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POLICE AUTHORITY TO KILL: AN EXPANDING RIGHT THAT REQUIRES RESTRICTION

SHELVIN SINGER*

INTRODUCTION

In 1976, the Eighth Circuit Court of Appeals, sharply critical of broad police power to kill citizens, held a Missouri statute authorizing police to use lethal force, when necessary to capture a person suspected of committing any felony, unconstitutional.¹ In June of 1983, the Sixth Circuit declared a similar Tennessee statute unconstitutional.² These decisions evince an understanding of the need to restrict common law authority of police to use lethal force against fleeing felony suspects. That understanding has not been reflected, however, in a general movement of courts and state legislatures toward greater restrictions on this crucial facet of police power. It is argued here that in the framework of this country's philosophy of crime, punishment, and justice, far too much authority to kill fleeing felony suspects rests in the hands of police officers and that a sharp curtailment of police authority used for such a purpose is long overdue.

Use of lethal force is among the most controversial of police activities.³ Indeed, fear of public condemnation expected in the wake of police killings has prompted extreme countermeasures on the part of at least one police department. There is substantial evidence that the police department of Houston, Texas, led by the department's top commanders, had encouraged line of-

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officers to carry a second gun in addition to their regulation service revolvers. The second gun, a so-called "drop gun," was to be carried in anticipation of incidents in which unarmed civilians were shot by police. The "drop gun" was to be placed next to, or in the hands of, the shooting victim. A gun in the possession of the shooting victim provided the officer responsible for the death with a plausible explanation for his use of deadly force.

Occasions in which police employ deadly force against fleeing felony suspects represent a significant percentage of the overall number of incidents in which lethal force is used by police. A study of police shootings in Chicago, Illinois, for example, reported that for the years 1974-78, 89 civilians who allegedly fled from the commission of serious offenses were shot by police officers. This figure represents 17% of the total number of victims of police shootings in the period under study. Use of lethal force in fleeing felon situations has claimed victims other than the suspects pursued. In some cases, police officers have been the victims of shots fired at fleeing suspects by fellow officers.

Most states bottom the right of police to use lethal force to capture fleeing felony suspects on the felonious nature of the crime allegedly committed or the use of force in the commission of the crime. The modern legislative trend toward expansion of the scope of criminal law—the identification of an increasing number of activities as crime and the concomitant process of elevating minor offenses to the status of major offenses—has combined with the typical nature-of-the-crime basis for police use of lethal force, to produce an enormous, virtually automatic expansion of the police right to kill.

4. Webster v. City of Houston, 689 F.2d 1220, 1227 (5th Cir. 1982).
5. Shootings by Chicago Police, supra note 3, at 1836.
7. Burglary provides an excellent example of the upgrading process. Although burglary historically was considered to be a serious offense, the required elements—the breaking and entry into a dwelling of another in the nighttime, with the intent to commit a felony—sharply restricted the cases in which it was found to have been committed. See R. Perkins, Criminal Law, 192-213 (2d ed. 1969). Today, one seldom finds sharp restriction of the type of premises entered or the time of entry required for the offense. Nor is a breaking required in many codifications of the burglary offense. Activities once considered minor trespasses now fall under the burglary heading. See, e.g., Ill. Rev. Stat. ch. 38, § 19-1 (1981); People v. Weaver, 41 Ill. 2d 434, 243 N.E.2d 245 (1968) (coin laundromat open for use by the public). See also People v. Blair, 1 Ill. App. 3d 6, 272 N.E.2d 404 (1971) (open-ended car wash); People v. Embry, 12 Ill. App. 3d 332, 297...
The effect of expanded criminalization described above is probably not a factor considered in legislative debates concerning the enactment or revision of the criminal law itself. Nevertheless, the effect is of profound significance in the area of police right to use lethal force. For example, in 1965, the Illinois legislature included under the criminal offense of burglary the stealing of any object from inside an automobile, even when the transgression is committed by an action no more serious than the offender reaching through the open window of a parked, unoccupied vehicle. Burglary is classified as a forcible felony. 8

Hence, in a state like Illinois, which permits police to use lethal force against a suspect fleeing from commission of a forcible felony, the offender who reached through the open window of an unoccupied vehicle might be the lawful target of lethal force used by a pursuing officer, if the offender could not otherwise be immediately captured. This progressive expansion of police authority to use deadly force is fraught with danger, both for individual suspects and for society as a whole. 9 A by-product of increased criminalization of behavior is the expansion of police authority to kill citizens. Nothing less than comprehensive legislative and judicial restrictions on the right of police to use deadly force against fleeing felony suspects is necessary to properly limit this expanding authority. Self-limitation by individual police departments, without other guarantees, is an inadequate framework of protection. 10

In a society which some perceive as overrun with crime and criminals, advocacy of limitations on the authority of police to use their weapons is sure to provoke an angry response. Some would argue that after the fact observers of police action have the benefit of 20/20 hindsight, the advantage of producing their reconstruction and evaluation in a calm, deliberative atmo-

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N.E.2d 604 (1973) (a telephone booth was held to be the subject of a burglary).

For expansion of the criminal law into new areas, one only need look to today's narcotic and drug laws.

