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Harper, Robert Berkley

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ACCOUNTABILITY OF LAW ENFORCEMENT OFFICERS IN THE USE OF DEADLY FORCE

Robert Berkley Harper*

I. INTRODUCTION

The importance of law enforcement officers¹ in today's society is without question. It is their unique responsibility to initiate the criminal justice process,² as well as to carry-out a myriad of services that benefit society. The majority of law enforcement officers in this country are professional, dedicated individuals who execute their sworn duties in a responsible and judicious manner. Notwithstanding the officers' worth and credibility, a need for accountability exists, as it does within all organizations and agencies in both the public and private sectors of our nation. Accountability is of special importance in situations where society permits a class of people to carry deadly weapons to be used against other citizens, since a potential abuse of this granted authority may result. To minimize this potential, the conditions under which this class may act must be strictly controlled. Accountability insures that law enforcement officers and agencies function in an effective manner without abuse to the citizenry.³

In recent years interest and concern has heightened in this country concerning the death penalty for convicted murderers, yet there has been little interest surrounding the most frequent means by which the states take a life. At least once each day, somewhere in the United States, a law enforcement officer fires a weapon at a civilian.⁴ According to the National Center for

* Assistant Professor of Law, B.S. University of Pittsburgh, 1962, J.D. University of Pittsburgh 1971. Police Legal Advisor for the City of Pittsburgh 1971-1972.

1. The term "law enforcement officer" is used throughout this article to include all individuals who are under oath and have the power to arrest. This not only includes police officers, but other governmental agents such as sheriffs, federal agents, etc. This follows the view taken by the RESTATEMENT (SECOND) OF TORTS, § 114 at 192 (1966):

Peace Officer.

A peace officer is a person designated by public authority, whose duty it is to keep the peace and arrest person guilty or suspect of crime.

2. Law enforcement agencies in the United States effected an estimated 10.2 million arrests in 1979 for all criminal infractions other than traffic violations. Nationally, the arrest rate per 1,000 inhabitants was 46. See: Crime in the United States, Uniform Crime Report, U.S. Department of Justice, (Washington, D.C. Released September 24, 1980) p. 186 [hereinafter cited as "Uniform Crime Report"].

3. ABA Project on Standards for Criminal Justice; The Urban Police Function, June 1974: *Part V. Control Over Police Authority*

5.1 Need for accountability.

Since a principal function of police is the safeguarding of democratic process, if police fail to conform their conduct to the requirements of law, they subvert the democratic process and frustrate the achievement of a principal police function. It is for this reason that high priority must be given for ensuring that the police are made fully accountable to their police administrator and to the public for their actions.

4. Uniform Crime Report, *supra* note 7 and 12. In the United States during 1979, there were an estimated 21,456 murders representing approximately two percent of all violent crimes. This was 10 murder victims for every 100,000 inhabitants in the nation. Of this total, 5.3% were killed

Health Statistics, 3,456 citizens died between 1965 and 1974 as a result of the "legal intervention" of law enforcement officers. This was 3,453 more deaths than the three persons that were put to death by the government after the judicial process in that period.⁵ In 1976, no citizen was executed in any jurisdiction in the United States, yet over five hundred persons were killed by law enforcement officers.⁶ According to the most recent estimates, law enforcement officers may be responsible for anywhere from four to seven percent of all homicides committed in the United States in recent years.⁷ Closely related to this fact is that there is no uniformity among the nation's 15,000 jurisdictions⁸ as to the circumstances under which it is permissible for an agent of the government to use deadly force⁹ against a citizen.¹⁰ These statistics emphasize the need for accountability where deadly force is used by officers against other citizens.

The purpose of this article is to review the current law which permits the use of deadly force by law enforcement officers in apprehending¹¹ suspected criminals. The concern here is with the grant of power to use deadly force as it relates to governmental agents¹² and not as it may apply to private citizens.¹³ Legislative action is necessary¹⁴ to achieve greater accountability of law officers when deadly force is employed.

II. HISTORY OF DEADLY FORCE TO ARREST

The term "felon" was in use long before English common law came into existence.¹⁴ It originated in European feudalism where the social, eco-

under the category of "suspected felony" by law enforcement and private individuals making a total of over 1,000 persons killed that year.

5. Uniform Crime Report, *supra* note 4.

6. There were no executions in the United States from 1968, the first such year on record, to 1977. In 1977 Utah executed one person, ending the ten year moratorium, and in 1979 Florida and Nevada each executed one person.

7. The official death records of the National Center for Health Statistics show a total of 295 deaths by legal intervention of police for 1976. Independent test of the death records data, however, reveal that they are under-reporting police homicides by about 50%. See: Sherman & Langworthy, *Measuring Homicide by Police Officers*, 70 J. CRIM. L. & CRIMINOLOGY 546, 559 (1979).

8. Arthur L. Kobler, "Police Homicide in a Democracy," 31 J. SOC. ISSUES, Winter 1975, 163 [hereinafter cited as "Kobler"].

9. Uniform Crime Report, *supra* note 2 at 1. There are over 15,000 law enforcement agencies that contribute to the FBI crime report in 1979.

10. MODEL PENAL CODE § 3.11(2) (Proposed Official Draft, 1962) definition of "deadly force" is "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm."

11. "Apprehending" a felon by deadly force does not necessarily involve killing that individual. The projectile may wound, graze, or miss entirely and still effectively stop the individual. However, when the state seeks to justify deadly force, it should be required to assume that death will in fact result.

12. In addition to the arrest process, the use of deadly force by law enforcement officers is sanctioned in five other situations: self-defense, to prevent the commission of a crime, to recapture after escape from arrest, to recapture after escape from a penal institution, and to stop a riot. See generally Comment, *Deadly Force to Arrest; Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV., 361, n.2 (1976) [hereinafter cited as *Triggering Review*].

13. There is a movement afoot to limit the arrest powers of private citizens. Following the Model Penal Code, Pennsylvania in 18 P.S. 508(b)(1), he [private citizen] is justified in the use of deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or another."

14. There is a theory that the word "felon" is derived from the Latin term meaning "venomous" or "poisonous" and this is consistent with its early common law usage as an expression of the

nomic and military system of society was based upon the mutual obligation between lord and vassal. Under this system, the breach of fealty was a most grievous action and was viewed to be as serious as a wrong committed against the Deity.¹⁵ Feudal disloyalty was a threat to the entire social structure of twelfth century society and merited the sanctions of forfeiture of all properties and corporal, or even capital punishment.¹⁶ The crime of the felon was so serious by feudal standards that any one who committed a felony was considered so dangerous that their continued freedom was seen as a threat to society at large and their immediate capture was imperative.¹⁷ At least until the fourteenth century, the felon was the outlaw whose life could be taken in the process of effecting an arrest without regard to whether he could be otherwise detained.¹⁸ It made little difference if the suspected felon was killed in the process of capture since, in the eyes of the law, he had already forfeited his life by committing the disloyalty.¹⁹ Those who breached feudal obligations and were punished in this manner were labeled felons.

English common law adopted this terminology to impose liability for the most serious breaches of the King's peace.²⁰ The word "felony" came to signify the character of the crime rather than the form of punishment.²¹ This evolved at a time when only a few crimes were felonies, and all of them involved force or violence.²² It was at this point in history that a law enforcement officer was granted a privilege²³ to kill a fleeing felon if he could not otherwise be taken.²⁴ Officers were granted the power to arrest (1) anyone they reasonably suspected of having committed a felony, if a felony had in fact been committed, or (2) anyone committing a felony in their presence²⁵ and deadly force could be used to effect the arrest.

