   A.2d at 1298.
squarely presented to the Law Court for decision. The potential consequences of such an application raise a host of concerns. While the procedure followed in Clisham’s case in investigating the complaint was flawed in some respects, allowing section 104 to operate in this context to justify Clisham’s forceful response is problematic. Clisham had clearly violated the criminal threatening statute and had done so in disregard of the authority of police officers in the performance of their duties. This would seem to have been a strong case for prosecution.

On a purely practical level, it is important to consider what effect a successful assertion of a section 104 justification defense would have in this situation. As far as Clisham knew, it was entirely possible that the officers were acting pursuant to a valid warrant. Necessarily, there is a concern that if section 104 is found to apply to such a situation, citizens—who have no accurate way of gauging the lawfulness of a search—will determine for themselves whether or not a police action is lawful. In other words, if citizens are made aware that the “right guess” may excuse an otherwise criminal act, or even that guessing is an option, that awareness may serve to encourage them to respond violently to assertions of police authority.

Moreover, law enforcement officers will undoubtedly question the wisdom of a policy that sanctions a violent response to what they believe is the legitimate performance of their duty. If officers must face the prospect of an after-the-fact determination of the legality of their actions in order to know whether the violence they encounter is justified, they may hesitate to investigate complaints. And while it may be argued that the sanctity of the home warrants such caution, violence on the part of the homeowner or dweller only escalates the confrontation.

Such an escalation may also yield the anomalous result that the force sanctioned by section 104 could lead to the justifiable use of force by a police officer under section 107. Section 107 provides in part:

2. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary:
   A. To defend himself or a 3rd person from what he reasonably believes is the imminent use of deadly force.

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8. See State v. Clisham, 614 A.2d at 1298-99. The police were without a warrant, and probable cause was never established.
9. See Court Rules Threat Was Justified, PORTLAND PRESS HERALD, Oct. 8, 1992, at 4B. If the headline were not enough, the teaser was more explicitly provocative: "The Supreme Court says a man was justified in threatening police with knives when they attempted an illegal search." Id. The article displayed prominently the language of the Clisham opinion: "The fact that police may have been acting in good faith does not justify an officer's forceful entry into a private home, the court said." Id.
The situation in which Clisham and the investigating officers found themselves could easily have turned into one in which the officers deemed it necessary to use force for self-protection. In such a case, the legality of the officers' use of force would turn on an application of section 107. In a case where the search by police officers would have been unlawful, either section 104 or section 107 would have to govern.

In State v. Clisham, the Law Court unanimously found that section 104(1) of the Maine Criminal Code operated to justify the use of non-deadly force by a private citizen seeking to prevent an illegal search of his house by police officers. This Comment will focus on the justification provisions of the Maine Criminal Code as they relate to law enforcement practices and will examine how the Law Court's most recent decision interpreting one of the provisions affects that relationship. This Comment will argue that the policy underlying the justification provisions mandates that the justification defense be denied to persons responding violently to an assertion of police authority, and that the Law Court's interpretation of section 104 in Clisham represents a departure from this policy.

This Comment first presents the Law Court's reasoning in State v. Clisham (Part II). It then explores the theory of justification generally (Part III), focusing on the existing body of Maine law with regard to the relationship between the justification provisions and arrest (Part IV). Concluding that Clisham is inconsistent with existing Maine case law and the justification provisions of the Maine Criminal Code, the Comment recommends that the Clisham result be reconciled with both (Part V). The Comment then proposes a legislative response designed to reconcile this conflict (Part VI). Finally, it provides, as alternatives to the recognition of a right to respond violently to police authority, suggestions for controlling police conduct (Part VII).

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12. Id.
II. THE CLISHAM COURT AUTHORIZES RESISTING FORCE BY A PERSON WHO BELIEVES THAT THE POLICE SEARCH IS UNLAWFUL

On July 25, 1991, Andrew Clisham was tried in district court on a criminal threatening charge. He asserted as a defense that under section 104(3)(B)(2) of the Maine Criminal Code he was entitled to use deadly force in the defense of his home because he reasonably believed that the officers, once in his home, would commit the crimes of invasion of privacy and criminal restraint. The district court found Clisham guilty of criminal threatening after concluding that he could not have reasonably believed that the police were likely to commit a crime after entering his dwelling. Clisham unsuccessfully appealed to the superior court and subsequently appealed to the Law Court.

Only four weeks after the submission of briefs, and without oral argument, the Law Court found that it was error for the district court to have applied section 104(3)(B)(2), the “deadly force” provision of section 104, and that the applicable statute was section 104(1), the non-deadly force provision. The district court had premised its decision on a finding that Clisham did not reasonably believe the police would commit further crimes once they entered his home. While this would have been the relevant inquiry under section 104(3)(B)(2), justifying the use of deadly force, the Law Court reasoned that such an inquiry was unnecessary here because Clisham had only threatened the use of deadly force. Citing State v. Williams, the Law Court asserted that the mere threatened use of deadly force is tantamount to the actual use of non-deadly force. Since deadly force had only been threatened and not used, it was error for the district court to apply the deadly force provision. Rather, section 104(1), governing the use of non-deadly force, should

17. Id. at 1298.
18. Id.
   8. “Deadly force” means physical force which a person uses with the intent of causing, or which he knows to create a substantial risk of causing, death or serious bodily injury. Intentionally or recklessly discharging a firearm in the direction of another person or a moving vehicle constitutes deadly force. . . .
   18. “Nondeadly force” means any physical force which is not deadly force.
21. State v. Clisham, 614 A.2d at 1298. See also MODEL PENAL CODE § 3.11 (1982) (“A threat to cause death or serious bodily injury, 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”).
have been applied.22

The Law Court noted that under section 104(1) there is no requirement that the person in possession of the premises reasonably believe that some other crime will be committed within the dwelling place.23 Finding that Clisham was indeed in possession of the premises, the court concluded that he would have been justified under section 104(1) in using non-deadly force if he reasonably believed that such force was necessary to prevent the commission of a criminal trespass by the police officers.24

The court went on to note that the police officers were without a warrant and had failed to establish probable cause.25 Since Clisham had not given his consent to the police entry, the court concluded that absent exigent circumstances26 the warrantless search would have been unconstitutional.27 Therefore, although the officers may have been acting in good faith, their forced entry would have constituted a criminal trespass.28 In support of this conclusion the court quoted State v. Boilard:29 “Warrantless official intrusions, without

25. Id.
26. The Clisham court passed over the question of whether there were exigent circumstances allowing the officers to search without a warrant. It is at least arguable that such exigent circumstances did exist. The officers had reason to believe that Ida Clisham had been harmed, and they did not know whether she was still in the house. Further, they could have reasonably believed that Andrew Clisham, armed with knives, presented a danger to Ida Clisham or to others who might have been in the house. Under these facts, it is not clear that the exigent circumstances exception to the warrant requirement would not apply. See Michigan v. Tyler, 436 U.S. 499, 509 (1978) (“a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant”); United States v. Guarente, 810 F. Supp. 350 (D. Me. 1993) (warrantless entry justified by exigent circumstances where police officers were responding to a reported domestic dispute involving a weapon). See also William C. Donnino & Anthony J. Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Alb. L. Rev. 90 (1980).
29. 488 A.2d 1380 (Me. 1985). The facts of Boilard are as follows: On August 20, 1983, the South Berwick police department received a telephone call reporting shouting between Donald Boilard and one of his children coming from the Boilard home. A police officer was dispatched to the scene of the dispute. The officer was told by the dispatcher that it sounded as if Boilard were beating his children. When the officer arrived, Boilard threw open the front door of the residence and told the officer “to get off his property.” Id. at 1382.

In response to the officer’s request to see the children, Boilard informed the officer that it was his house and he did not have to show the officer the children. Before Boilard could close the door, however, the police officer managed to force his way into the Boilard home. Once inside the home, the officer attempted to make his way into
1993] MAINE'S JUSTIFICATION PROVISION

consent, upon the citizen's private property . . . in the absence of probable cause and exigent circumstances, are unconstitutionally [sic] unauthorized and unjustified and constitute a trespass." 30

the living room where Boilard's two sons were sitting. Boilard made an unsuccessful attempt to halt the officer's progress by pushing the officer outside the house. A scuffle between Boilard and the officer followed, and Boilard was placed under arrest for assault and obstruction of government administration, and later charged with those crimes. Following a trial, he was convicted on both counts. Id. at 1382-83.