9. See, e.g., Police Misconduct, supra note 3.
10. Note, Unconstitutional Use of Deadly Force by the Police, 55 CHI-KENT L. REV. 539, 547 (1979). However, the Chief of Police of Minneapolis, Minnesota argued that police department regulations and practices have effectively reduced homicides by police officers in the line of duty. Bouza, Myths and Hard Truths About Police Shootings, 3 U. TOLEDO L. REV. 337, 339 (1982).
sphere. The police officer, critics would say, does not have this luxury when confronted with a split second decision regarding the propensity for violence on the part of a suspect, or the likelihood that an offender may be captured quickly without resort to deadly force.

Hence, while we ponder rules of police behavior far from the mean streets, it is well to remember the stark fact that the life of a good police officer may be at times in the greatest jeopardy, and that violent action may be the only reasonable response an officer can make in a tense, life-threatening situation. Tampering too much with the right of police to exercise broad discretion in the use of deadly force may promote an unwillingness by officers to be aggressive in pursuit of criminal suspects, lessening police effectiveness and increasing the overall danger of violence and criminality in society.

Nevertheless, it is maintained here that the law allows police overbroad authority in the use of lethal force against fleeing felony suspects. In this area, it is argued, greater protection for the suspect corresponds with general societal interests.

CIVIL LIABILITY ARISING OUT OF A POLICE OFFICER’S USE OF DEADLY FORCE

Paralleling the general expansion of police authority to use deadly force is a trend toward use of section 1983 of the Civil Rights Act of 1871 by plaintiffs seeking redress in cases of alleged misuse of police power to kill. In pertinent part, section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Since the objective of a civil law suit is the recovery of substan-

tial money damages, the most attractive target in a suit based on
the misuse of police power is the municipal authority standing
behind the individual police officer. Availability of this adver-
sary to the plaintiff in a section 1983 action, however, depends
upon the extent to which municipalities are considered "per-
sons" for purposes of section 1983.

In *Monroe v. Pape*, the United States Supreme Court held
that the term "person" as used in section 1983 did not include
local governments. The Court reasoned that since liability ex-
tended expressly only to "persons," governmental liability did
not arise from a police officer's invasion of privacy, false arrest,
and wrongful detention. Under *Monroe*, it appeared that a
plaintiff's potential recovery would be limited to the relatively
meager financial resources of the individual officer who commit-
ted the alleged wrong and, perhaps, to that of the officer's imme-
diate supervisor. The possibility that a municipality might reim-
burse an officer in its employ who was forced to pay a judgment
in a section 1983 action, would not substantially enhance a
plaintiff's opportunity for a large recovery. The jury, typically
reluctant to impose heavy liability on an individual officer,
would not normally be told about the municipality's willingness
to pay the cost of judgment.

Despite the rather conclusive result in *Monroe*, the rule pro-
viding local government immunity under section 1983 was er-
roded in *Monell v. New York City Department of Social Ser-
vices*. In *Monell*, the Court decided that municipal liability
could indeed arise under section 1983, not under a theory of re-
sondeat superior, but where the conduct complained of was
part of official policy or custom, whether the policy or custom
was express or implied. *Monell* did not decide, however, whether
local governments retained some qualified immunity in section
1983 actions based upon an individual immunity of public of-
icers. That question was addressed by the Court two years later
in *Owen v. City of Independence*. In *Owen*, the Court con-
cluded that the municipality of Independence, Missouri did not
have even a qualified immunity from suit for the alleged mis-

deeds of the city manager and city council, although they acted in good faith, so long as their misconduct arose under color of their municipal office.\textsuperscript{15}

The susceptibility of local governments as well as individual police officers and police commanders to suit under section 1983, described above, ensures that such action will be used increasingly as the framework for challenges to police misuse of force in every form. Section 1983 is especially attractive to plaintiffs challenging official misconduct because the trial court may award attorneys fees to the prevailing party.\textsuperscript{16}

The United States Supreme Court, however, has not entirely eliminated barriers to liability of municipalities under section 1983. Soon after the Owen decision, the Court found that punitive damages could not be recovered from a municipality. In \textit{City of Newport v. Facts Concerts, Inc.},\textsuperscript{17} the Court observed that there was nothing in the section 1983 legislative history to suggest that Congress intended to deprive local governments of their historic immunity from punitive damages liability; nor did the Court see any public policy interest sufficient to overcome traditional immunity. The cost of a punitive award, the Court observed, would fall ultimately on the innocent taxpayer.\textsuperscript{18}

In any event, it seems clear that under the present state of the law, local governments must clearly announce a policy sharply narrowing the authority of police officers to rely upon the use of deadly force, or face the prospect of liability under section 1983 for the violation of victims' civil rights. Ironically, it has been noted that restrictions on police use of force by either police departments or municipalities, in excess of state law limitations, may provide the basis for civil liability that would not otherwise arise under state law.\textsuperscript{19}

Regrettably, the reaction of police and prosecutors to threatened civil rights actions often is limited to a search for

\textsuperscript{15} Although it has been noted that § 1983 provides no express immunities, the Court has held that prosecutors are totally immune from suit under § 1983 for acts done as part of the prosecutorial or judicial function. That limitation persists. \textit{Imbler v. Pachtman}, 424 U.S. 409 (1976).