There were different reasons for the justification of the common law rule permitting law enforcement officers to employ deadly force. First, the use of deadly force was seen as merely an acceleration of the penal process.²⁶ Capital punishment had replaced forfeiture for felonies in that the baseness

threat that outlawry posed to uncertain royal authority. See 2 Holdsworth, *A History of English Law* 358 (1923) at 357.

However, it has been argued that the word is derived from "fee" (estate) and "lon" (price or value). Thus signifying the penalty of forfeiture. See 4 Blackstone, *Commentaries* at 96.

15. *Triggering Review*, *supra* note 12, at 407; See also, 4 Blackstone, *Commentaries* at 95.

16. Comment, *Use of Deadly Force in the Arrest Process*, 31 LA. L. REV. 131 (1970) [hereinafter cited as "Arrest Process"].

17. *Id.* at 132.

18. *Schumann v. McGinn*, 240 N.W.2d 525 at 532-33 (Minn. 1976).

19. Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12 WM. & MARY L. REV. 67, 70-71 (1970) [hereinafter cited as "Statutory Survey"]; See: *Petrie v. Cartwright*, 114 Ky. 103, 105, 70 S.W. 297, 299 (1902).

20. Comment, "Civil Disabilities of Felons", 53 VA. L. REV. 403 (1967). See also: 2 Holdsworth, *A History of English Law* 358 (1923).

21. 4 W. BLACKSTONE, *Commentaries* 95-96.

22. Civil Disabilities of Felons, *supra* note 20 at 406; See cited authority contained in *Triggering Review*, *supra* 12 at 365.

23. The RESTATEMENT (SECOND) OF TORTS § 10 (1965) defines "privilege" as a statement of the fact that "conduct which, under ordinary circumstance, would subject the actor to liability, under particular circumstances does not subject him to such liability."

24. *Supra* note 22.

25. *Perkins*, *Criminal Law* 2d ed. Page 978 (1969) [hereinafter cited *Perkins*].

26. *Supra* note 20.

of the deeds of felons justified death. In committing the felony, the actor had forfeited his right to life.²⁷ Although the protections and formalities of an orderly trial and conviction were dispensed with, the killing of the felon resulted in no greater consequences than those authorized for the punishment of the offense.²⁸ A law enforcement officer could kill a fleeing felon because the felon had forfeited his life and the killing was but a premature execution of the inevitable judgment.²⁹

The privilege that permitted the killing of escaping felons was also predicated on the existing weapons technology of the times. Early common law officers lacked accurate distance weapons so the implements of apprehension of felons was limited to knives, swords, farm tools and halberds.³⁰ The gun had not been invented and crossbows were available only to the most wealthy gentry.³¹ Therefore, the only way a felon could be apprehended was by physically subduing him in hand-to-hand combat or with a hand-held weapon. If death resulted under these circumstances, the homicide was justified.³²

A third significant reason for the common law rule permitting law enforcement officers to kill fleeing felons was to prevent their escape. If a fleeing felon was not immediately apprehended, he usually would escape ultimate arrest, as there were no organized police networks to apprehend criminals. The apprehension process under the common law was formalized by the "hue and cry",³³ an arrest procedure in which an alarm was raised upon the commission of any felony. This practice originated in the late thirteenth century during the reign of Edward I (1272-1307), when persons were known throughout the community and were easily identified and pursued. When a hue and cry was raised, every person had to aid in the pursuit of the felon, or be subjected to liability.³⁴ If the felon was able to evade the individuals chasing him on horse or on foot, he would be able to escape apprehension altogether.

The use of deadly force, however, was limited to the apprehension of felons. At common law, an offense other than treason or felony was a misdemeanor—originally, it was called a trespass.³⁵ If the crime perpetrated was a misdemeanor, the officer was not permitted to use deadly force to

27. The additional conviction for murder made no difference with regard to the degree of punishment because all felonies were capitally punished. Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 52 (1956).

28. *Id.*

29. Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 Van. L. Rev., 71, 74 (1980) [hereinafter cited as "Sherman"].

30. *Id.*

31. Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582, 583 (1929).

32. Sherman, *supra* note 29 at 75.

33. "Hue and Cry", under old English law refers to the loud outcry with which robbers, burglars, and murders were pursued. All who heard the outcry were obliged to join in pursuit of the felon. See: 4 BLACKSTONE, Commentaries at 293.

34. See text and cited authority contained in "Triggering Review," *supra* note 12 at 365.

35. WHARTON'S CRIMINAL LAW § 20 p. 87: "[I]n common usage, the word, 'crimes', is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence, are comprised under the gentle name of "misdemeanor" only. Note 43 cited in Wharton. See also: 4 BLACKSTONE, Commentaries 5.

effect the arrest.³⁶ It was believed that the interest of society in apprehending the misdemeanant was not as vital as the interest in apprehending the felon.³⁷ Most American jurisdictions still recognize the felony/misdemeanor distinction as it relates to the use of deadly force by law enforcement officers.

Common Law Rationale is No Longer Applicable

Neither expedient retribution, inadequate technology, nor escape prevention is justification for the use of deadly force in today's society. Today, few felonies result in capital punishment.³⁸ In fact, many states have eliminated capital punishment from their criminal codes,³⁹ and in those states that have retained capital punishment, it is seldom used.⁴⁰ Society is therefore left with the historical anachronism whereby people can be killed in the process of being arrested for crimes for which the most severe punishment would be incarceration and, indeed, the typical punishment for which is often no incarceration at all.⁴¹

Common law philosophy suited the period in which it developed, but subsequent changes in both law and society make its continued relevance questionable. No longer is "felon" linked with death as it once was in Eng-

36. Patrick Colquhoun, *A Treatise on the Police of the Metropolis* (Montclair, NJ: Paterson Smith) 1969; originally published in 1795, (London) pp. 388-89.

37. See cited authority contained in *Triggering Review*, *supra* note 12, at 364-65; Weissengoff v. Davis, 260 F. 16, 19 (4th Cir. 1919). Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 Neb. L. Rev. 408, 419 (1954); Tsimbinos, *The Justified Use of Deadly Force*, 4 Crim. L. Bull. 3, 17 (1968). [hereinafter cited as Tsimbinos]. Model Penal Code § 3.07, Comment (Tent. Draft No. 8, 1956); See: Caveat to Restatement, (Second) Torts § 131 (1965); *Furman v. Georgia*, 408 U.S. 238 (1972).

38. Fifteen states have entirely eliminated the death penalty. See: Miller and Rubin, *The Law Enforcement Officer's Use of Deadly Force: Two Approaches*, 8 AM. L.Q. 27, 35 (1969) [hereinafter cited as Miller and Rubin].

39. Indeed, since June, 1967, only three persons have been executed in the United States for a criminal offense. See *supra* note 7; Comment, *Mattis v. Schnarr: Deadly Force and Fleeing Felons*, 21 SAINT LOUIS U.L. J. 513, 516 (1977), [hereinafter cited *Force and Fleeing*].

40. A study of the Pittsburgh Common Pleas court found that most white male offenders who had been convicted of serious offenses were placed on probation. All of these criminals had a prior record of at least one felony. The same study revealed that approximately one-half of offenders convicted of aggravated assault and having a record of at least two prior felonies were also released on probation. See M. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* (1977); G. COLE, *CRIMINAL JUSTICE* 335 (1972).

Robbery is undeniably a serious crime; it threatens the victim's life and disrupts public order. In the 1967 victimization survey conducted by the President's Commission on Crime and Administration of Justice, robbery was reportedly one of the most feared crimes. Cf., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, *FIELD SURVEYS II* (1967) with PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, *TASK FORCE REP.: CRIME & ITS IMPACT: AN ASSESSMENT* (1967). Nevertheless, the Pittsburgh study indicates that in that city only 25 percent of convicted robbers received prison sentences. P. Greenwood, *PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE*, 109 (1973).