On appeal, Boilard challenged the district court's denial of his motion to dismiss the charges against him or to suppress evidence of the crimes of assault and obstruction of government administration. Boilard presented, on appeal before the Law Court, the same argument that he had made to the district court in support of his motion, contending that it should have been granted because of the allegedly illegal police entry into his home which resulted in the confrontation with the officer and led to his arrest. Id. at 1382.

The Law Court reversed the finding of the motions judge that the police officer had lawfully entered Boilard's home, deciding instead that the officer's forceful entry into the home constituted a trespass. The court did not, however, reverse the lower court's denial of Boilard's motion to suppress evidence constituting the basis of the charges, or to have the charges dismissed.


The chief of police had told the officer that a court order had been issued the previous day which prevented the defendant from parking in the lot. In reality, the order forbade the defendant from having any contact with the owner of the lot but did not specifically mention the parking area. Id. at 129. On appeal, the defendant claimed it was error on the part of the trial court to decline to instruct the jury on his theory of the defense, which entitled him to use force to the extent he believed necessary to prevent a reasonably apparent unlawful taking of personal property. Id. at 130.

After noting the relevant New Hampshire statutory provision relating to use of force in property offenses (the equivalent of § 752-A of the Maine Criminal Code,
Having determined that the officers' entry would have been a criminal trespass, the Clisham court turned to the question of whether Clisham reasonably believed that the force he used was necessary to prevent or terminate the trespass. While the record did not include a specific finding on this issue, the Law Court found that Clisham's threatened use of knives to prevent armed police officers, who were threatening to kick down his door, from entering his home was reasonably necessary to prevent a trespass. The court concluded that under section 104(1) Clisham's actions were justified as a proper exercise of non-deadly force. 31

III. THE THEORY OF THE JUSTIFICATION DEFENSE

To understand the operation of the justification defense, it is important first to understand the role of justification provisions within the context of a criminal code as a whole. Embodied in any criminal code is the doctrine of criminalization; that is, legislative enactments of proscribed forms of conduct. Such a statement of societal prohibitions, however, will suffer from being either overinclusive or underinclusive. A criminal code cannot with specificity set forth society's determination as to what is and what is not lawful conduct in every situation. 32 In the interest of fairness, the criminal code is fashioned in general terms and permits those accused of committing crimes to defend themselves with claims of justification. 33 Justification doc-


To say that a statute designed to permit and condone self-help as a way of protecting oneself from the actions of tort-feasors, wrongdoers, and run-of-the-mill miscreants authorizes the use of force against a police officer discharging his duties . . . is to stretch the statute past the breaking point. . . . There is ample protection to the public from unlawful seizure of property by law enforcement agents, either by way of civil claims for damages or by way of the appropriate application of the exclusionary rule. State v. Haas, 596 A.2d at 130-31.

Thus, while the New Hampshire statute does not on its face differentiate between police officers and private citizens, the court found such a distinction necessary to effectuate the legislative intent behind the provision.

31. For further analysis of Clisham and § 104, see infra part V.

32. One commentator has attributed this inherent limitation of a criminal code to the impossibility of providing for the infinite variety of factual situations and, more important, to the fact that human moral judgments are too complex to be represented by a set of rules. A criminal code is thus only an approximation of a society's intuitive judgments. See Paul H. Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 U.C.L.A. L. Rev. 266, 271-72 (1975).

33. In Maine, this result is accomplished by means of § 101 of the Maine Criminal Code. That section provides in pertinent part:

1. The State is not required to negate any facts expressly designated as a "defense," or any exception, exclusion or authorization which is set out in
trines provide exculpatory exceptions for certain actions that, while statutorily wrong, are considered permissible or not harmful to society.

Paul Robinson, a leading commentator on criminal law defenses, has identified three categories of justification: (1) the lesser evils or choice of evils justification; (2) the defensive force justification; and (3) the public authority or aggressive force justification. According to Robinson, the first category most clearly reflects the general statute defining the crime by proof at trial, unless the existence of the defense, exception, exclusion or authorization is in issue as a result of evidence admitted at the trial which is sufficient to raise a reasonable doubt on the issue, in which case the State must disprove its existence beyond a reasonable doubt.

3. Conduct which is justifiable under this chapter constitutes a defense to any crime; provided that, if a person is justified in using force against another, but he recklessly injures or creates a risk of injury to 3rd persons, the justification afforded by this chapter is unavailable in the prosecution for such recklessness. If a defense provided under this chapter is precluded solely because the requirement that the actor's belief be reasonable has not been met, he may be convicted only of a crime for which recklessness or criminal negligence suffices, depending on whether his holding the belief was reckless or criminally negligent.


34. Robinson conceives of the doctrines of justification not as doctrines of "exculpation," but rather as part of a system of adjudicatory principles that may, in some cases, prevent the attachment of blame. In other words, a violation of a criminal statute does not create a presumption of fault or guilt until the adjudicatory principles of blame—which include the justification provisions of a code—have been applied. Thus, a doctrine of justification does not "exculpate" because no fault or guilt has yet been established. See Paul H. Robinson, Rules of Conduct and Principles of Adjudication, 57 U. Chi. L. Rev. 729, 741-42 (1990).

35. See George P. Fletcher, The Right and the Reasonable, 98 Harv. L. Rev. 949, 954 (1985) ("Claims of justification concern the rightness, or at least the legal permissibility, of an act that normally violates the law."); Robinson, supra note 32, at 272-73 (arguing that an act which would otherwise be considered criminal is justified if such act does not effect social harm).


39. The comparable Maine provision is found in Me. Rev. Stat. Ann. tit. 17-A, §§ 102, 102-A, 106, 107 (West 1983 & Supp. 1992-1993). Robinson notes that the use of public authority justifications differs from other justifications generally in that the former are often limited to certain persons whose position or training warrants their position as protector of the interests at stake. Robinson, supra note 36, at 216. Such interests include, inter alia, law enforcement, judicial authority, parental authority, and military authority. Id.
eral principle behind the justification defenses. The lesser evils or competing harms justification is by definition the embodiment of the balancing notion underlying all of the defenses. Robinson contends that the justification defenses generally are an expression of a society's need to balance competing harms, and it is this process of weighing that serves to define the limitations of a justification defense.

While identifying differences among the three general types of defenses, Robinson points to a uniform internal structure that they share. This structure allows for a necessary and proportionate response when certain triggering conditions exist. The necessity portion of the structure that Robinson identifies has two elements: (1) a temporal requirement of immediacy of the triggering conditions, and (2) a limitation on the defendant's use of force to what is necessary to protect or further the interest at stake. If a defendant uses force that causes more harm than is necessary, he has violated the necessity requirement and may be denied the justification. In other words, if non-criminal or less harmful alternatives for avoiding the threatened harm are available, the infliction of criminal harm is not justified.

The proportionality requirement is similar to the second prong of the necessity test in that it places a limit on the harm that may be used in protection or furtherance of an interest. Even when the triggering conditions are met and less harmful alternatives are unavailable, if the harm caused by the actor is too severe in relation to the value of the interest sought to be protected, the actor will be

40. See Robinson, supra note 36, at 214. Robinson's illustration of this justification involves a forest fire raging towards a town of 10,000 citizens. The actor burns a field of corn which lies between the fire and the town. The burned field serves as a firebreak, and the town and its inhabitants are saved. The actor has satisfied all of the elements of arson by setting fire to the field to destroy it and the immediate harm he has caused (the destruction of the field) is the harm that the criminal statute serves to prevent and punish. However, the actor is likely to have a complete defense, asserts Robinson, because his conduct and its harmful consequences were justified. Id. at 213-14.

41. Id. at 214.

42. Id. at 216. Robinson provides a general idea of the triggering conditions under each defense:

In defensive force justifications an aggressor must present a threat of unjustified harm to the protected interest. . . . Public authority justifications are triggered when the circumstances arise which evoke the use of authority given to the actor. . . . In its purest form, the [lesser evils] defense is available whenever any legally protected interest is threatened or may be furthered.

Id.

43. Id. at 217-18.


45. See Robinson, supra note 36, at 218.
denied the justification. For example, deadly force cannot be used to protect against non-deadly force.

In general, the criminal law seeks to narrow the range of activity to which the justification provisions will apply. As noted above, justification defenses are an exercise in weighing competing values. The necessity and proportionality requirements are an attempt to establish guidelines and limitations on the balancing exercise. A judicial decision that gives wide interpretation to these limiting concepts runs the risk of encouraging conduct that is harmful to broader societal interests. The relevant question when considering a justification defense in a particular case should be whether the result achieved by means of its application is beneficial to society.