\textsuperscript{17} \textit{453 U.S. 247 (1981).}

\textsuperscript{18} \textit{Id. at 267.}

\textsuperscript{19} \textit{See Ronkowski, Uses and Misuses of Deadly Force, 28 De Paul L. Rev. 701, 727-28 (1979).}
means to discourage potential plaintiffs from pursuing complaints. For example, attempts may be made to thwart civil suits by threatening complainants with criminal prosecution. The typical scenario finds the police or prosecution attempting to elicit a promise from the prospective complainant not to bring a civil action or internal disciplinary complaint, in exchange for dismissal of a pending or potential criminal complaint, whether or not the criminal charge is well founded. This kind of activity has been successfully disguised within the plea bargaining process. Where coercion exercised against a complainant has been exposed, it has been condemned by courts as violative of citizens' first amendment right to complain about the alleged misconduct of an officer and to resort to the remedy of a civil suit.20 In any event, it is unlikely that any promise by a victim of official misconduct not to sue in exchange for the dismissal or withholding of a criminal charge would be binding. It is likely that such a promise would be found void as a product of unlawful coercion.21

Perhaps the most appalling recent example of unlawful official action to avoid the consequences of excessive use of deadly force by police is found in Webster v. City of Houston,22 mentioned above. In that case it was found that Houston police officers had been taught, from their police training days on, to carry a second hand gun with them, in addition to their service revolvers, to lay next to a civilian victim who had been shot by police, where the victim was in fact initially unarmed. As to that practice, the Webster court concluded:

20. See MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970); Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968).

In Lewis v. City of New Orleans, 415 U.S. 130 (1974), a woman automobile passenger told the police officer of her unhappiness with police performance following the officer’s citation of the driver, her husband, for an alleged traffic violation. The language the woman used was plainly insulting and profane. As a result, the officer charged her with a city ordinance violation which made it an offense to “wantonly curse or revile, or to use obscene or opprobrious language” to a police officer. The Court reversed the conviction, holding that, under the first amendment, a citizen has a right to express her opinion about the work of a police officer in strong language. See also United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (to successfully invoke the defense of discriminatory prosecution, a defendant must establish that the police officer’s choice to prosecute him was based on an unjustifiable standard which violates his rights to due process under the fourteenth amendment).

21. See Restatement (Second) of Contracts § 175 (1979).

22. 689 F.2d 1220 (5th Cir. 1982).
[T]he use of a throw down weapon was well nigh universal throughout the police department. From their earlier days in the police academy, recruits surreptitiously learn to ‘protect themselves’ by employing a throw down. . . . Use of a throw down was] a living part of official policy at HPD.23

In short, the Houston police department employed a systematic scheme for falsifying the evidence surrounding the use of lethal force by police. This falsification of evidence was not only condoned, but encouraged at the highest police command level.24

Hence, our brief review of the potential for relief from abusive police practices in the use of deadly force through civil litigation indicates that relief by this method has been partial, and that the method itself is strongly resisted by police. For restriction of police discretion to use deadly force against fleeing felony suspects, we must look beyond the remedy of the individual civil suit.

DEADLY FORCE DEFINED

Section 3:11 (2) of the Model Penal Code defines deadly force as:

force which the actor uses with the purpose of causing or which he knows will 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.25

The foregoing definition of deadly force adequately describes the phenomenon for our purposes. Note that the definition of deadly force hinges upon the weapon used and the state of mind of the actor, not upon the outcome. A suspect’s death may occur in a variety of circumstances, though force usually viewed as short of deadly is used: e.g., striking a blow with a fist.

23. Id. at 1227.
24. Id.
The fist may cause death in an unusual situation, but a fist alone is not usually considered a deadly weapon. For our purposes, deadly force will be taken to include force involved in the use of inherently deadly weapons only: guns, knives, etc.

Common Law—Fleeing Suspect

Simply stated, it was the common law rule that lethal force could not be used to effect the arrest of a person suspected of committing a misdemeanor, even though failure to use such force would result in the escape of the suspected offender. On the other hand, if it reasonably appeared to the officer that only through the use of deadly force could one suspected of any felony be prevented from escaping, then without exception the use of deadly force was authorized.

Contemporary decisions based on the common law are not consistent regarding a police officer's right to use deadly force to arrest a person where the felony was not committed in the presence of the officer. In most American jurisdictions, the officer may use deadly force when necessary to effect the arrest, whether or not the crime occurred in the presence of the officer, provided there is probable cause to believe that the suspect committed the felony. A more restrictive standard is maintained by a few common law based jurisdictions: specifically, deadly force may be used only when the crime was committed in the presence of the officer. In most jurisdictions in which the use of deadly force by police officers is governed by statute, lawfulness has been made to hinge, in this respect, upon whether or not there is probable cause to believe that the offense occurred and that the party against whom force is used is the offender.

The common law rule authorizing the use of lethal force to capture a suspect fleeing from any felony, where less drastic action would not reasonably appear to accomplish the task, was based in large measure upon the fact that during the development of the early common law in England, the death penalty was imposed upon almost all convicted felons. Thus, there was

26. See Deadly Force to Arrest, supra note 25.
27. Id. at 364.
28. LAFAYE & SCOTT, CRIMINAL LAW 404-05 (1972).
29. See, e.g., PERKINS & BOYCE, CRIMINAL LAW, 1100-01 (3d ed. 1982).
30. Sherman, Execution Without Trial: Police Homicide and the Constitution, 33
relatively little disproportion between the penalty of death on conviction and death at the hands of a pursuing police officer. Today, however, society has sharply restricted those crimes for which the death penalty may be imposed. In the United States, the death penalty may be imposed only where the offender has been convicted of murder, and then only in special circumstances. If the offender has been convicted of murder, but guilt is found on the basis of accessoryship or principleship of a lesser degree, for example, when the convicted party is not the actual killer, the state's authority to impose the death penalty is doubtful. Furthermore, upon conviction, the felon sentenced to death has available a host of post conviction review procedures. In short, since the days of the early common law, society has determined that the sentence of death is appropriate in only a miniscule number of cases, and then, only after the most painstaking of judicial investigations. In contrast, the continuing right of police in many jurisdictions to utilize deadly force in a wide variety of circumstances to capture fleeing felony suspects reserves for the police a degree of authority which society has deemed excessive even in the hands of the nation's highest tribunals. As a result, some state legislatures have responded to our changing philosophy of punishment by limiting police use of lethal force. Approximately twenty-three states, however, have not materially changed the common law rule on police use of lethal force to capture a fleeing felony suspect. It is urged here