Pittsburgh was not unique. In Los Angeles, 94 percent of the offenders charged with burglary ultimately received no punishment. Meanwhile, only 27 percent of the convicted robbers having major prior records were sent to prison. In Wisconsin, over a five year period, 63 percent of convicted felons having prior felony records were placed on probation. Babst & Mannering, *Probation versus Imprisonment for Similar Types of Offenders*, 2 J. OF RESEARCH IN CRIME & DELINQUENCY 61-65 (1971).

41. New Jersey does not classify crimes as felonies or misdemeanors, but instead has divided crimes into high misdemeanors and misdemeanors.

land and in the early days of the United States.⁴² Today felony offenses include a wide variety of criminal violations. Along with such typical common law felonies as murder and forcible rape, statutory offenses that have no element of violence are included in the classification.⁴³ Even the common law crime of burglary has been extended by modern statutes to the point where it constitutes either a general attempt or a statutory trespass, while retaining the severe sanctions attached for nighttime intrusion into a dwelling.⁴⁴ There is a broad spectrum of acts classified as felonies by modern statutes simply by the punishment imposed.⁴⁵

Under current United States law the use of capital punishment has been limited to the crime of homicide. This is a drastic change from the common law where all felonies were capital offenses. Many states have eliminated execution as a form of punishment altogether.⁴⁶ In those states that have retained capital crimes, its use has been severely limited due to the antipathy of the penalty by juries and courts.⁴⁷ Few citizens are executed by the states each year compared to the hundreds killed by state agents in arresting fleeing felons. There is a pressing need to re-draw the lines where officers are granted the right to use deadly force against felony suspect citizens to effectuate an arrest.

Our form of policing has changed since its beginnings in England.⁴⁸ At one time American and English systems shared similarities in practices.⁴⁹ In fact, when policing was first instituted in the United States, American officers, like their English counterparts, were not armed.⁵⁰ The American system of policing changed drastically in the mid-eighteenth century when officers took up arms. This change was the result of actions by the police officers themselves and their use of privately owned guns in the performance of duty. The police were allowed to be legitimately armed and today a firearm is a regular part of an American police officer's working equipment.⁵¹ The use of firearms makes it possible to apprehend or kill suspected felons without hand-to-hand combat as was the case in our early history.

The common law rationale requiring an immediate arrest has been undermined severely by the development of organized law enforcement sys-

42. Note, *The Use of Deadly Force in Arizona by Police Officers*, L. & Soc. Order 481 (1973) [hereinafter cited as *Force in Arizona*] 482-83.

43. See: Note, "Reformation of Burglary," 11 WM. & MARY L. REV. 211, 213 (1969).

44. *Jones v. Marshall*, 528 F.2d 132, 139 (1975).

45. See: Comment, "Triggering Review," *supra* 12 pages 366-367.

46. *Force and Fleeing*, *supra* note 45 page 516.

47. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police pp. 3-7 (Washington, D.C.: GPO, 1967) [hereinafter cited as "Task Force Report"].

48. *Id.*

49. New York's locally controlled municipal police carried only clubs. Individual captains encouraged their men to carry revolvers for self-protection against a heavily-armed underworld. By the end of the 1860's revolvers were standard equipment, although they were never formally authorized. Wilbur R. Miller, *Police Authority in London and New York City 1830-1870*, 1 *Criminology Review Yearbook*, 314, 319.

50. *Id.*

51. Note, *Substantive Due Process and the Use of Deadly Force Against the Fleeing Felon: Wiley v. Memphis Police Department & Mattis v. Schnarr*, 7 CAPITAL U. L. REV. 497, 498 (1978) [hereinafter cited "Due Process"].

tems at the state and federal levels.⁵² These groups generally cooperate and form an effective nationwide police network. With increasing technical and scientific sophistication in law enforcement techniques, the likelihood that a felon will escape ultimate apprehension has been reduced substantially.⁵³ A suspected criminal who escapes will often be arrested at some later time.

Clearly, the circumstances which once justified the common law felony/misdemeanor distinction are no longer present in today's society.⁵⁴ Under modern legislation many statutory misdemeanors involve conduct more dangerous to life and limb than many felonies.⁵⁵ Normally, the distinction between felonies and misdemeanors depends upon the nature of the penalty provided for the particular offense and not upon the risk of danger to society. Virtually no commentator today supports the common law felony/misdemeanor distinction.⁵⁶

It seems difficult and illogical for a police officer to determine into which category a given offense falls in order to decide the amount of force that he or she is permitted to use to apprehend a suspected criminal. It would be more realistic for the officer to evaluate the risk of danger to society *prior* to the decision to use deadly force against a person fleeing from arrest. At the present time, an officer must be well versed in the distinction between misdemeanor and felony, for the statute which permits him to be definitively forceful when arresting or pursuing a felon does not give him parallel power in respect to misdemeanants.⁵⁷

III. THE CURRENT STATE OF THE LAW

All states currently permit the use of deadly force by law enforcement officers to arrest or apprehend certain suspected criminals. Law enforcement officers are permitted to use deadly force to stop all or some fleeing felons in every jurisdiction in the United States. In this important area of

52. "Force and Fleeing", *supra* note 44, at 515.

53. *Id.* at 516.

54. MODEL PENAL CODE § 3.07 Comment (Tent Draft No. 8, 1956); Greenstone, "Liability of Police Officers for Misuse of Their Weapons," 16 CLEV.-MAR. L. REV. 397 (1967) [hereinafter cited as "Greenstone"].

55. MODEL PENAL CODE § 3.07, Comment 3 (Tent. Draft No. 8, 1958) at 56-58.

Today, the significance of the distinction between felony and misdemeanor has wholly altered. Relatively few crimes are punishable by death. A very small percentage of arrests actually make are for offenses which are capitally punishable . . . Moreover, under modern legislation, many statutory misdemeanors involve conduct more dangerous to life and limb than some felonies. Compare, for example, such felonies as the distillation of alcohol in violation of the revenue laws, on the one hand, and such misdemeanors as reckless and drunken driving, on the other. Even a felony which often is committed in such a way as to endanger life, may in many particular cases be committed in a fashion which creates no such peril. Accordingly the felony-misdemeanor distinction is inherently incapable of separating out those persons of such dangerousness that the perils arising from failure to accomplish immediate apprehension justify resort to extreme force to accomplish it . . . As a result of these difficulties and the awareness that the reckless use of firearms by peace officers can create a social problem of no mean proportions, a number of attempts have been made to alter and rationalize the existing rules relating to the use of deadly force in arrest situations . . .

56. Day, *Shooting the Fleeing Felon, State of Law*, 14 CRIMINAL LAW BULLETIN, 285 [hereinafter cited "Day"]: "The slightest reflection will show these reasons for the felony/misdemeanor distinction no longer exist."