IV. COMPARISON OF THE CLISHAM RESULT TO THE LAW COURT'S TREATMENT OF RESISTING FORCE BY A PERSON WHO BELIEVES THAT AN ARREST IS UNLAWFUL

A. Section 108: Physical Force in Resisting an Arrest and State v. Austin

The first decision to interpret the relationship of the justification provisions of the newly enacted Maine Criminal Code to law en-

46. Id.
47. See Rosen, supra note 44, at 21.
49. The legislative history of the Maine Criminal Code on the justification provisions demonstrates a sensitivity to these concerns. The legislative record quotes one member of the Senate Judiciary Committee as stating, with regard to §§ 104 and 108:

Both sections 104 and 108 contain a number of prerequisites which must be met before the defense of justification is available. I am only going to dwell on them because I think that they ought to be the determinative prerequisites . . . .

The first limitation is that there must be reasonable belief. This means that the jury must find that the defendant honestly believed that the circumstances which gave rise to the right to use deadly force actually existed. . . .

The other word of importance is "necessary," and this is perhaps the most important word in these statutes. We have no intention of granting people a license to execute other people when it is not necessary. Generally speaking, this means that deadly force must be the only viable remedy under the circumstances.

50. See Rosen, supra note 44, at 21.
51. Id.
52. 381 A.2d 652 (Me. 1978).
53. Beginning in 1972, for the first time in the history of the State of Maine, the criminal laws of Maine were systematically rewritten. MAINE CRIMINAL LAW REVISION COMMISSION, INTRODUCTION TO ACOMPANY THE MAINE CRIMINAL CODE, at 3 (1975).

One of the central accomplishments of the Maine Code was, as the Commission itself described, "the articulation of vitally important rules of law that have traditionally been left unexpressed by legislative enactments and only incompletely developed
forcement was *State v. Austin*. Austin considered the asserted right, under section 108, of a free citizen to use non-deadly force to resist an arrest by a law enforcement officer. In a unanimous opinion, the Law Court held that the Legislature did not intend to give a person the right to resist a law enforcement officer's use of reasonable, non-deadly force to effect an arrest, whether legal or illegal. Austin is instructive not only for the result it achieved—the elimination of the common law right to resist arrest in certain circumstances—but also for its treatment of the justification provisions, interpreting them within the context of the Maine Criminal Code as a whole.

1. The Case

At approximately 1:00 a.m. on July 11, 1976, two officers from the Town of Mexico Police Department in Maine were investigating complaints of loud noises being made by persons leaving a local lounge around closing time. The officers were stationed across from the lounge when one of them heard someone leaving the lounge shout an obscene name. As the same person repeated the name twice more, the officer was able to single him out. The officer heard the obscenity called out once more and observed Preston P. Austin point his hand directly at the police cruiser and call out another obscene name. The officer then got out of the cruiser and approached Austin, advising him that he was under arrest for disorderly conduct.

After attempts to handcuff Austin failed, a second officer provided assistance by carrying Austin to the car where the officers, working together, were able to handcuff the arrestee. As the two policemen placed Austin in the cruiser, Austin kicked one of them in the thigh. On the ride to the station, Austin kicked the other officer in the head. Austin was charged with disorderly conduct and two counts of assault. Following a jury trial, he was found guilty on both assault charges, but was acquitted of the disorderly conduct charge.

On appeal, the Law Court unanimously affirmed the judgments of conviction. The court took as its starting point the "thrust of defendant's arguments on appeal," that is, "his asserted right to resist an illegal arrest with force." The court noted that prior to May 1, 1976 (the effective date of the Maine Criminal Code), Maine fol-

55. State v. Austin, 381 A.2d at 654.
56. Id. at 653.
57. Id. at 652-53.
58. Id. at 653.
lowed the prevailing common law rule embodied in *State v. Robinson*, which provided that, "[a]n illegal arrest is an assault and battery. The person so attempted to be restrained of his liberty has the same right, and only the same right, to use force in defending himself as he would have in repelling any other assault and battery."

Having taken note of the prior law under *Robinson*, the court went on to reject it: "[r]eading the provisions of the Criminal Code as a whole shows . . . that *Robinson* no longer states the law of Maine." According to the Law Court, with the enactment of the Criminal Code came specific provisions addressing the right to resist an arrest that were to be taken as comprehensive.

The court began its analysis of the specific Code provisions by setting forth, in relevant part, the language of the applicable sections of the Code. First, the court cited section 107(1)(A) which states that a law enforcement officer is justified in using a reasonable degree of non-deadly force upon another person "[w]hen 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, unless he knows that the arrest or detention is illegal." The court then drew upon the language of section 108, again providing emphasis:

[a] person is justified in using a reasonable degree of nondeadly force upon another person in order to defend himself or a 3rd person from what he reasonably believes to be the imminent use of unlawful, nondeadly force by such other person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose.

Finally, the court cited section 752, which made a person guilty of assaulting an officer if the person "knowingly assaults a law enforcement officer while the officer is engaged in the performance of his official duties." The comment to that section, also reproduced by the court in the *Austin* opinion, stated as follows:

59. 145 Me. 77, 81, 72 A.2d 260, 262 (1950).
60. *Id.* at 81, 72 A.2d at 262.
62. *Id.* at 654.
65. Me. Rev. Stat. Ann. tit. 17-A, § 752 (repealed 1977). The substance of § 752 was re-enacted in § 752-A. Section 752 proscribed knowing assaults upon a law enforcement officer while the officer was engaged in the performance of his or her official duties. The revised statute expands the culpable state of mind requirement and narrows the illegal conduct reached. Section 752 prohibited knowing assaults, that is, acts causing bodily injury or offensive physical contact. Section 752-A prohibits the causing of bodily injury by one acting intentionally, knowingly or recklessly. Me. Rev. Stat. Ann. tit. 17-A, § 752-A (West 1983 & Supp. 1992-1993).
The policy here is to discourage people in custody from a violent response to what they see as an illegal arrest. The second rule is that if, in making the arrest, the officer uses more force than the law allows him, the victim of that excessive force commits no crime if he defends himself from it.

The court found that these provisions, taken together, made clear that "the legislature did not intend section 108 to give a person the right to resist a law enforcement officer's use of reasonable, nondeadly force to effect an arrest, whether legal or illegal." The court supported this conclusion through an analysis that began with an examination of section 107.

Section 107, stated the court, provides a justification for a police officer to use a reasonable degree of non-deadly force to effect an arrest when the officer reasonably believes it necessary. The court noted that the only exception to this justification was in circumstances when the officer knows the arrest or detention is illegal. The practical consequence of the provision, the court concluded, was that there would be instances when an arrest ultimately turned out to have been illegal, but because an officer did not know of its illegality at the time of the arrest, that officer would be justified in using a reasonable degree of non-deadly force to effect the arrest.

The court then turned to section 752(2), which, in conjunction with section 207, prohibited an arrestee from knowingly "causing bodily injury or offensive physical contact" to the arresting officer. Drawing on the comment to section 752, the court observed that the Legislature had expressly intended the section to deter a violent response by an individual to an arrest perceived as illegal.

The court then turned back to section 108, noting that the section's language, while allowing a private person the use of reasonable, non-deadly force, limits a person to defending himself "from what he reasonably believes to be the imminent use of unlawful, nondeadly force by such other person." The court reasoned that to find that such justification extended to resisting an illegal arrest would contradict the legislative intent behind sections 107 and

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67. Id.
69. State v. Austin, 381 A.2d at 654.
70. Id.
71. Id.
73. Id.
74. Id.
Rather, the court stated, the justification of section 108 depends upon the unlawfulness of the force, not the illegality of the arrest. Hence, though an arrest may be illegal, it is still lawful under section 107 unless the officer uses excessive force or the officer knows that the arrest is illegal.

2. Analysis

The Law Court made clear that the approach it employed sought to give effect to the legislative intent behind the inclusion of the justification provisions in the Maine Criminal Code. The court's reasoning provides a paradigmatic example of the balancing of competing interests that constitutes the defining exercise of a doctrine of justification. The court was engaged in exactly this balancing when it wrote that the Code provisions, taken as an "integrated whole," establish that

[i]n general, under the code a person being arrested must not respond violently. On the other hand, a police officer is given substantial leeway in using nondeadly force in making an arrest—namely, that amount he reasonably believes necessary to make the arrest—provided he does not know the arrest is illegal. Section 108 gives the arrested person a right of self-defense against unlawful or excessive force used by the police officer; but if he reacts violently to nondeadly force applied by the police, he takes his chances on being able later to show the officer was not justified under section 107.80

Austin represents a complex weighing of interests—those of effective law enforcement and those of the bodily integrity of the arrestee. The policy choice of Austin is clear: The interests of effective law enforcement outweigh a person's interest in resisting what he or she perceives to be, and may in fact be, an illegal arrest.81 The

76. State v. Austin, 381 A.2d at 655.
77. Id.
78. Even if the arrested person is later able to establish the unlawfulness of the officer's use of force, he loses his justification if he is the initial aggressor, or the provoker, of the unlawful force under the circumstances defined by § 108 of the Code. The relevant language of § 108(1) states:

However, such force is not justifiable if:

A. With a purpose to cause physical harm to another person, he provoked the use of unlawful, nondeadly force by such other person; or
B. He was the initial aggressor, unless after such aggression he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues the use or threat of unlawful, nondeadly force.