31. Coker v. Georgia, 433 U.S. 584 (1977) (death penalty punishment is excessive for rape conviction); see also Roberts v. Louisiana, 428 U.S. 325 (1976) (statute which requires the death penalty whenever a defendant is found guilty of murder in the first degree violates the eighth and fourteenth amendments).

32. Enmund v. Florida, 458 U.S. 782 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). However, in People v. Ruiz, 94 Ill. 2d 245, 447 N.E.2d 148 (1982), the Illinois Supreme Court held that Enmund does not bar the death penalty for offenders who, though they are not the actual killers, were substantially involved in the killings and intended the acts which eventually led to the killings.

33. Typically, jurisdictions that have codified the common law rule permit a police officer to use lethal force to stop a fleeing felon when he reasonably believes that such use of force is necessary. See, e.g., Ark. Stat. Ann. § 41-510 (1947). Other jurisdictions require that a reasonable police officer would, in the same situation, use lethal force. See, e.g., Nev. Rev. Stat. § 200.140 (1979); Miss. Code Ann. § 97-3-15 (1983) (any felon); Mont. Rev. Codes Ann. § 94-2512 (1947) (any felon); Conn. Gen. Stat. § 53a-22(C2) (1958) (police officer must reasonably believe that the person pursued committed or at-
that considerably greater restraint upon police is sorely needed. There is no review procedure that will revive the suspect killed by a police officer.

**CONCEPTS UNDERLYING LEGISLATION AND COURT DECISIONS LIMITING THE AUTHORITY OF POLICE TO USE DEADLY FORCE**

No one has yet seriously suggested that police use of lethal force be limited to occasions on which the offense involved is murder, nor is such a suggestion made here. Persons suspected of crimes deemed less serious than murder may present an immediate threat to human life when at large and the need to capture such persons is justification for the use of deadly force by police. Hence, it is argued here that society's general interests are best served by a regulation of police use of lethal force which strikes an accommodation between the harsh common law rule authorizing the use of lethal force against all fleeing felony suspects and modern judicial punishment restrictions.

One of the more popular legislative modifications of the common law rule regarding the police officer's right to use deadly force follows the line of limiting the right to cases involving forcible felonies, i.e., rape, robbery, burglary, murder and

tempted to commit a felony); Fla. Stat. § 776-05 (1961) (use of lethal force is permitted when necessary to apprehend any felon). In California a police officer is permitted to use lethal force to effect an arrest for any felony. Cal. Penal Code § 196 (West 1954). However, in 1977, the California Court of Appeals held that despite the language of the statute, police officers were permitted to use lethal force only when the suspect was believed to have committed a forcible felony. According to the court, interpretation of the statute to encompass any felony would render it unconstitutional. Kortum v. Alkite, 138 Cal. Rptr. 26 (Cal. App. 1977).

Some jurisdictions have promulgated the common law rule through case law. In Maiorana v. MacDonald, 598 F.2d 1072 (1st Cir. 1979), the court of appeals held that to use lethal force a police officer must reasonably believe in good faith that such force is necessary to effectuate the felony arrest. In Vaccaro v. Collier, 38 F.2d 863 (D. Md. 1930), the court held that a police officer may use lethal force against anyone who has committed or may reasonably be believed to have committed a felony. In other case law jurisdictions, the police officer is permitted to use lethal force when he reasonably believes that it is necessary to effectuate a felony arrest. See, e.g., Jackson v. District of Columbia, 412 A.2d 948 (D.C. App. 1980); Baltimore & O.R. Co. v. Stube, 11 Md. 119, 73 A. 697 (1909); Commonwealth v. Young, 362 Mass. 597, 96 N.E.2d 133 (1950). In People v. Doss, 406 Mich. 90, 276 N.W.2d 9 (1979), the court held that police have the right to use lethal force when such use is reasonable under all of the circumstances. Those circumstances must include a reasonable belief that there is great danger to the individual officer or to others.
like offenses, or offenses where deadly force was actually used or threatened, regardless of how the crime is otherwise characterized. Some have suggested even more restrictive rules. One of the most carefully considered court opinions advocating substantially greater limitations upon police use of deadly force than those contained in most current state statutes is Mattis v. Schnarr. 34

The Schnarr case was a civil suit under section 1983 arising out of the killing of an eighteen year old youth who had broken into an unoccupied office of a golf driving range. The decedent was unarmed, and was sufficiently fleet of foot to have escaped pursuing officers, had not one officer shot and killed the offender. The officer had shouted a warning that he would shoot if decedent did not stop. Decedent did not stop and the officer fired the fatal bullet. 35

The case arose under a Missouri statute which permitted an officer to use deadly force against a fleeing suspect if the person had committed any felony and it reasonably appeared that his escape could not be prevented except by the use of deadly force: essentially the common law rule. 36 Decedent's father, as plaintiff, argued that the statute violated on its face the due process and equal protection clauses of the fourteenth amendment because the life and death authority vested in the police by the statute allowed police to kill suspected offenders even when the crimes allegedly committed were relatively minor. Further, the father argued that the use of force against his son was unreasonable because there was no evidence that the suspect had presented any real danger to the police or the public. 37

The Eighth Circuit could see little reason for the continuation of an English common law rule of ancient origins, developed under vastly different conditions from those prevailing today. As the court noted, English common law, when adopted in a United States jurisdiction, must be interpreted in light of the limitations on state action imposed by the United States

35. 547 F.2d at 1009.
37. Mattis v. Schnarr, 547 F.2d at 1011.
Constitution.  