57. Safer, *Deadly Weapons in the Hands of Police Officers, on Duty and off Duty*, 49. JOURNAL OF URBAN LAW, U. OF DET. LAW REV. 534 (1972) [hereinafter cited as "Safer"].

criminal law and justice the discretionary power placed in the hands of a law enforcement officer is inordinate. At all times, officers are faced with split second decisions, without the aid of trial, judge and jury, whether to kill or not to kill.⁵⁸

A. *Common Law States*

At least twenty states have adopted the common law approach by statute which permits law enforcement officers to use deadly force against all suspected felons.⁵⁹ This is the least restrictive policy granting officers the privilege to use their weapons against other citizens suspected of crimes—a privilege granted even if the officer is arresting the person without a warrant and even though a felony was not actually committed.⁶⁰ It is sufficient that the officer have reasonable cause, based on either his own knowledge or from facts communicated to him by others, to suspect that the one being apprehended is a felon.⁶¹ If the person being arrested for a felony charge endeavors to escape, the officer may kill and the homicide will be justified.⁶²

There is no requirement that a felony "in fact" be committed in order to justify the homicide. Most courts hold that the felony requisite is satisfied if the police officer had reasonable grounds to believe that the arrestee or escapee was reasonably believed to be a felon.⁶³ Some states have enacted statutes which state that "reasonable belief" or "sufficient cause to assume" is enough to justify the use of deadly force. This justification will limit the officer's liability for civil damages⁶⁴ as well as protect him from criminal charges.⁶⁵

There is conflict within the various states adopting the common law rule as to whether the use of deadly force must be "actually necessary" or whether it may be only "apparently necessary."⁶⁶ The majority view today

58. Alaska Stat. § 11.15.090 (1970); Ariz. Rev. Stat. § 13-410 (1978); Ark. Stat. Ann. § 41-510(2)(a) (1977); CAL. PENAL CODE § 196 (West 1970); Conn. Gen. Stat. § 53a-22(c)(2) (1975); Fla. Stat. Ann. § 776.05 (Supp. 1975); Idaho Code § 19-610 (1970); Kan. Stat. Ann. § 21-3215(1) (1974); Miss. Code Ann. § 97-3-15 (1972); Mo. Rev. Stat. § 563.046(3)(2)(a) (Vernon 1979); Nev. Rev. Stat. § 200.140(3)(b) (1973); N.H. Rev. Stat. Ann. § 627:5(II)(b)(1) (1974); N.J. Stat. Ann. tit. 2 C:3-7(b)(2)(c) (1979); N.M. Stat. Ann. § 40A-2-7 (1963); Okla. Stat. Ann. tit. 21, § 732 (1951); R.I. Gen. Laws § 12-7-9 (1969); S.D. Comp. Laws Ann. § 22-16-32 (1967); Tenn. Code Ann. § 40-808 (1956); Wash. Rev. Code Ann. § 9A-16.040(3) (1977); Wis. Stat. § 939.45(4) (1973).

59. MODEL PENAL CODE, Comment 3 at 57 (Tent. Draft). "The early common law privileged an officer in the use of deadly force where necessary to secure the arrest of one reasonably suspected of felony, even though such person was in fact innocent."

60. Rummel, *The Right of Law Enforcement Officers to Use Deadly Force to Effect an Arrest*, 14 N.Y. LAW FORUM 749, 751 (1968) [hereinafter cited as "Rummel"]:

Necessity for deadly force means apparent necessity rather than actual necessity, but the officer must have had good grounds for his belief.

Cases speak of "the measure of necessary force [as] that which an ordinary prudent and intelligent person, with the knowledge and in the same situation of the arresting officer, would deemed necessary." *Barret v. United States*, 64 F.2d 148, 149 (App. D.C. 1933), citing *Castle v. Lewis*, 254 F. 917, 925 (8th Cir. 1918).

61. See, e.g., *Hendricks v. Commonwealth*, 163 Va. 1102, 178 S.E. 8 (1935).

62. Comment, "Killing A Suspect Felon Fleeing to Escape Arrest," 38 Ky. L. J. 618, 619-20 (1950).

63. Perkins, *supra* note 25 at 981: "Firmly established in the common law of England was the privilege to kill a fleeing felon if he could not otherwise be taken"

64. *Supra* note 60.

65. See 2 Hale, *History of the Pleas of the Crown* 85-86 (1788).

66. Perkins, *The Law of Arrest*, *supra* note 55 at 279.

requires only apparent necessity.⁶⁷ The distinction in any instance, seems to be largely academic, since no case has been found in which it was crucial.⁶⁸ Yet this distinction may be important under certain fact situations.⁶⁹

By enacting the common law rule with minor changes, these twenty states have not established a standard that will lead to accountability of law enforcement officers. There is no required performance level which officers must seek prior to employing deadly force. It is often left to the individual officer to determine what is reasonable and just in a particular instance. Consequently an officer may kill a citizen in cases where there is no physical danger to the public or to the officer.

B. *Dangerous Felony States*

Because of the harshness of the application of the common law rule, a number of states have enacted justifiable homicide statutes which depart from the common law by requiring that the felony in question be "dangerous" in nature.⁷⁰ The commission of "any" felony will not justify a homicide as was true under the common law; it must be a "forcible felony" involving danger to life or great bodily harm. Eleven states⁷¹ specify the kinds of felonies for which deadly force may be employed by mandating that only "violent" or "forcible" felonies justify the use of deadly force.⁷²

One of the major criticisms of the "forcible felony" rule is that it permits the use of deadly force against an unarmed fleeing burglary suspect.⁷³ At common law, burglary was defined as "the breaking and entering of a dwelling of another in the nighttime with the intent to commit a felony."⁷⁴ Under modern statutes burglary has been expanded to include the "entering of a building to commit a crime."⁷⁵ Today a burglary can be committed

67. Day, *supra* note 57 at 289.

68. *Id.*

69. See Statutory Survey, *infra* note 78.

70. Colo. Rev. Stat. § 18-1-1707(2)(b) (1975); Ga. Code § 26-902 (1972); Ill. Rev. Stat. ch. 38, § 7-5(A)(2) (1973); Ind. Code § 35-41-3-3 (1979); La. Rev. Stat. Ann. § 14:20 (West 1950); Mont. Code Ann. § 45-3-102 (1979); N.Y. Penal Law § 35.30(1)(a)(ii) (McKinney 1975); N.D. Cent. Code § 12.1-05-07(2)(d) (1975); Or. Rev. Stat. § 161.239 (1973); Pa. Stat. tit. 18 § 508(a)(1)(ii) (1973); Utah Code Ann. § 76-2-404(2)(b) (Supp. 1977).

71. Sherman, *Restricting the License to Kill-Recent Developments in Police Use of Deadly Force*, 14 CRIM. L. BULL. 577, 581 (1978) [hereinafter cited Sherman].

72. The use of deadly force is discriminatory. Ronkowski, *Uses and Misuses of Deadly Force* 28 DE PAUL LAW REVIEW 701, 715-16 (1979) [hereinafter cited "Ronkowski"]:

"[C]onsider the attempted arrest of an automobile thief. The officer would not be justified in shooting because no forcible felony has been committed. However, if the arrestee had broken into the automobile, stolen some cigarettes and then fled, he would have committed the forcible felony of burglary and could be shot." (footnotes omitted).

73. *Triggering Review*, *supra* note 12, 365 note 34.

74. Perkins, *supra* note 25 at 192:

"common law burglary is the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony." There are six elements: (1) the breach, (2) the entry, (3) the dwelling, (4) "of another," (5) the nighttime and (6) burglarious intent.

75. Under Modern Statute:

Burglary.

Burglary defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned. See PA. STATE. TIT. 18 § 3502(a) & (b) (1973).

without the breaking and entering of a domicile during the day or night.⁷⁶ The very elements which made common law burglary exceptionally dangerous are no longer required. There should be concern in the situation where the suspected felon has not used violence or threatened a person's life, yet deadly force can be used against him.⁷⁷

Those states enacting the forcible felony rule did so at a time when the death penalty was part of their criminal codes. Its continued use is questioned because of the drastic nature of deadly force and the lack of an immediate threat to the arresting officer. Police officers should not be able to impose a greater sentence than the courts are permitted to impose. The use of deadly force should be limited to situations which call for the defense of self or others.