ME. REV. STAT. ANN. tit. 17-A, § 108(1)(A) & (B) (West 1983).
79. See supra notes 36-41 and accompanying text.
80. State v. Austin, 381 A.2d at 655.
81. By 1992 twenty states had, by statute or by state supreme court decisions, limited the common law right to resist an unlawful arrest. PAUL H. ROBINSON, CRIM-
proper recourse for the aggrieved individual is, Austin tells us, not to resort to violent self-help, but rather to obtain release on bail or personal recognizance, or to seek civil damages. As the Austin court observed: “The legislature has thus cast the advantage on the side of law enforcement officers, leaving the person arrested in most cases to pursue his rights, not through violent self-help, but through prompt hearing before a magistrate with prompt consideration for release on bail or personal recognizance.”

B. The Hegarty Incident: The Potential Consequences of Resisting

As Austin counseled, the policy behind the justification provisions should be one that discourages violent responses to an officer's assertion of authority. When a right to resist is recognized, the result in cases like Clisham and the Hegarty incident, discussed below—whether or not the resister is “right” in his or her resistance—is an escalation of the conflict.

On Friday, May 15, 1992, four men set up camp at a small private...
campsite outside the town of Jackman, Maine. After a day of fishing, all four of the campers returned to the campsite, and after having finished their dinner, were met by Katherine Hegarty. Hegarty, whose house was about 185 feet from the campsite, repeatedly asked the men where they had gotten the key to her gate. She believed that the men had wrecked her gate by forcing the key, and told them, "[T]his is my house and you're invading my privacy." The men offered to leave in the morning. Hegarty threatened the campers and, after entering her house, came out and fired a gun in their direction. In total, Hegarty shot approximately thirty rounds in the direction of the campers.

Having successfully escaped the camping area, the four campers reported the incident to the Somerset County Sheriff's Office. In response to the call, four officers met with the campers and then decided to proceed to the camp to arrest Mrs. Hegarty. When they arrived, Hegarty told them that they were unlawfully on her property and could not rightfully enter her home. She warned the officers, "[Y]ou don't have a right to be on my property," "Get out of here," and "You're not coming in here." After attempts to draw Hegarty from her house failed, the officers positioned themselves around her camp and forcefully entered. While the officers were making entry, however, Mrs. Hegarty had armed herself. One of the officers witnessed Hegarty raise her gun and begin to move it in the direction of two of the other officers. Two of the officers yelled at her three times to put the gun down. When Hegarty failed to comply, three of the officers, almost simultaneously, fired what proved to be fatal shots.

The Hegarty incident demonstrates the potential consequences of the conflict between a reading of the justification provisions that allows a citizen to use force against a police officer, on the one hand, and the justified use of deadly force by police officers under section 107, on the other. Katherine Hegarty, no less than Andrew Clisham, may have thought herself justified in using force against the police officers to defend her home. Indeed, after Clisham, it is possible that Hegarty would have had a viable defense to a criminal prosecution under section 104. After all, in Hegarty's case, as in Clisham's, the officers had no warrant and no consent was given for the search.

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85. The facts set forth here are drawn from the press release of June 3, 1992, issued from the Office of the Attorney General of the State of Maine. See ME. DEPT. OF ATTY. GEN., ATTORNEY GENERAL RESPONDS TO HEGARTY SHOOTING, STATEMENT OF FACTS 1 (June 3, 1992) [hereinafter RELEASE].
86. Id. at 2.
87. Id.
88. Id. at 11.
89. Id. at 11-12.
90. See discussion supra part II.
91. Of note in this regard is the second claim for relief filed on behalf of the Es-
Arguably, in Hegarty's case, no less than in Clisham's, exigent circumstances did not exist. Therefore, absent probable cause, under the Clisham court's rationale, Hegarty would have been justified in using a reasonable degree of non-deadly force to prevent the officers' criminal trespass.92

It is uncertain whether Katherine Hegarty made a considered decision to assert her right to resist violently what she perceived to be an unlawful search of her home. It is probable, however, that to the extent persons are aware that such a right exists, the likelihood of its exercise is increased. The exercise of that right could mean the loss of life—of the person resisting, or of the police officer.

V. THE NEED TO RECONCILE JUSTIFIED FORCE TO RESIST AN ARREST AND JUSTIFIED FORCE TO RESIST A SEARCH OR A SEIZURE

The result reached in Clisham is inconsistent with the case law in Maine and the justification provisions of the Maine Criminal Code. A basic tenet of the criminal justice system should be that its laws not encourage violence. In the context of the justification provisions, such a belief simply reflects an awareness that: (1) the citizen who responds with violence has no sound method of gauging the legality of his or her conduct (the response is at best a guess that the search would be unlawful); (2) there is a conflict between the use of force legally permitted an officer seeking to perform his or her duties, and that allowed the resisting citizen; and (3) the right of an individual to expel a police officer from his or her premises does not accomplish its purpose, since it serves only to escalate the conflict and ultimately causes the citizen to be lawfully arrested for the results of his or her forceful response.

tate of Katherine A. Hegarty, which alleges, in part, that the defendants violated Me. Rev. Stat. Ann. tit. 17-A, §§ 104 & 107 (West 1983 & Supp. 1992-1993). Hegarty v. Somerset County, United States District Court (Me.), Civil Docket No. 93-004-B [hereinafter Complaint]. The factual allegations of the Complaint assert that "[t]he five police officers had not obtained or initiated any proceedings to obtain a warrant to arrest Katherine Hegarty or to enter Hegarty's house," and that "[t]here was no emergency or imminent threat to the safety of the police or public when Hines broke into the Hegartys' house." Id. at 6. Since Katherine Hegarty did not give her consent to the officers to enter her premises, the warrantless search of her house was conducted under substantially the same circumstances as the warrantless search in Clisham would have been. State v. Clisham, 614 A.2d 1297, 1299 (Me. 1992).

92. It may be argued that a distinction between the Hegarty incident and the Clisham facts can be drawn on the basis of the absence or presence of probable cause for the search. To make that distinction, however, is to point to the flaw in the Clisham result. Both Katherine Hegarty and Andrew Clisham were defending their homes from what they perceived to be an unlawful entry. As a policy matter, it is absurd to say that whether they were entitled to a § 104 justification defense depends upon whether they had guessed correctly that there was no probable cause for a search—an after-the-fact determination that neither Clisham nor Hegarty could have accurately predicted.
Clisham is clearly wrong as a policy matter. It ignores the message of cases like Austin that recognize the danger posed by a citizen’s violent response to officers acting in the performance of their duties. To read the justification provisions as the Clisham court did is, at least indirectly, to encourage violent responses to law enforcement activity. Issues such as the legality of an arrest, the constitutionality of a search, and the presence or absence of probable cause and exigent circumstances should be argued and decided in a court of law or through some other orderly process. These are not questions that should be resolved at the end of a gun barrel or the blade of a knife.

It is equally apparent that Clisham is susceptible to attack strictly on legal grounds. As a preliminary matter, section 104 allows force to be used to “prevent or terminate the commission of a criminal trespass.” That the officers, simply by approaching the house and investigating the call, were not criminal trespassers, is clear. The Clisham court reasoned that absent exigent circumstances or consent, a warrantless search inside Clisham’s home would have been unconstitutional. Therefore, stated the court, a forced entry would have constituted a criminal trespass. While the court treated its

93. Some courts have restricted a citizen’s right to resist an arguably illegal search. See United States v. Woodring, 536 F.2d 598, 599-600 (6th Cir. 1976) (no right to resist police authority to search); United States v. Ferrons, 438 F.2d 381, 389-90 (3d Cir. 1971) (“a person does not have a right to forcibly resist the execution of a search warrant by a peace officer or government agent, even though that warrant may subsequently be held to be invalid”); State v. Blackman, 617 A.2d 619, 629-32 (Md. Ct. Spec. App. 1992) (no privilege to resist a police frisk even if the frisk would have been unlawful); State v. Doe, 583 P.2d 464, 466-67 (N.M. 1978) (even if arrest was unlawful person cannot use force to resist search by officer made in good faith); State v. Hatton, 568 P.2d 1040, 1045-46 (Ariz. 1977) (no right to resist search warrant later found to be illegal).