Proceeding from this foundation, the court concluded that where the maximum penalty authorized by legislation for the commission of a crime is significantly less severe than death, it is a gross anomaly to permit the state to kill the suspect through police action, merely because use of lethal force was necessary to apprehend the suspect immediately. The offense committed in Schnarr was breaking and entering into an unoccupied store, a crime not usually threatening to life. Nor was the offender himself a potential threat to human life. He displayed no weapons and he fled on foot. Although the offense in Schnarr was categorized as burglary, a forcible felony under modern criminal statutes and a serious felony at common law because it applied only to nighttime entries into dwellings, the acts of the Schnarr offender were far less grave than the “forcible” classification of the crime indicates. The offender’s death in Schnarr, at the hands of a pursuing police officer, exceeded enormously any penalty that a judge might impose. Moreover, the court noted, the right to trial and all the ancillary proceedings that that right entails must be strictly satisfied under the Constitution before the duly authorized sentencing agency, the court, can impose punishment. When the decision to use deadly force against a suspect is made by a police officer, no such due process protections exist.

The fundamental constitutional right of the fleeing felony suspect to life, guaranteed by the fifth and fourteenth amendments, should give way to police authority to use deadly force only if the state can demonstrate an equivalent or greater interest in permitting police to use deadly force to effect the offender’s capture. In situations where the suspect presents a grave threat to the bodily security of the police officer or the general public, such an interest is present. Commission of a crime classified as a felony, however, is not enough by itself to show that the suspect presents the required grave threat. Felonies, the Schnarr court says, “are infinite in their complexity,
ranging from the violent to the victimless. The police officer cannot be constitutionally vested with the power and authority to kill any and all escaping felons, including the thief who steals an ear of corn, as well as one who kills and ravishes at will."

Thus, the court found the Missouri statute authorizing the use of deadly force against all fleeing felons, the statute on which the police officers in Schnarr relied, unconstitutional. Underlying the Schnarr decision was the court's perception that use of deadly force against the suspect fleeing unarmed from a non-violent burglary had exacted a punishment grossly disproportionate to the crime committed, a punishment executed on the spot without benefit of mandated procedural protections.

Although the Schnarr decision was reversed by the United States Supreme Court on unrelated grounds, the Eighth Circuit has reiterated the rule in Schnarr in a subsequent case, and that decision remains in force. The Schnarr rule has had a mixed reception in the courts. The Alaska Supreme Court, in dictum, has agreed with the Schnarr rule, but the Minnesota Supreme Court has rejected it. The position of the Sixth Circuit on a similar question in Wiley v. Memphis Police Department and Garner v. Memphis Police Department is discussed below. Despite the significance of the Schnarr decision for potential liability of local political subdivisions arising out of police use of deadly force against fleeing felony suspects, the case has prompted little action in state legislatures, even those

43. 547 F.2d at 1020.
44. Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978), cert. denied, 439 U.S. 912 (1978). Landrum involved the police killing of a suspected burglar of a gasoline station. The station was closed at the time of the offense, the suspect was unarmed, and the police had no reason to believe that the suspect was carrying a weapon. Nebraska state law was interpreted to limit police use of deadly force to those cases in which the fleeing suspect threatened to use or did use deadly force in the crime, or where the police believed that there was a substantial risk that the suspect would cause death or great bodily harm unless captured immediately. In attempting to establish their good faith, police defendants relied upon a police department directive permitting officers to use deadly force to capture any person suspected of committing any felony, when deadly force appeared to be the only way to effect an immediate arrest. See also Russ v. Ratliff, 538 F.2d 799 (8th Cir. 1976), cert. denied, 429 U.S. 1041 (1977).
48. 710 F.2d 240 (10th Cir. 1983).
49. See infra text accompanying notes 50-61.
within the Eighth Circuit. The importance of the issues addressed in Schnarr and the implications of the approach used by the Eighth Circuit, however, guarantee that the decision will be influential in the courts and legislatures of other jurisdictions in the future.

SIXTH CIRCUIT DECISIONS: WILEY AND GARNER

Soon after the Mattis v. Schnarr decision, the Sixth Circuit faced a challenge to a Tennessee statute that authorized police to use deadly force in pursuit of a fleeing felony suspect. In Wiley v. Memphis Police Department a sixteen year old youth had been killed by police fire as the youth was attempting to flee from the nighttime burglary of a sporting goods store. Police found two shotguns and ammunition taken from the burglarized store next to the dead body of the offender.

The court’s conclusion that pursuing police were aware that firearms were present in the burglarized premises, and the weapons and ammunition found near the fatally wounded suspect, lessened the relevance of the case for purposes of comparison with Schnarr. Nevertheless, two judges of the three judge Sixth Circuit panel in Wiley expressed hostility to the Schnarr ruling, characterizing it in the language of the Schnarr dissent as a recognition of a “constitutional right to commit felonious offenses and to escape the consequences of those offenses.”