C. *Model Penal Code*

Nine states⁷⁸ have adopted the Model Penal Code rule⁷⁹ which limits the use of deadly force to a greater degree than the dangerous felony rule or

76. Fletcher, *Rethinking Criminal Law*, 1978. § 3.2.4. *New Offenses Akin to Burglary-Without-Breaking*. "Once it became tenable to think of burglary as a crime committed by a nominally innocent and unthreatening entry into a building, legislators began to sense the potential of a whole new model of criminality. Recent years have witnessed a spate of new offenses penalizing various acts of 'entering' buildings, trains, or other structures. It is too early to assess whether this liberalized conception of burglary will generate large number of convictions where the entry is unincriminating. Yet the potential is undoubtedly there."

77. Del. Code Ann. tit. 11 § 467(c) (1974); Hawaii Laws, Act 9, ch. 3 (1972) (effective 1973) § 307(3); Iowa Code § 804.8 (1979); Ky. Rev. Stat. § 503.090(2) (1975); Maine Rev. Stat. Ann. tit. 17A § 107-2(B) (1975) (effective March 1, 1976); Minn. Stat. § 609.066 (West 1975); Neb. Rev. Stat. § 28-839(3) (Supp. 1974); Tex. Penal Code art. 2, § 9.51(c) (1974). North Carolina allows the use of deadly force to arrest one fleeing from a felony with a deadly weapon in addition to those situations in which the Model Penal Code formulation authorizes deadly force. N.C. GEN. STAT. § 15A-401(d)(2)(b) (1973).

78. MODEL PENAL CODE § 3.07 (1962):

§ 3.07 Use of Force in Law Enforcement.

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

(2) Limitations on the Use of Force.

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

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

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

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

(i) the arrest is for a felony; and

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

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

(iv) the actor believes that

(1) the crime for which the arrest is made involved conduct including the use of 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

the common law rule.⁸⁰ Under the provisions of the Model Penal Code, the use of deadly force to effect an arrest is justified only when the conduct of the suspected criminal involves a substantial risk that the person to be arrested will cause death or serious bodily harm to others if escape takes place.⁸¹ The restrictions set by the Model Penal Code meet many of the criticisms of the other laws discussed, but are open to several objections. Although this rule provides more protection for the suspected criminal it requires the arresting officer to make a split-second decision as to the likely consequences of the felon's future actions. It is a rare situation where a police officer knows the individual being arrested and could say with any degree of certainty that the individual's resisting or fleeing arrest is likely to endanger human life or cause serious bodily injury to another. Because the suspected escaping felon used force in committing his alleged crime, it does not necessarily mean that he is dangerous.⁸² For example, the man who kills his wife in the passion of a heated argument, or upon finding her in bed with another man, is not likely to go out and kill again.

Many law enforcement agencies and police departments criticize the Model Penal Code standard as being too narrow and imprecise for their purposes. They, as well as other critics, point out that many serious crimes—for example, robberies or forcible rapes—would not necessarily involve the use or threatened use of deadly force and that in any event, it was unfair to place on the arresting officer the burden of determining whether the force used by the suspect was “deadly” or not.⁸³ The Model Penal Code grants law officers great latitude in firing their weapons. It goes beyond self defense situations and, as did the “dangerous felony” rule, permits officers to impose a greater punishment than could a court. In addition, the Code is contrary to the present movement within many police departments that have adopted regulations permitting deadly force only in life-threatening situations.

D. *Remaining States*

The remaining ten states have no statutes limiting an officer's use of deadly force in arresting suspected felons. Eight of these states have relied upon the courts to establish when and to what extent deadly force may be used by officers in felony arrest situations.⁸⁴ The two remaining states do

escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

79. Triggering Review, *supra* note at 369:

The philosophy of the Model Penal Code is to ignore the technical classification of a crime as a felony or misdemeanor, and to focus instead on a balance of interests: the need to apprehend suspects, the safety of the arresting officers, and the value of human life.

80. The suspect who flees is rarely a threat to the police officer's safety. He seeks disengagement rather than entanglement.

81. *Id.* at 568: Many surreptitious crimes against property (example, automobile theft) and many felonious acts involving humans rather than things (for example, statutory rape) have no element of violence or threatened violence, so police violence is neither responsive nor protective, but is itself generative.

82. These states are Maryland, Alabama, Ohio, Massachusetts, Michigan, Virginia, West Virginia and Wyoming. See: Due Process, *supra* note 51, 498-499.

83. South Carolina and Vermont *id.*; Due Process, page 499 as to the two states above.

84. Note, *The Civil Liability of Peace Officers For Wounding or Killing*, 28 U. OF CINCINN. L.

not have statutes relating directly to arrest situations, but permit the use of deadly force in defense of the individual, defense of others, suppression of a person attempting to commit murder, rape, burglary or robbery with force or violence, and other circumstances.⁸⁵

V. CRITICISM OF THE PRESENT LAW

In this most important area of criminal law and justice two conflicting interests of society are at stake. The first is that of the government in apprehending suspected criminals, deterring escape attempts, and maintaining effective arrest power of police.⁸⁶ The second interest relates to the preservation of individual life and the adjudication of the guilt or innocence of the suspect in accord with his constitutional rights.⁸⁷ Central to any decision in this area of the law, these two interests must be weighed to determine which shall prevail in any specific situation. The current rules of law concerning arrest and the use of deadly force in effecting an arrest do not reflect the shifting balance between these two interests.

The present privilege granted law officers to use deadly force in arresting fleeing felony suspects has been subject to exhaustive criticism.⁸⁸ As early as 1858 a New York Times editorial questioned a shooting by a New York City police officer. The article suggested, "If a policeman needed to defend his life, the use of force was permissible, but if he was chasing a suspect, he had no right to shoot the man. A policeman either had to be swift enough to catch the suspect or justice must be lost."⁸⁹ In the same year, another New York Times editorial⁹⁰ expressed grave concern about a possible future in which "[E]very policeman is to be an absolute monarch, within his beat, with complete power of life and death over all within his range, and armed with revolvers to execute his decree on the instant, without even the forms of trial or legal inquiry of any kind"⁹¹ To a certain degree this future has been realized, in some jurisdictions, in the privilege granted law enforcement officers to shoot fleeing suspects.

The first major proposal to limit the common law privilege granted officers in their use of deadly force against fleeing felons was proposed by the American Law Institute in 1934. The Institute adopted Section 131 of the Restatement of Torts which provided:

The use of force against another for the purpose of effecting an arrest of the other by means intended or likely to cause death is privileged, if
(a) The arrest is made for treason or for a felony which normally causes

REV. 488, 489 (1959); Note, *Justification for the Use of Force in the Criminal Law*, 13 STANFORD L. REV. 566, 580-81 (1961).

85. *Id.*, CINCINN. L. REV.; *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976).

86. Ploscowe, *A Modern Law of Arrest*, 39 MINN. L. REV. 473, 476 (1955); See: Model Penal Code § 3.07 at 60-63 Comment (Tent. Draft No. 8 1958).

87. Quoted in L. Kenneth & J. Anderson, *THE GUN IN AMERICA* 22 (1975) at 150.

88. W. Miller, *COPS AND BOBBIES* (1977) at 146.

89. *Id.*

90. The RESTATEMENT OF TORTS changed in 1948. The American Law Institute discarded this provision, replacing it with a section intended to follow the common law more closely. The new provision was carried over into the Restatement (Second) in 1965 and is now § 131.