95. See State v. Cloutier, 544 A.2d 1277, 1280 (Me. 1988) (a policeman, entering onto walkway of house on the basis of a suspicion held in good faith, comes within an implied invitation of the owner).

96. State v. Clisham, 614 A.2d at 1299.

97. Id. Once it is accepted that police actions constitute a criminal trespass, a situation invoking Me. Rev. Stat. Ann. tit. 17-A, § 104(3) (West 1983) and justifying the use of deadly force against police officers is at least conceivable. Section 104(3) reads:

3. A person in possession or control of a dwelling place or a person who is licensed or privileged to be therein is justified in using deadly force upon another.

B. When he reasonably believes that deadly force is necessary to prevent or terminate the commission of a criminal trespass by such other person, who he reasonably believes:

(1) Has entered or is attempting to enter the dwelling place or has surreptitiously remained within the dwelling place without a license or privilege to do so; and
conclusion as following from State v. Boilard, this is clearly not the case. Since the Law Court in Boilard did not reach the question of the applicability of section 104, an inquiry into whether the police entry in that case would have constituted a criminal trespass was unnecessary and indeed was considered to be so by all but the dissent in that case.

By relying on Boilard for the proposition that the action of the police officers was unconstitutional, and therefore criminal, the Clisham court avoided a consideration of the actual legal standard

(2) Is committing or is likely to commit some other crime within the dwelling place.

Indeed, the argument by Clisham to the superior court, renewed on appeal to the Law Court, was that § 104(3)(B) applied. State v. Clisham, 614 A.2d at 1298. Clisham contended that he reasonably believed that the police were likely to commit the crimes of violation of privacy, Me. Rev. Stat. Ann. tit. 17-A, § 511 (West 1983), and criminal restraint, Me. Rev. Stat. Ann. tit. 17-A, § 302 (West 1983), within the dwelling place once they had entered. State v. Clisham, 614 A.2d at 1298.

98. 488 A.2d 1380 (Me. 1985).

99. The Clisham court’s use of Boilard is ironic. In Boilard, although the court found that the police officer’s forceful entry into the Boilard home constituted a civil trespass and was illegal, the evidence of the criminal acts committed by Boilard following the entry was not suppressed. The Law Court held that, “[d]espite the illegality of the entry into Boilard’s home, it is beyond question that the exclusionary rule does not extend to suppress evidence of independent crimes taking place as a reaction to an unlawful arrest or search.” State v. Boilard, 488 A.2d at 1386-87. The Boilard court quoted with approval an Oregon court of appeals case, State v. Burger, 639 P.2d 706, 708 (Or. Ct. App. 1982) which stated:

We decline to hold that after an unlawful entry evidence of subsequent crimes committed against police officers must be suppressed. Such a rule would produce intolerable results. For example, a person who correctly believed that his home had been unlawfully entered by the police could respond with unlimited force and, under the exclusionary rule, could be effectively immunized from criminal responsibility for any action taken after that entry. We do not believe that either the state or federal constitution compels such a result.

State v. Boilard, 488 A.2d at 1387. See also State v. Kittleson, 305 N.W.2d 787, 789 (Minn. 1981) (exclusionary rule does not require suppression of evidence of assault on officer even if police entry was in violation of Payton v. New York, 445 U.S. 573 (1980)); Commonwealth v. Saia, 360 N.E.2d 329, 332 (Mass. 1977) (even assuming the illegality of a police entry into a private dwelling, the exclusionary rule does not operate to suppress evidence of an assault and battery on the police officers following the entry).

100. Five of the six justices on the Boilard court appended a concurring opinion stating that the defendant never raised the issue of § 104 justification and that failure to do so “was not so obviously wrong that the court below should have intervened to overrule counsel’s choice of defense tactics, by giving the instruction on its own initiative.” Id. at 1391. Justice Dufresne, in the part of his opinion not joined by his colleagues, would have vacated the convictions on the ground that the jury was not properly instructed that, if they found the officer to be a criminal trespasser, Boilard could have used reasonable force in ejecting him from his home under § 104(1). State v. Boilard, 488 A.2d at 1387-90.
supplied by the criminal trespass statute. In order to satisfy the culpable state of mind requirement of the statute, the officers would have had to know that they had no license or privilege to enter upon the property. It is far from clear that such a finding could be made. Certainly, the officers were acting within the normal scope of their powers.

Further, in finding that section 104 does not differentiate between private citizens and police officers, the court's approach runs counter to one which envisions the Criminal Code as an integrated and coherent whole. The tension between the Clisham court's application of section 104 and other provisions of the Criminal Code is particularly acute with regard to section 107 and the Legislature's grant to police officers of the right to use force in the performance of their duties. In Clisham the defendant was wielding two large hunting knives and could just as easily have been holding a gun. He threatened that he had used the knives before, and claimed proficiency in throwing them. Suppose Clisham had made a sudden movement toward the officers and one or both of them had shot Clisham. It is likely that the officers in that situation would be justified in the use of deadly force under section 107(2)(A).

A policy


1. A person is guilty of criminal trespass if, knowing that that person is not licensed or privileged to do so, that person:
   A. Enters any dwelling place;
   ...
   D. Remains in any place in defiance of a lawful order to leave that was personally communicated to that person by the owner or another authorized person . . . .

102. A finding in this regard would require an inquiry into the state of mind of the officers. See State v. Dansinger, 521 A.2d 685, 689 (Me. 1987) ("the issue of license or privilege necessarily involves the state of mind of the Defendants . . . "). Such an inquiry did not occur either at the trial level or on appeal.

103. See, e.g., State v. Judkins, 440 A.2d 355, 358 (Me. 1982) ("Clearly an officer may be acting within the scope of his official duties . . . even while making an illegal arrest").


105. State v. Clisham, 614 A.2d at 1298.

106. Id. See State's Brief, supra note 3, at 4.

107. Though the Clisham court, under the authority of State v. Williams, 433 A.2d 765, 768-70 (Me. 1978), and the Model Penal Code, found that Clisham's threatened use of deadly force was tantamount to the use of non-deadly force, the officers may nevertheless have been justified in responding with deadly force. Section 107 leaves such a possibility open. See Me. Rev. Stat. Ann. tit. 17-A, § 107(2)(A) (West 1983 & Supp. 1992-1993); supra note 10 and accompanying text for the language of § 107(2)(A); Model Penal Code § 3.11 note 9 (1962) ("Although the actor who threatens deadly force is not considered to have used deadly force, it may be noted that under other sections of Article 3 a threat to use deadly force may sometimes give rise to the permissible use of responsive deadly force.")
that allows an individual such as Clisham to threaten deadly force, while at the same time authorizing officers to respond with force of their own, only creates an escalating confrontation. The Legislature could not have intended such a result. While the approach of the Law Court to statutory interpretation has generally been to give statutes their ordinary meaning from the language that the Legislature used, such an analytical starting point does not preclude a finding that the purpose of section 104 is only served when a differentiation between private persons and law enforcement officials is made. The fact that such a differentiation does not exist on the face of the provision is surely not dispositive, particularly where the failure to find such a distinction results in an internally inconsistent criminal code. Austin so holds.' In Clisham, as in Austin, the recognition of the right to respond violently to a police officer is contrary to the tenor of section 752-A and to the prerogative granted

If the officers had shot Clisham, and their belief in the necessity of using deadly force, or the imminence of the use of deadly force against them, was found not to be reasonable, they would still be afforded the justification of § 107 as long as holding the belief was not itself reckless or criminally negligent. Furthermore, even if the belief were found to be reckless or criminally negligent, the officers could only be convicted of a crime for which recklessness or criminal negligence suffices. ME. REV. STAT. ANN. tit. 17-A § 101(3) (West 1983); supra note 33 for the pertinent language of § 101. See, e.g., State v. Davis, 528 A.2d 1267, 1269-70 (Me. 1987) (operation of § 101 in the context of a self-defense claim in an assault case); State v. Lagasse, 410 A.2d 537, 543 (Me. 1980) (operation of § 101 in the context of a self-defense claim in a manslaughter case).