Two years later a different Sixth Circuit panel addressed the deadly force issue in Garner v. Memphis Police Department, a case factually similar to Schnarr. In Garner, an unarmed fifteen year old boy was killed by police while fleeing from the burglary of an unoccupied residence. Before firing the fatal shots, the officer had shined his flashlight upon the boy as the boy was attempting to scale a fence. The officer clearly saw that the offender was a youth and was apparently unarmed.

The father of the decedent sued the city and the individual

51. Id. at 1249.
52. Id. at 1251.
53. Id. at 1253 (quoting Mattis v. Schnarr, 547 F.2d 1007, 1023) (Gibson, J., dissenting).
54. 600 F.2d 52 (6th Cir. 1979).
55. Id. at 53.
officers involved under section 1983 for wrongful death resulting from violations of the fourth, eighth and fourteenth amendments.\textsuperscript{56}

In its first consideration of the Garner case, the Sixth Circuit affirmed the decision of the district court that the individual officer who shot the fleeing suspect was not liable in a section 1983 suit because the officer had relied in good faith on Tennessee law which permitted police to use deadly force against fleeing felons if capture could not be effected by other means. In light of the United States Supreme Court’s decision in Monell,\textsuperscript{57} however, the Sixth Circuit overruled the district court’s dismissal of the father’s section 1983 action against the city.

Garner was argued before the Sixth Circuit again in January of 1983 after the district court, on remand, had found no constitutional violation in the challenged police action.\textsuperscript{58} The court of appeals held that the Tennessee statute authorizing police to use deadly force against fleeing felony suspects to prevent their escape, although the suspects are unarmed and nonviolent, violated the fourth amendment protection against an unreasonable seizure of the person, as well as fourteenth amendment due process rights.\textsuperscript{59}

Furthermore, the court found that the Tennessee statute was unconstitutional “because it does not put sufficient limits on the use of deadly force. It is ‘too disproportionate.’ It does not make distinctions based upon ‘gravity and need’ nor on the ‘magnitude of the offense.’”\textsuperscript{60}

Although the Sixth Circuit quoted Schnarr with approval,\textsuperscript{61} the constitutional restrictions on police use of deadly force to capture fleeing felony suspects as delineated by the Sixth Circuit are more limited than those set out in Schnarr. “The officers may be justified in using deadly force,” the Sixth Circuit found, “if the suspect has committed a violent crime or if they have probable cause to believe that he is armed or that he will endan-

\textsuperscript{56} Id.
\textsuperscript{57} Monell v. New York City Department of Social Services, 436 U.S. 658 (1979).
\textsuperscript{58} Garner v. Memphis Police Department, 710 F.2d 240, 242 (6th Cir. 1983).
\textsuperscript{59} Id. at 246.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 247.
ger the physical safety of others if not captured." As noted by the court, the standard it announced follows the outline of the Model Penal Code. The Code provisions on the use of deadly force by police officers, examined below, represent a substantial, if not wholly adequate, restriction of police power.

COMMONLY FOUND MODIFICATIONS OF LETHAL FORCE AUTHORITY

Despite the tremendous expansion of the modern criminal law, the willingness of society to provide extensive procedural guarantees within the criminal justice system, and the abolition of degrees of criminal involvement, large numbers of jurisdictions in the United States retain what is in substance the old common law rule regarding the use of lethal force by police in pursuit of a felony suspect. Even in those jurisdictions where modifications have been made, it is suggested here, restrictions on police authority to use lethal force against fleeing felony suspects have not gone far enough.

62. Id. at 246.
63. Id. at 247.
64. See supra text accompanying note 33.
65. The following summarizes the law limiting police use of deadly force to arrest fleeing felony suspects in some states that have departed from the common law rule.