91. President's Commission on Law Enforcement and Administration of Justice and the National Commission on Reform of Federal Criminal Laws. Cited in *Mattis v. Schnarr* 547 F.2d 1007, 1013-14 (8th Cir. 1976).

- or threatens death or serious bodily harm, or which involves the breaking and entry of a dwelling place, and
- (b) The actor reasonably believes that the arrest cannot otherwise be effected.⁹²

More recently, in 1967, the President's Commission on Law Enforcement and Administration of Justice reported that it had evidence from its studies and from police officials themselves that in some cities a significant number of policemen assigned to high-crime areas treated citizens with disrespect, and sometimes, physical abuse. Following the Commission's report, several studies have been conducted which suggest the need for changes in the law relating to the use of deadly force to make law enforcement officers more accountable for the deaths of citizens.⁹³

One of the first major studies concerning the death of citizens at the hands of police officers was conducted by Professor Paul Takagi of the University of California.⁹⁴ Professor Takagi found that police officers in 1970 and 1971 killed, on the average, one person per day in the United States.⁹⁵ What arose as a means of protecting the person has become a weapon for protecting property. Professor Takagi feels that the common law operated under an illogical system, granting a broader privilege to use deadly force in arresting a felon than could be used to prevent his criminal act. Thus, he concludes, it is time for a reevaluation of this rule. He states: "Human life—even that of a fleeing criminal—is to be preserved whenever possible. A human sacrifice is justified only when a competing human interest is involved."⁹⁶

A more recent study relating to the killing by police of civilians revealed that white males continue to be killed at a consistent rate of 0.2 per 100,000 males aged nine or over.⁹⁷ The rate of black males aged nine and over killed by the police reached an all-time high of 2.4 per 100,000 in 1969 and continues to rise. Almost all victims of police homicides are male and most of them are between the ages of 17 and 30. Around half of all police homicides are members of minority groups. Recent data suggest, however, that national figures used to measure homicides by police are grossly under-reported.⁹⁸

Compounding this problem area of the use of deadly force is the lack of consistency by the various states in the classification of crimes.⁹⁹ Certain

92. *Id.* at 1019-20, N. 30.

93. Takagi reviewed civilian deaths resulting from police use of force in California and reported that the incidence rate of such deaths increased by two and one-half between 1962 and 1969, and that these rates have remained constantly nine times higher for blacks than for whites over the last 18 years. (Paul Takagi, "A Garrison State in 'Democratic Society,'" *Crime and Social Justice*, p. 29 [Summer, 1974].)

94. *Id.*

95. Kobler *supra*, note 8.

96. *Id.*

97. *Id.*

98. While misdemeanants cannot be exposed to deadly force, some crimes designated felonies today are of a less serious nature than most misdemeanors, and felons committing such felonies are subject to summary execution for relatively minor acts. Compare felony of distillation of alcohol in violation of revenue statute with misdemeanors such as drunken or reckless driving. *Force and Fleeing*, *supra* note 45 at 515.

99. See: Comment, "Policeman's Use of Deadly Force in Illinois, 48 CHI.-KENT L. REV. 252, 253 (1971) [hereinafter cited "Force in Illinois"].

felonies under the common law have been eliminated altogether under modern codes (as in the case of the crime of adultery). Conduct considered a felony in one state might be a misdemeanor in another, and may not even be a crime in a third. As a result, a law officer is permitted to use deadly force in situations where the suspected felon happens to be on one side of a state line and not on another.¹⁰⁰ Such fortuity clearly demonstrates that the common law rule with its felony/misdemeanor distinction makes no sense in our present day society.¹⁰¹ When the reason for the rule has changed, it follows that the rule should be changed.

VI. PROPOSED CHANGES TO THE COMMON LAW RULE AND OTHER CURRENT RULES

It is time to reevaluate the current state of the law and arrive at an improved standard—one which reflects modern day society—to govern the use of force by law enforcement officers. This nation was founded on certain fundamental rights, including the right to trial by jury, determination of guilt beyond a reasonable doubt and equal treatment under the law.¹⁰² A felony suspect is not a convict, and it is only strong necessity that compels his detention before trial. The infliction of serious bodily injury or death should not be imposed when it will eliminate those rights on which this nation was founded.¹⁰³ The only legal justification for depriving a citizen of life must be of equal or greater importance than those rights. Therefore, the only true justification for the use of deadly force is to preserve the life of another.¹⁰⁴ State legislatures must enact laws which make self-defense or defense of others the only standard whereby law enforcement officers will take a life to effect an arrest.

Self-defense as an excuse for deadly force was recognized by the early common law¹⁰⁵ and exists in all jurisdictions today. This excuse arises where it is necessary to protect one's life or to save oneself from great bodily harm under circumstances reasonably giving rise to fear of death or great bodily harm.¹⁰⁶ No state law presently is so restrictive as to permit law enforcement officers to use deadly force only in cases of self-defense or the defense of another.¹⁰⁷ For years, under a Texas statute, however, the use of deadly force was never privileged solely to effect an arrest.¹⁰⁸ Deadly force

100. Certain jurisdictions, however, have disregarded the original purpose of the felony prevention rule and have expanded its scope to include any felony. What arises as a means of protecting persons has become a weapon for protecting property. *FORCE IN ARIZONA*, *supra* note 42 page 9. *See*: Note 45.

101. According to the original understanding of the fourteenth amendment, toleration by the state or local authorities of police brutality is a violation of the equal protection clause. Protection against violence was one of the chief aims of the framers. Avins, *Equal Protection Against Unnecessary Police Violence*, 19 *BUFF. L. REV.* 599, 600 (1970).

102. *Butler v. Crumlish*, 229 F. Supp. 565, 567 (E.D. Pa. 1964).

103. *Force in Illinois*, *supra* note 98 at 256.

104. *Id.*

105. "Privilege" and "excuse" are based upon different rationales, but today for all intent and purpose they are both the same.

106. The term "self-defense" also includes the right to defend another person against what is reasonably perceived as immediate danger of death or grievous bodily harm to the person from his assailant, 40 *AMERICAN JURISPRUDENCE* 2d, 170-171.

107. *TEXAS PENAL CODE*, Art. 12.12 (1925).

108. *Id.*

could be used by a law officer to arrest only in cases of self-defense. This restriction applied to police officers as well as private persons.¹⁰⁹ The focus of the statute was upon the dangerousness of the arrestee and not on the statutory classification of the criminal's act as a felony or a misdemeanor. Texas abandoned this rule in 1974, replacing it with provisions based on the Model Penal Code's proposal.

Federal law enforcement agencies, on the other hand, have for a long period of time used the more restrictive policy of self-defense for their officers. Federal officers are not permitted to use deadly force except in cases of self-defense or the defense of another from an immediate threat of physical violence.¹¹⁰ An example of the regulations of one federal agency is that of the Bureau of Narcotics and Dangerous Drugs:

An agent will not shoot at any person except to protect his own life or that of some other person.

Agent will not fire at fleeing suspects or fleeing defendants, agents will not fire at a fleeing automobile being used simply as a means of escape.

The firing of warning shots is prohibited. Agents will not remain passive in a threatening situation. However, the agent will ensure that he has made an accurate assessment of the situation in considering the use of firearms.

Firearms will not be utilized to coerce or intimidate suspects or defendant who are not threatening an agent or another person.¹¹¹

This is an example of the use of deadly force only for the purpose of defending a human life—the defense-of-life standard.