108. While the hypothetical posited above has the officers responding with deadly force, it is also possible that they could respond with non-deadly force. Section 107 (1)(B) of the Maine Criminal Code allows an arresting officer to defend herself or a third person from what she reasonably believes is the imminent use of non-deadly force. See State v. Judkins, 440 A.2d 355 (Me. 1982). Nevertheless, whether the response is with deadly force or non-deadly force, the result is an escalation of the conflict.

109. To the extent that the purpose of § 104 was discussed by the Maine Legislature, it was in the context of justifying the use of force by a homeowner to repel a burglar. Representative of this discussion are some of the statements made on the House floor discussing why § 104 was drafted:

The situation that it [§ 104] was drafted to deal with is a situation that has been discussed across the state where a person enters the dwelling which is occupied, for example, by a single person . . . . The person who is in the house committing the crime says . . . . You have no reason to be afraid, I am not going to hurt you but I am going to rob you and burglarize the house. Or, another situation would be where a person came into the house and said, we are not going to hurt you but we have a truck here and we are just moving out all of your stuff.


110. See State v. Vainio, 466 A.2d 471, 474 (Me. 1983) ("The starting point in any given case concerning the interpretation of a statute must be the language of the statute itself.").

111. See supra part IV.A.

police officers by section 107.113.

VI. A Proposal for Statutory Reconciliation

The proposed legislation set forth below seeks to differentiate between police officers and ordinary citizens under section 104. This distinction is intended to resolve the conflict between section 104, as interpreted by the Law Court in State v. Clisham, and section 107, which justifies the use of force by a police officer in the performance of his or her official duties. In so doing, the legislation would make Maine law regarding resistance to searches and seizures consistent with that governing the use of force allowed in order to resist an arrest. To make the other justification provisions consistent with the proposed change in section 104, section 105 should be similarly modified.

While the adoption of these modifications should not depend on the implementation of the suggestions of the Attorney General's Task Force on the Use of Force, the Legislature and the Board of Trustees of the Maine Criminal Justice Academy should consider the Task Force recommendations together with a statutory change. Section 104 appears below with the Author's proposed additions underlined. Section 104-A with Comment follows and is the Author's proposed statutory addition.

CHAPTER 5
DEFENSES AND AFFIRMATIVE DEFENSES; JUSTIFICATION

§ 104. Use of force in defense of premises

1. Except as provided in section 104-A, a person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using nondeadly force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by such other in or upon such premises.

2. A person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using deadly force upon another when and to the extent that he reasonably believes it necessary to prevent an attempt by the other to commit arson.

3. Except as provided in section 104-A, a person in possession or control of a dwelling place or person who is licensed or privileged to

116. See Me. DEP'T OF ATT’y GEN., ATTORNEY GENERAL'S TASK FORCE ON THE USE OF FORCE: FINDINGS & RECOMMENDATIONS, (Nov. 1992) [hereinafter TASK FORCE REPORT].
be therein is justified in using deadly force upon another:

   A. Under the circumstances enumerated in section 108; or
   B. When he reasonably believes that deadly force is necessary to
      prevent or terminate the commission of a criminal trespass by such
      other person, who he reasonably believes:

      (1) Has entered or is attempting to enter the dwelling place or
          has surreptitiously remained within the dwelling place without a li-
          cense or privilege to do so; and
      (2) Is committing or is likely to commit some other crime
          within the dwelling place.

4. A person may use deadly force under subsection 3, paragraph
   B, only if he first demands the person against whom such deadly
   force is to be used to terminate the criminal trespass and the other
   person fails to immediately comply with the demand, unless he rea-
   sonably believes that it would be dangerous to himself or another to
   make the demand.

5. As used in this section:
   A. Dwelling place has the same meaning provided in section 2,
      subsection 10; and
   B. Premises includes, but is not limited to, lands, private ways
      and any buildings or structures thereon.

§ 104-A. Limitation on the use of force against a law en-
forcement officer engaged in a search or a seizure

1. A person is not justified in using force against a law enforce-
ment officer engaged in a search or a seizure if:

   (A) The officer has made reasonable efforts to advise the person
       that the officer is a law enforcement officer acting in accordance with
       that officer’s duty;
   (B) The person knows or has reason to know that the officer is a
       law enforcement officer acting in accordance with that officer’s duty;
   (C) The officer acts in good faith; and
   (D) The officer does not use unlawful force in carrying out the
       search or seizure.

Comment

This section is designed to limit the use of permissible force
against a law enforcement officer when that officer is engaged in
the performance of his or her official duties in conducting a search
or a seizure. More specifically, it is intended to overrule the result
in State v. Clisham, 614 A.2d 1297 (Me. 1992), and a reading of
section 104 that allows for a violent response by a private citizen to
a nonconsensual search by a police officer.

Subsection (1)(A) of this section, like subsection 107(2)(B)(1),
contains a requirement that the officer make reasonable efforts to
advise the person that he or she is a law enforcement officer acting
in accordance with his or her official duties. If the person subject to
the officer’s authority knows or has reason to know that this is in
fact the case, that person would be denied a defense under section 104 or 105 if he or she threatened to use, or actually used, force against the officer. Under subsection (1)(C) the officer must have acted in good faith in initiating the search or the seizure.

The statute leaves intact, in subsection (1)(D), the right of self-defense allowed a citizen under section 108 against unlawful or excessive force used by the officer. The person takes his or her chances, however, on later being able to show that the officer was not justified under section 107. State v. Austin, 381 A.2d 652 (Me. 1978).

VII. CONTROLLING POLICE CONDUCT: ALTERNATIVES TO AUTHORIZING A VIOLENT RESPONSE TO POLICE AUTHORITY

Arguably, it was the perception that police officers are not responsibly exercising their prerogatives that spawned the Clisham result.\(^{117}\) If, for example, police departments are not providing for administrative discipline, and inadequate training is resulting in poor police procedure, the argument in support of the right to resist what one perceives to be an illegal exercise of police authority becomes more attractive.\(^ {118}\)

In one of the leading articles espousing the right to resist an arrest, Paul Chevigny writes that the arguments of the critics of the right can be reduced to one central point: "[C]onstituted authority is now sufficiently civilized that citizens should deal with it peacefully. Violence only encourages disrespect for the law."\(^ {119}\) That characterization, while perhaps a bit simplistic, is not unfair. An underlying premise of cases such as Austin is that the police can be trusted in the overwhelming majority of cases to "exercise their code-granted prerogatives with restraint . . . ."\(^ {120}\) Thus, with so much dependent upon the integrity of police action, Mr. Chevigny's observation becomes particularly interesting in this post-Rodney King era\(^ {121}\) and in light of the Katherine Hegarty incident.

\(^{117}\) This seems at least to have been the perception of Andrew Clisham's lawyer, Wayne Foote. See Court Rules Threat Was Justified, PORTLAND PRESS HERALD, Oct. 8, 1992, at 4B. The article said of Mr. Foote, "he hopes it [the Clisham case] will cause police to think twice before searching people's homes illegally." Id. Foote was quoted as saying, "I would hope that it keeps police from doing this sort of thing but I don't know that I have any confidence that this will happen. Nothing happened to the police officers and my client went to jail." Id.

\(^{118}\) See Chevigny supra note 83, at 1134-35. Assuming arguendo the theory that other remedies may be substituted for the right to resist, Chevigny observes that "the rationale of the right is not undermined unless those alternative remedies are real ones." Id. at 1134. This, however, is perhaps a better argument for the strengthening of alternative remedies than for an adherence to the common law right.

\(^{119}\) Id. at 1136.

\(^{120}\) State v. Austin, 381 A.2d at 655.

\(^{121}\) On March 3, 1991, Los Angeles police beat a black man, Rodney King, who had been stopped following a high-speed chase. The beating was captured on video-
A. Returning to the Hegarty Incident: Focusing Attention on
the Integrity of the System

The Hegarty incident, in particular the actions of the police of-
ficers involved in the shooting, led to significant public outcry122 and
an investigation by the State Attorney General's Office. Following
the investigation, Attorney General Michael Carpenter released a
statement on June 3, 1992, declining to pursue criminal charges
against the police officers.123

The decision not to prosecute effectively released the officers from
criminal liability.124 While reasonable prosecutors could have dis-
tape by a bystander and was widely broadcast by the media. The incident focused
public attention on violence used by police forces. Paul Chevigny, Let's Make It A

122. See Answers Sought in Police Shooting, PORTLAND PRESS HERALD, May 19,
1992, at 3B; Shooting of Woman by Police Questioned, PORTLAND PRESS HERALD,
May 21, 1992, at 1A, 8A.