In Virginia, police may use deadly force, if necessary, to effect arrest only for "capital felonies," not minor ones. Hendricks v. Commonwealth, 178 S.E. 8, 10 (Va. 1935). New Hampshire permits a police officer to use deadly force if he reasonably believes the offender has committed a felony and is using a deadly weapon to escape, or if the offender is otherwise likely to seriously endanger human life if not captured. Before using deadly force, however, the officer must make a reasonable effort to warn the offender that he is a policeman attempting to effect an arrest. N.H. REV. STAT. ANN. § 627:5 (1974). In Kansas, a police officer may use deadly force to arrest a fleeing felon who is using a deadly weapon to escape, or who has otherwise indicated that he will endanger human life unless arrested without delay. KAN. STAT. ANN. § 21-3215 (1981). In Alaska, a peace officer may use deadly force to arrest for any felony involving the use of force against the person, or any offense where the suspect is escaping while in possession of a firearm, or any offense where the suspect's escape will endanger lives of others. ALASKA STAT. § 11.81.370 (1962). The relevant Colorado statute authorizes the use of deadly force by a peace officer when the crime is a felony and the suspect used a deadly weapon. Also, while authorizing the use of deadly force to arrest a suspect fleeing in a manner dangerous to others, Colorado specifically eliminated from this category the suspect fleeing in a motor vehicle and violating motor vehicle laws. COLO. REV. STAT. § 18-1-707 (1973). In Hawaii, peace officers may use deadly force to arrest for any felony involving use of deadly force or any felony where there is substantial risk a fleeing suspect will cause death or serious bodily injury unless captured without delay. Such use of deadly force, however, is only justifiable if the peace officer believes the force employed does not create a substantial risk of injury to innocent persons. HAWAI REV. STAT. § 703-307
A frequently employed legislative modification of common (1976). Illinois authorizes a peace officer, or anyone he has summoned to assist him, to use deadly force to arrest for a forcible felony, or any offense where the suspect is using a deadly weapon to escape, or any offense in which the suspect otherwise indicates he will endanger human life if not captured without delay. ILL. REV. STAT. ch. 38, § 7-5 (1981). In Iowa, a peace officer may use deadly force to arrest when the suspect has used deadly force in commission of a felony or when the officer believes the suspect would use deadly force unless immediately apprehended. IOWA CODE ANN. § 804.8 (West 1979). Kentucky allows a peace officer to use deadly force to arrest a suspect who used deadly force in commission of a felony or who is otherwise likely to endanger human life unless captured. KY. REV. STAT. § 503.090 (1975). A Maine law enforcement officer may use deadly force to arrest a suspect whom he reasonably believes has committed any offense involving the use of deadly force or is otherwise likely to seriously endanger human life or cause serious bodily injury if not captured. Before using deadly force, the officer must make a reasonable effort to warn the fleeing suspect that he is a law enforcement officer attempting to effect an arrest. The warning is not necessary, however, if the officer reasonably believes the suspect already knows he is being pursued by the officer. ME. REV. STAT. ANN. tit. 17-A, § 107 (1964). In Minnesota, a peace officer may use deadly force only when necessary to effect an arrest for a felony involving the use of deadly force, or a felony where the officer believes the fleeing suspect will cause death or great bodily harm unless captured without delay. The statute specifically states that it provides no defense to a peace officer in a civil suit brought by an innocent third party injured as a result of the officer's use of deadly force in effecting an arrest. MINN. STAT. ANN. § 609.066 (West Supp. 1983). A peace officer in Nebraska, or a person authorized to assist him, is justified in using deadly force when he believes it necessary to effect an arrest for a felony involving use of deadly force or a felony where there is substantial risk the suspect will cause death or serious bodily harm if apprehension is delayed. The officer must also believe the force employed creates no substantial risk of injury to innocent persons. NEB. REV. STAT. § 28-1412 (1979). New Jersey allows a peace officer, or a person authorized to assist him, to use deadly force to effect an arrest for the commission or attempted commission of homicide, kidnapping, sexual assault, criminal sexual contact, arson, robbery, or burglary of a dwelling. The force used must not create a substantial risk of injury to innocent persons. N.J. STAT. ANN. § 2C:3-7 (West 1982). New York allows a peace officer to use deadly force to arrest for any felony or attempted felony involving use of physical force against the person, for any offense where the fleeing suspect is armed with a deadly weapon or firearm, and for kidnapping, arson, escape first degree, and burglary first degree. The statute specifically states that it provides no defense for an officer who uses deadly force recklessly with respect to innocent persons. N.Y. PENAL LAW § 35.30 (McKinney 1975 & Supp. 1982). A North Carolina law enforcement officer may use deadly force to arrest any offender who is using a deadly weapon to escape or who otherwise presents an imminent threat of death or serious physical injury to others unless apprehended. N.C. GEN. STAT. § 15A-401 (1978). Deadly force may be used by a Pennsylvania peace officer to arrest or prevent escape when reasonably believed necessary in forcible felony cases, or whatever the offense where the offender is escaping with a deadly weapon or otherwise indicates he will endanger the lives of others unless arrested without delay. 18 PA. CONS. STAT. ANN. § 508 (Purdon 1983). In Texas, a peace officer, or person authorized to act for him, may use whatever force necessary, regardless of the offense, when the officer reasonably believes the offender used deadly force or will cause death or serious injury unless arrested without delay. However, the officer must first make an effort to announce his purpose and identity, unless he reasonably believes his
law police authority to use deadly force against fleeing suspects is the limitation of that authority to crimes involving force, e.g. murder, manslaughter, robbery, burglary, arson, and other like offenses. As noted above however, too many offenses, such as burglary under expanded legislative definitions, are classified as forcible although the behavior involved falls far short of constituting a serious threat to police or public security.

Many of those states modifying the common law rule have adopted restrictions tracking those contained in the Model Penal Code. The American Law Institute's Model Penal Code, in the 1962 official draft, recommends the following legislation on police authority to use deadly force to complete an arrest:

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

identity is already known to the suspect or cannot be made known to him. Texas Penal Code Ann. § 9.51 (Vernon 1974). In Utah, a peace officer, or persons acting under his direction, may use deadly force to arrest for a forcible felony, when the offender is using a deadly weapon to escape, or when the offender's escape will endanger human life. Utah Code Ann. § 76-2-404 (1978).
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. 66

In pertinent summary, the Model Penal Code does not focus on the classification of the crime allegedly committed, but rather upon the potential danger of the pursued offender, or the use of force in the perpetration of the offense itself. By linking the right of police to use deadly force to the demonstrated dangerousness of the offender to police or the public, the Code represents a significant step toward enforcing a measure of proportionality in the offense/police response equation. Although it is an advance on the common law and upon those modifications of the common law that remain focused on the classification of the crime as the standard by which police authority to use deadly force in pursuit of an offender is determined, the Model Code approach is not without flaws.