VII. THE ADVANTAGES OF THE DEFENSE-OF-LIFE STANDARD

The defense-of-life policy appears to be the best policy that could be enacted by the various states for their law enforcement officers. This policy has the virtue of being both constitutional¹¹² and highly practical.¹¹³ It is constitutional because self-defense is an individual action rather than a state action;¹¹⁴ the right to defend one's life need not be granted by the state.¹¹⁵

109. TEXAS PENAL CODE, Art. 2, § 9.51(c) (1974).

110. Sherman, *supra* note 30 at 92: The policy of the Federal Bureau of Investigation since at least 1972 has been 'that an agent is not to shoot any person except, when necessary, in self-defense, that is when he reasonably believes that he or another is in danger of death or grievous bodily harm.' The federal Bureau of Narcotics and Dangerous Drugs, which operates one of the most hazardous types of law enforcement programs, adopted a similar policy in 1971. (Footnotes omitted).

111. The policy of both the FBI and the Treasury Department agencies, such as the Secret Service, is to discharge a firearm only when the life of the officer or of another person is in danger. 1 Working Paper of the National Commission on Reform of Federal Criminal Law 268-69 (July 1970).

112. Cited in *Mattis v. Schnarr*, *supra* note 94 at 1016 note 18.

113. Sherman, *supra* note 29 at 99: [P]olice homicide and the constitution lead to the conclusion that the present state laws are unconstitutional, not just in the common law states, but in the Model Penal Code and "forcible felony" states as well." Page 97. Each of the possible constitutional bases, with the exception of the Sixth Amendment, is thoroughly canvassed in Comment, *Triggering Review*, *supra* note 12, 371-88.

114. *Force in Arizona*, *supra* note 42 at 493.

With a self-defense policy, there is nothing complex to remember, and no need to consider prior events; the officer need only evaluate the information he observes to assess whether someone is committing an overt act signaling an immediate threat to the officer or someone else. *See: Id.* Sherman.

The defense-of-life standard takes police action out of the realm of punishment administered by the state. It looks towards the future behavior and not upon past actions of the suspect.¹¹⁶ If the State takes a life by its agents this can be classified as punishment—the right to use deadly force as currently used. Both the fifth and fourteenth amendments of the United States Constitution specifically forbid deprivation of life without “due process of law.” It has been argued that the use of deadly force is a violation of the constitutional rights of the victim.¹¹⁷

The state's interest in protecting the lives and bodies of citizens includes those of the suspected felons, thus the defense-of-life standard is appropriate. Also the defense-of-life standard has a practical advantage for both the law officer and the society at large. Because the rule looks to future behavior of the victim, the law enforcement officer has objective facts to consider before he uses deadly force.¹¹⁸ Society, in turn, will have objective facts by which to judge the conduct of the officer.¹¹⁹

To achieve accountability, the defense-of-life standard must be enacted by state legislatures as a standard for law enforcement in situations where deadly force is employed. The primary object of the law should be to maximize protection both for the individual and for society and to minimize opportunities for abuse of discretion by individual officers.¹²⁰ Society is protected by effective law enforcement, and the individual is protected by requiring law enforcement officers to refrain from shooting suspects except in very compelling circumstances.¹²¹ The law must balance these interests to insure that citizens, whose lives are at stake, are not subjected to inconsistent treatment by law officers simply because a particular officer is in pursuit.¹²²

Greater specificity and illumination of policies relating to the use of deadly force by law officers and recommending restraint of weapons will protect the society at large and not merely the intended targets of police officer's bullets.¹²³ Each year, many hundreds of innocent bystanders have been killed in the course of police pursuits of suspected criminals.¹²⁴ Despite the popular conception that police officers are expert marksmen, in

115. Sherman, *supra* note 29 at 98.

116. *Id.*

117. *Mattis v. Schnarr*, *supra* note 94 at 1018: “Such punishment, of course, can only take place after the offender has been accorded due process. Due process, in the criminal context, means a trial and its attendant procedural safeguards.” (Footnotes omitted).

118. When people commit overt threatening acts there is less ambiguity. Sherman, *supra* note 29 at 99.

119. *Force in Arizona*, *supra* note 42 at 492.

120. *Id.*

121. Criticism is expressed in reaction to the frequently disproportionate use of deadly force against non white suspects. See: *Mattis v. Schnarr*, *supra* note 93 at 1014.

122. *Force in Illinois*, *supra* note 98 at 257; Safer, *supra* note 58 at 572.

123. R. Daley, TARGET BLUE (1978). In 1970 in New York, the police had a total of 634 shooting incidents. Six hundred fifty-nine police officers fired 1643 shots, including 183 warning shots, of which only 436 shots hit their targets. Of these 643 incidents, seven officers died, 242 were injured and 19 had their firearms taken away from them. Fifty criminals were killed and 212 criminals were wounded. Most of these shootings occurred at night. Almost all of these incidents occurred within a distance of seven yards and lasted under two seconds. Only 75 incidents were a Hollywood type gun fight with the officer and criminals exchanging multiple shots.

124. See: Harvie, The Police Officer's Use of Force: Law and Liability 15 (1971), where it stated that “[i]t is difficult, if not impossible to shoot accurately at a moving vehicle, especially from a moving vehicle.”

many typical pursuit situations, the rank-and-file police officer is often a poor marksman.¹²⁵ Not only may the officer's firing injure innocent bystanders, but it may prompt the suspect to return fire, or even cause others pursuing the suspect to use deadly force.¹²⁶ Thus the initial risk to society of the felon escaping arrest, is greatly increased by the firing of a weapon by the police officer.

This recommended change in the use of deadly force would not require an officer to assume an unreasonable risk of harm. It would be unreasonable to require that law enforcement officers take unnecessary risk in the performance of their duties. Guns are the most widely used weapons in the commission of violent crimes.¹²⁷ But guns are also used in other types of crimes, and in the proper case, the officer can protect himself or others whether the attacker has committed a serious felony, a misdemeanor, or any crime at all. The felon is now an immediate danger to society.¹²⁸ The officer need only evaluate the information he observes to assess whether deadly force is required on his part. The decision of the officer will be based upon the risk of danger to society as it appears at that moment.

The current policy permitting law officers to use deadly force against fleeing felons contributes little or nothing to public safety or the deterrence of crimes.¹²⁹ Instead, the unrestrained use of deadly force often increases hostility towards law enforcement officers and exacerbates community tensions.¹³⁰ The alienation that exists in minority communities towards law enforcement officers can often be traced to incidents of promiscuous use of force.¹³¹ Blacks and other minorities are killed by police at a rate much higher than their percentage of the population. The number of blacks killed by police has remained at least nine times higher over the last 18 years in which statistics have been evaluated than the rate of the population at large.¹³² Although blacks comprise only 12 to 14 percent of the Nation's population, they comprise at least 50 percent of those killed by police.¹³³ A

125. *Force in Arizona*, *supra* note 42 at 495. This is a similar argument to that found against the use of warning shots in this comment.

126. Tom Wicker, *New York Times*, December 12, 1980: "Someone is murdered with a handgun in the United States every 50 minutes In 1979, handgun fire caused 10,728 American deaths. During the seven peak years of the war in Vietnam, for example 40,000 Americans were killed in action; during the same years, 50,000 Americans were killed with handguns in the nation's streets, barrooms, households and public places."

127. "Task Force Report," *supra* note 47 at 189-190: "Officers should be allowed to use any necessary force, including deadly force, to protect themselves or other persons from death or serious injury. In such cases, it is immaterial whether the attacker has committed a serious felony, a misdemeanor, or any crime at all."

128. *See* Study, published in the *Annals of the American Academy of Political and Social Science*, noting that fewer than one percent of felony arrests for murder, rape, robbery, burglary and larceny in New York from 1973 to 1978 resulted in attacks on police.