123. See RELEASE, supra note 85, at 1.

124. This decision did not, of course, foreclose a federal prosecution. See Tess
Nacelewicz, U.S. Official Probes Hegarty Case, PORTLAND PRESS HERALD, July 30,
1992, at 1A, 10A. The U.S. Attorney's Office, however, made a decision not to
prosecute.

Paul Chevigny has written an interesting article on the role of the federal govern-
ment in stopping local police brutality. See Chevigny, supra note 121, at 370. Written
just over a year after the Rodney King incident, the article is concerned primarily
with federal intervention to stop patterns of misconduct at local levels.

Early in his article, Chevigny describes with approval the international standards
for law enforcement developed at the United Nations. These standards, Chevigny
notes, "mandate effective reporting and review procedures for incidents of injury and
death." Id. Contrasting this with the federal system of the United States, Chevigny
writes of the latter, "Although the Constitution also sets some general limits on officials' use of force, the federal government does not monitor local compliance even
with constitutional, not to speak of international, standards; there are, for example,
no federal 'reporting and review' procedures for local police violence." Id. at 370.

Chevigny suggests that various federal agencies, including the Bureau of Justice
Statistics, collect and publish data regarding police violence on local levels. The fed-
eral government, he asserts, could collect information "on the number and type of
citizen complaints against the police; on officers disciplined by departments and the
nature of their offenses; on the number of officers prosecuted for local crimes; and on
systems of review, command-control and accountability within local departments." Id. at 371.

Armed with the knowledge acquired from the gathering of these statistics and in-
formation, Chevigny proposes that the federal government do two things:

1) When the Justice Department is satisfied that there is a widespread and
continuous pattern of the use of excessive force or other violation of basic
rights, federal funding to the local police authority should be terminated.
There should be a hearing procedure to determine the facts, as there is
under the present system when a department is accused of discrimination.

2) When resources supplied under a federal program have themselves been
used in connection with acts of police brutality, an equivalent sum should
be returned to the government.

Id. at 372.
agreed on whether or not to prosecute, the Attorney General's reliance on section 107 in the exercise of his discretion is not without foundation in the language of that provision. Clearly, the practical implications of the existence of a justification provision such as section 107 can be quite significant. Not only does the provision operate to vindicate what would otherwise be a criminal act, but such a decision also has the effect of focusing attention on the integrity of the system upon which the justification would operate.

Hence, while the Attorney General's decision whether to prosecute was probably the most eagerly anticipated result of his investigation, the statement issued by his office is perhaps more remarkable for its criticism of the actions taken by the officers than for the ultimate decision not to prosecute. In fact, the majority of the substantive

125. See 300 Protest Sheriff's Lack of Action, PORTLAND PRESS HERALD, July 2, 1992, at 2B (David Crook, district attorney for Somerset and Kennebec counties, recommending that a grand jury investigate the shooting); District Attorney Joins Hegarty Protesters, PORTLAND PRESS HERALD, July 6, 1992, at 3B (Crook joins those protesting Attorney General Michael Carpenter's decision not to prosecute the officers).

126. See Release, supra note 85.

127. On an administrative level, the Sheriff of Somerset County absolved his officers of any blame in the shooting. See Somerset Sheriff Clears Officers in Hegarty Death, PORTLAND PRESS HERALD, July 1, 1992, at 1A, 10A.

128. The officers and/or their supervisors may still be found to be liable for civil damages. A civil suit has been filed in connection with the death of Katherine Hegarty. See Complaint, supra note 91. Named as defendants in the Complaint are: Somerset County; John Atwood, Commissioner of the Maine Department of Public Safety; Andrew E. Demers, Jr., Chief of the Bureau of Maine State Police; Spencer Havey, Sheriff for Somerset County; Gary Wright, Maine State Police Trooper; Rene Guay, Deputy Sheriff for the Somerset County Sheriff's Office; Wilfred Hines, Sergeant for the Somerset County Sheriff's Office; Thomas Giroux, Jr., Reserve Officer for the Somerset County Sheriff's Office; and William Crawford, Jr., Sergeant for the Somerset County Sheriff's Office. Id. at 2-3. See supra part IV.B. (discussing the role of the police officers in the shooting).


129. At one point in the release, the Attorney General wrote:

Despite my decision not to criminally prosecute, I find that the total operation was avoidable and the officers' conduct was outside the parameters of responsible, established police procedures. Thus, regarding the three officers involved in the shooting, I am recommending to Colonel Demers and Sheriff Havey that strong disciplinary action be taken up to and including dismissal . . . Although I also question the professional fitness of these three officers, I do not have the authority to revoke their certification. If I did, I would so recommend that revocation to the Criminal Justice Academy Board of Trustees.

See Release, supra note 85, at 2-3.
portion of the release is devoted not to the potential criminal liability of the officers, but rather to the lack of responsibility demonstrated by their actions and to ways to prevent future occurrences of like incidents. Expressing his concern and his intent to take action of some kind, the Attorney General wrote in the release:

Additionally, my office must take the lead in examining existing state law, policy, law enforcement procedures and training to minimize the possibility of future tragedy. To that end, I am inviting the Commissioner of Public Safety, the head of the Maine State Police and the heads of the Chief of Police and Sheriffs’ Associations to join me on June 10th to begin the process of analyzing State of Maine law enforcement standards that govern this type of situation.\textsuperscript{130}

The Attorney General’s initial response and the entire chain of events set in motion following the shooting of Katherine Hegarty can be taken as a functional response to the command of \textit{Austin}. In \textit{Austin}, the court cautioned:

\begin{quote}
[T]he police should exercise their code-granted prerogatives with restraint, with police departments using administrative discipline to assure that individual officers in fact use no more force than necessary to effect arrests. Violence breeds violence, whoever starts it.\textsuperscript{131}
\end{quote}

\textit{Austin} revealed a certain framework in which the justification provisions relating to law enforcement activity were to exist.\textsuperscript{132} This framework relied to some extent on the institutional integrity of the law enforcement system for the proper operation of the code-granted prerogatives allowing the use of force by officers. The Attorney General’s decision not to prosecute was a judgment that the use of force in the situation presented in the Hegarty incident was such a code-granted prerogative. Most important, however, this decision recognized that the legitimacy of these prerogatives depends upon their responsible exercise.

The Attorney General’s approach sought to give proper effect to the purpose of section 107,\textsuperscript{133} while at the same time addressing the rationale that supports the existence of section 107. The method of analysis employed by the Attorney General recognized that section 107 presupposes a law enforcement system of integrity. This process and realization is analogous to an approach that views the result in \textit{Clisham} as wrong, but seeks to understand its underlying rationale. Stated differently, if police officers are to be afforded the protection of section 107, they should exercise that privilege responsibly, as the

\textsuperscript{130} Id. at 3.
\textsuperscript{131} State v. Austin, 381 A.2d 652, 655 (Me. 1978).
\textsuperscript{132} Id. at 653-55. \textit{See also} discussion \textit{supra} part IV.A.
Law Court in *Austin* counseled. Only then can the system work properly and with integrity. This rationale holds equally true where section 104 and the rights of a citizen subject to police authority are concerned. For an officer to be shielded from a reading of section 104 that allows citizens to respond violently to an officer’s assertion of authority, an officer should act in a manner consistent with the theory that would warrant that protection.

One approach to remediying abuses by police officers is, in cases like *Austin*, to provide for a right to resist arrest; or in cases like *Clisham* or the Hegarty incident, to allow for a right to respond violently to what one perceives to be a criminal trespass by a police officer. A better approach is one which, in its desire to effect change, recognizes that violence breeds violence, and that the system—which should be made to work with integrity—cannot work at all if it encourages escalation of conflict.

### B. Seeking To Inspire Confidence in the System: The Task Force Report

One consequence of the Hegarty incident and the resulting investigation was the creation of the Attorney General’s Task Force (“Task Force”) and the issuance on November 16, 1992, of its report detailing unanimous findings and recommendations. While the effect of the Task Force recommendations remains to be seen, it did suggest one means of addressing some of the competing interests at stake under the justification provisions of the Maine Criminal Code.