Specifically, the Model Penal Code, along with other common law modifications noted above, ignores the question of the

appropriateness of the use of lethal force against fleeing felony suspects who are involved in violent offenses, but to a considerably lesser degree, and who may not have been aware of the use of violence in the crime. For example, the conspirator who performs a relatively minor role in a burglary, remaining outside the premises to provide a warning of approaching danger, might be totally unaware that his confederates inside the premises have killed the householder. Yet such an individual might, under the Model Penal Code, be the subject of the lawful use of lethal force by pursuing police officers. The same is true for the offender whose involvement ended before the crime took place and who did not contemplate the eruption of violence during the completion of the crime. Indeed, it was precisely because of the comprehensive utilization of the death penalty for almost all felony offenders at common law that the law developed the categories of degrees of involvement in crime. That is, categories of involvement were created to prevent the conviction as principals of persons less involved in given crimes because, if convicted as principals, they would be likely to face the death penalty.

Historically, accessories were divided into three categories: accessories before the fact, those who aided, procured, or encouraged the offender in his criminal enterprise prior to the perpetration but who were not present at the time and place of the crime; accessories after the fact, those who were not present at the time of the crime but who aided the offender to escape apprehension; and, accessories to the crime itself, those present at the scene of the crime with intent to aid the perpetrator. Accessoryship at the time of the crime was abolished by the common law early on and replaced with the concept of principal in the second degree. The principal in the first degree was the actual perpetrator. As resort to the death penalty became less frequent, the need for precision in the classification of degrees of involvement lessened.

Legislatures responded by eventually abolishing the accessoryship and principal in degree categories with the exception, generally, of the category of accessory after the fact. Today, all involved in a crime typically are grouped together under a single

68. See generally id. at 643-85.
principalship heading. For the purposes of the authority of police officers to use deadly force against fleeing suspects, the result of eliminating concepts of degree and accessoryship is to vastly increase the scope of police power.

It is not argued here that we return to an era of categorization of degrees of criminal involvement. Nevertheless, if the basis for the use of lethal force to apprehend a fleeing suspect is the classification of crime committed or, as in the Model Penal Code, the force used in the commission of the crime, is it not logical to consider degrees of criminal involvement in determining when the police may use lethal force if the suspect pursued is presently unarmed? The argument is useful to demonstrate the problems inherent in an approach to limitation of police authority based upon the use of violence in the commission of the crime.

Neither modification of the common law rule defining the authority of police to use lethal force in the apprehension of a fleeing suspect, discussed above, entirely satisfies the need of our society for physical security of citizens. Nor does current law in most jurisdictions provide police with a workable standard to apply quickly in arriving at the decision to use deadly force to capture or stop a fleeing suspected offender. Accordingly it is urged here that a different standard be employed. The test for allowing police to resort to deadly weapons to stop the flight of any suspect should hinge exclusively upon a reasonable belief that the particular offender pursued is armed and/or dangerous to human life. This simple test appears to be a practical one for police officers who would have to use it in circumstances of extraordinary pressure. It would permit police to act entirely upon what they actually observe in their pursuit of a suspect. Officers would not be encouraged to speculate about what occurred at the scene of a crime nor to test their knowledge of the sometimes obscure concepts of crime classification.

**Conclusion**

Few legislatures and few courts have exhibited enthusiasm for the creation of stricter limitations on police authority to use deadly force in effecting the capture of fleeing felony suspects. Crime is regarded as one of our nation's most pressing concerns, and popular political wisdom maintains that the public wants
more power and discretion placed in the hands of police, not less.

Yet there is something very wrong with a system of law that allows police officers to kill many more people in many more situations than a court can order killed after a criminal trial is completed.

Our nation prides itself on being a government of laws, not men, and on its willingness to provide constitutional protections in the judicial process even to the most depraved and despised of its citizens. Despite this environment of concern for constitutional rights, most states today follow what is substantially the common law rule permitting police broad life and death authority over the lives of fleeing felony suspects. Because of the expansion of the number of crimes considered felonies in modern penal codes, adherence to the common law rule serves to vastly increase the scope of the police right to kill. It is ironic that as the state’s authority to take the life of a convicted offender has been sharply reduced, the right of police officers to take the life of a suspect prior to trial has been sharply and consistently expanded. Clearly, the common law justification for police authority to kill fleeing felony suspects: that is, that the captured felon would almost surely be executed for his crime, is invalid today.

Currently, many states forbid the death penalty, and those that permit it do so in only the most limited circumstances. Police power to kill fleeing felony suspects creates a framework in which the penalty of death can be performed outside of the judicial process for the commission of relatively minor offenses. While the situation is not as dramatic in those states that have modified the common law rule, even those states allow police authority before trial far in excess of the power of the court after trial.

In many communities, relations between citizens and the police are strained. Police shootings that result in the death of fleeing suspects serve to heighten community hostility toward law enforcement officers. The community is quick to perceive a disproportion between the seriousness of the crime allegedly committed by the fleeing suspect and the penalty exacted by police. Broken ties between citizens and police take a toll on society in diminished police effectiveness.

It is urged here that the public interest is best served by
limiting police authority to use lethal force against fleeing felony suspects to those cases in which the suspect pursued is reasonably believed to present an immediate threat to life. The classification of the suspected offense should play no role in determining the right of police to use deadly weapons. This test is simple in application, for it hinges on what the pursuing officers actually observe, not on speculation about what occurred at the crime scene nor on the officers' understanding of the classification of criminal offenses. The standard proposed here also promises to achieve a greater proportionality between the seriousness of the crime allegedly committed and the punishment carried out. Our society requires fairness in criminal proceedings. That requirement is not waived against a fleeing felony suspect. Flight alone should not expose a suspect to possible death at the hands of police.