With regard to the current status of the justification provisions of the Code, “the Task Force concluded that the current statutory provisions offer a proper balance between the rights of a citizen subject to arrest and the interests of the law enforcement officer who is lawfully performing his or her duty.” The Task Force went on, how-

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135. The Task Force was formed as a result of Attorney General Carpenter’s meeting on June 10, 1992, with representatives of various law enforcement agencies. See *supra* text accompanying note 130. The membership of the Task Force consisted of representatives of the Maine Sheriff’s Association, the Maine Criminal Justice Academy, the Maine Chiefs of Police Association, and the Maine State Police, as well as a legislator, and a member of the public. See Letter from Vendean V. Vafiades to Michael E. Carpenter, Attorney General of Maine (Nov. 16, 1992) (transmittal letter for *Task Force Report*) [hereinafter Task Force Transmittal Letter]. The Task Force was chaired by Vendean V. Vafiades, Chief Deputy Attorney General. It did not conduct an independent review of the Hegarty incident, but instead focused its research and meetings on “law enforcement training, certification, policy and procedures and the review of Maine law on use of physical force by law enforcement officers.” *Id.* at 1.


ever, to say—echoing the sentiment expressed in Austin—that "all members of the Task Force expressed a strong opinion that law enforcement officers must exercise restraint in the use of force, employing permissible force only when necessary."138

Among the findings and recommendations of the Task Force were several dealing with the training programs for law enforcement officers in the State of Maine.139 These recommendations, while hardly revolutionary, are essential to the creation and maintenance of a process of training and preparation of officers for the performance of their duties. The public must be secure in its knowledge that this training is of the highest quality140 and is regularly reviewed to ensure that it retains those standards.141 The recommendations seek to

139. See Task Force Report, supra note 116, at 6-12.
140. That a segment of the public does not presently place a great degree of confidence in the training that law enforcement officers in Maine receive is evidenced by various letters to the editor appearing in the Portland Press Herald on June 18, 1992, approximately two weeks after Attorney General Michael Carpenter's decision not to prosecute the officers involved in the shooting of Katherine Hegarty. Crime and Punishment: Shooting Trials Too Much To Take, Portland Press Herald, June 18, 1992, at 8A. One letter, written by Michael G. McDonough, the Bureau Director of the Portland Police Department, is representative of the tenor of many of the others published:

A major variable which leads to such scenarios [as the shooting of Katherine Hegarty] relates to the totally inadequate training offered to police officers in this state. It is an absurdity that Maine requires 9 months of training to become certified as a hairdresser or barber, but only 14 weeks to become certified to perform one of society's most demanding occupations—police officer. . . .

Id. See also Randy Wilson, A Death in Temple, Maine Times, Mar. 26, 1993, at 1.
141. Failure to maintain such standards can create civil liability on the part of a supervisory official or governmental entity under 42 U.S.C. § 1983. See Michael J. Gerhardt, The Monell Legacy: Balancing Federal Concerns and Municipal Accountability Under Section 1983, 69 S. Cal. L. Rev. 539, 603-613 (1989) (inadequate police training as a policy or custom involving possible constitutional violation).

A claim for relief under 42 U.S.C. § 1983 has been brought in connection with the death of Katherine Hegarty. See Complaint, supra note 91, at 9. Factual allegations 42 and 43 of the Complaint filed are as follows:

42. Defendant Atwood [Commissioner of Maine Department of Public Safety] and Demers [Chief of the Bureau of Maine State Police] acted with deliberate, reckless and/or callous indifference to the constitutional rights of persons with whom the police come into contact in failing to provide defendant Wright [Maine State Police Trooper] with adequate training and supervision regarding the warrantless entry into houses and/or the use of force which may be appropriate in situations similar to that involving Katherine Hegarty. This failure to provide adequate training and supervision was affirmatively linked to the actions taken by Wright.
43. Defendants Atwood and Demers were deliberately indifferent and/or negligent in hiring, retaining, supervising and/or training Wright.

Id. at 8.

Factual allegations 44 and 45 repeat the charges of allegations 42 and 43 with respect to defendants Somerset County and Spencer Havey (Sheriff for Somerset County).

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inspire such confidence by proposing: (1) the postponement of an officer's probationary period until after he or she has successfully completed the 480 hour basic training period at the Criminal Justice Academy; (2) an assessment and evaluation of the Academy program at least once every seven years; (3) a consolidation of the core basic training program for municipal and county law enforcement officers with the basic training program at the State Police Academy; and (4) a survey and analysis of the use of part-time/reserve officers and the presentation of a report to the Board of Trustees of the Academy to be incorporated into the Board's Annual Report to the Legislature by 1995.

Part III of the Report addressed the Academy's admissions and accreditation responsibilities. Citing the importance of public in-
put, the Task Force recommended that the Board be enlarged to include three public members with no law enforcement affiliation. Additionally, and in response to a specific suggestion set forth by the Attorney General in his June 3 release, the Task Force recommended a statutory change to expand the Board's decertification jurisdiction to include mandatory review of all cases in which a law enforcement officer uses deadly force that results in death.147 As part of this recommendation the Task Force further proposed that the Board carefully monitor the implementation of section 2806 of title 25 of the Maine statutes.148 This section details the conduct for which the certificate of a law enforcement officer may be suspended or revoked and the complaint process for bringing such conduct to light. The monitoring would include reports on the nature, source, and outcome of all complaints in the Board's 1993 annual report to the Legislature.149 These recommendations, taken together, are integral to the establishment of a law enforcement system that emphasizes the accountability of its officers.

The final, and perhaps most important, part of the Report recommended the development and implementation of a statewide data collection system on the use of physical force by law enforcement officers.150 The data collected would include "the source of each call-
out, the type of call-out, the result of the call-out, the time spent on the call-out and other such geographic and frequency statistics."\textsuperscript{101} The information would then "be reviewed by the Board for possible procedural or training changes and . . . be included in the Academy's report to the Legislature in 1995."\textsuperscript{102} That there currently exists no such system for the gathering of such statistical information is indicative of, if not an insensitivity to the potential for systematic patterns of police misconduct, at least a perception that such misconduct is not widespread. In any event, a reliable and comprehensive source of information recording the use of physical force by police officers would make for a better informed public. The potential consequences of the availability of these statistics should not be underestimated. One possible consequence is the use of the data to spot patterns of misconduct on the part of certain town or municipality police forces and to limit or deny state or federal funding to those forces.\textsuperscript{103} Similarly, the availability of such statistics could facilitate section 1983 actions.\textsuperscript{153}

As a whole, the Task Force recommendations provide some useful suggestions for inspiring confidence in the system of law enforcement that exists in Maine. By tightening the standards for all officers and increasing their accountability by providing for administrative discipline, the recommendations represent a commendable, if not complete, attempt at systematic reform.\textsuperscript{155}

is threatened or used. Id. at 17. It further suggested a review and revision of the Policy and Procedure Manual that is distributed to all law enforcement agencies for adaptation and adoption locally. In addition to making the updated Manual widely available to law enforcement officers, the Report suggests that "[t]he Board, after consultation with the Attorney General, shall develop a minimum standard policy and procedure for use of physical force which shall be followed by all law enforcement agencies." Id. at 19.

151. Id. at 18.
152. Id.
153. See discussion supra note 124.
154. Some courts have looked to the existence of such factors as a pattern of illegal acts, or the knowledge of supervisory officials of prior illegal acts by their subordinates, in determining whether liability on the part of a supervisory official or governmental entity arises under 42 U.S.C. § 1983. See, e.g., Bordanaro v. McLeod, 871 F.2d 1151 (1st Cir. 1989) (municipality found liable where police had long history of similar violations of warrant requirements that was the equivalent of a policy and constituted gross negligence amounting to deliberate indifference to the rights of the public). Cf. Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (city could not be held liable since single incident of excessive force did not establish an official policy or practice to support inference of inadequate training under Monell v. New York City Dept' of Social Servs., 436 U.S. 658 (1978)). See also Susan Bandes, Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act, 72 Iowa L. Rev. 101 (1986).
155. On April 1, 1993, approximately one week before this Comment's publication deadline, a bill was proposed incorporating some of the suggestions of the Task Force Report. L.D. 1114 (116 Legis. 1993). Most notably, the bill requires: (1) that the membership of the Board of Trustees of the Maine Criminal Justice Academy be
VIII. CONCLUSION

A court entirely secure in the integrity of actions of police officers would not have reached the Clisham result. The path to a better system of law enforcement, however, does not lie in a rationale such as that found in Clisham. If the unstated rationale of Clisham is that police abuses need to be remedied, then the solution must be one that in its desire for change embraces the system and the rule of law. The remedy is not self-help on the corner of a street or in the doorway of a home. The response to an abuse of police power should not be violence. Violence breeds violence. The solution lies in civil remedies, legislative reform such as that set forth in Part VI, and administrative reforms such as those described in Part VII. The policy should be “comply now, defend later” in a court of law and, or alternatively, seek compensation through a civil action.

Law enforcement officers should be given every incentive to follow the letter of the law, and they should be trained accordingly. But they should not—in the exercise of their duties—be subjected to court-encouraged violence, or any violence at all, by a potential arrestee.

F. Todd Lowell