129. Task Force Report, *supra* note 47 at 144-147 (Footnotes omitted).

130. *Id.* page 189: "Police use of firearms to apprehend often strains community relations or even results in serious disturbances."

131. Address by Howard P. Carrington, "The Community Relations Service Perspective" in "Deadly Force: What Police and the Community Can Do about It." A Workshop Conducted by the Community Relations Service. U.S. Dept. of Justice. Nashville, Tenn. (Oct. 1978) page 5. [Hereinafter cited as "Carrington."].

132. National Advisory Commission on Criminal Justice Standards and Goals, *Police*, Washington, D.C.: Gov. Printing Officer, 1973.

133. Task Force Report, *supra* note 47 at 190: "If all departments formulated firearm use poli-

more restrictive policy relating to the use of deadly force by law officers would undeniably lead to better police-community relations,¹³⁴ not only in black communities, but in other minority communities as well.

It is important to keep in mind that limiting the situations in which deadly force is permitted will not in itself guarantee a reduction in the number of citizens shot by police. The absence of such changes, however, will undoubtedly guarantee a continuation of the existing trend. It is possible, and no doubt probable, that by enacting defense-of-life legislation, there will be a substantial reduction in the number of deaths each year caused by law enforcement officers. In a national study conducted by Arthur Kobler in Seattle,¹³⁵ data compiled from newspaper stories of homicides by police officers revealed that by using the criterion of a justification standard—of an immediate threat to life—two-fifths of the homicides were unjustified, one-fifth were questionable, and only two-fifths were justified. With only two-fifths of the deaths justified under a self defense standard, it is quite likely that the change to a defense-of-life standard would lead to a substantial reduction in the number of deaths by police officers each year.¹³⁶

Policies which permit the use of deadly force in self-defense situations only, would be less difficult to draft for legislators and police administrators. More importantly, these rules and regulations would be easier for law enforcement officers to read and understand.¹³⁷ No longer would officers have to remember classifications of crimes as felony or misdemeanor; or distinguish between dangerous and non-dangerous felonies. It is the lack of a firm and understandable policy that accentuates the differing views of individual officers¹³⁸ and results in discretionary and sometimes arbitrary actions. A defense-of-life policy lends itself to a lucid rule that officers can use as a standard *before* using deadly force. Such a rule will lead to greater accountability when a citizen suspected of a felony is injured or killed.

VIII. TRAINING IS ALSO NEEDED

It is not the suggestion of the writer that our law enforcement officers should not be well armed, and most officers in this nation are very well armed. But the essential factor so often missing is that officers are not well trained in the use of their weapons. Especially important is that this training include restraint in the use of deadly force. It is surprising and alarming that few police departments provide their officers with careful instructions on the circumstances under which the use of a firearm is proper. Howard P. Carrington has stated this problem clearly:

cies . . . and these policies were consistently enforced, many of the tragic incidents which had a direct bearing upon community relations could have been avoided."

134. Kobler, *supra* note 9 at 164-65.

135. *Id.*

136. *Force in Arizona*, *supra* note 42 at 493 note 72.

137. *Id.* page 493. Safer, *supra* note 58 at 573-574.

138. Address by Dr. Lee P. Brown, "Reducing the Use of Deadly Force: The Atlanta Experience." A Workshop Conducted by the Community Relations Service. U.S. Dept. of Justice Nashville, Tenn. (Oct. 1978) page 5.

[I]t is important for police administrators to develop policies based on some sense of a philosophy of what police officers are about. This philosophy should place a heavy emphasis on the value of human life. It should include an understanding that the police use of deadly force must be socially and morally warranted as well as legally authorized.

There's no question that the discretionary power that is placed in the hands of the policeman is inordinate. At all times, he's faced with that split-second decision where he does indeed become executioner, judge, and jury. He is given an inordinate amount of life and death discretion, yet as a former policeman, I don't think many policemen relish having this awesome authority in their hands. But regulations as they are now leave a policeman little or no alternative except to play that role.¹³⁹

The time to have officers "play that role" is over and we must reduce the excessive use of force by improved selection, supervision, and the training of police officers.¹⁴⁰ Some improvement has been made in these three areas, but much more must be accomplished, especially in the area of training.

In a recent study of the policeman's view of his function, Jerome H. Skolnick offered this description:

The policeman views criminal procedure with the administrative bias of the craftsman, a prejudice contradictory to due process of law. That is, the policeman tends to emphasize his own expertness and specialized abilities to make judgment about the measures to be applied to apprehend 'criminals', as well as the ability to estimate accurately the guilt or innocence of suspects. He sees himself as a craftsman, at his best, a master of his trade. As such, he feels he ought to be free to employ the techniques of his trade, and that the system ought to provide regulations contributing to his freedom to improvise, rather than constricting it.¹⁴¹

This perception of himself as a crime-fighter craftsman is sometimes manifested by a general hostility towards the citizens that he is sworn to protect. Training is needed whereby officers understand that as craftsmen they must respect the lives and safety of all citizens.

Attitudes and corresponding behavior can be acquired at almost any time in a person's life and are often acquired by individuals prior to their becoming police officers. The evidence that is available indicates that police recruits are not especially sadistic or even authoritarian.¹⁴² On the contrary, the works of such experts in the field as Niederhoffer and MacNamara suggest that "the policeman is usually an able and gregarious young man with social ideals, better than average physical prowess and a rather conventional outlook on life, including normal aspirations and self-interest."¹⁴³ While police academies have been upgraded in many cities and their curricula have been immeasurably improved, new recruits are frequently denied the benefit of this upgrading because they must be quickly placed on the streets to fill existing needs.¹⁴⁴

Police training on a nationwide scale is a relatively recent practice in the United States. It was not until the end of the decade of the sixties that the nation took a realistic view of criminal justice and the role of the police. In 1968-69, Law Enforcement Assistance Agency funds were granted to the

139. Carrington, *supra* note 130 at 5-6.

140. Task Force Report, *supra* note 47 at 169.

141. Skolnick, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966).

142. A staff report to the National Commission on the causes and Prevention of Violence (Washington D.C. & G.P.O., 1969), P. 190.

143. Skolnick, *The Politics of Protest: Violent Aspects of Protest and Confrontation*, a staff report to the National Commission on the Causes and Prevention of Violence (Washington E.C.: GPO, 1969), p. 190.

144. *Id.* at 190.

states, and training programs became a reality for many departments.¹⁴⁵ In the training process the officer is taught to respond or react to specific situations in a more or less uniform manner, with maximum proficiency.¹⁴⁶ After enacting a defense-of-life rule and giving officers the proper training, accountability will surely follow. The officer will know the limits to which the use of weapons is proper by learning to recognize those situations in which such action is permissible.

Currently the training period for law enforcement officers varies from state to state and department to department. Training programs range from as few as 240 hours to 1040 hours.¹⁴⁷ A national survey has found that the total hours of instruction in subjects relating to community relations averaged 6.6% of the total hours of instruction.¹⁴⁸ Most of the training hours are spent on crime control subjects rather than on due process subjects.¹⁴⁹ A national survey conducted for *Police Training and Performance Study* found that due process subjects averaged 23% of the total hours of instruction.¹⁵⁰ Officers *must* be exposed to a greater degree to the study of human relations and due process to assist them in their sensitive and demanding work. This training will lead to more effective law enforcement by promoting professionalism, sensitizing officers and enhancing democratic values. These are areas of training for anyone using deadly weapons.

It is essential that all police departments formulate written firearm policies which, coupled with a strong training program clearly define defense-of-life as the only situation in which weapons are to be used.¹⁵¹ These written policies must be both comprehensive and understandable.¹⁵² Vague, cursory statements are unsatisfactory, for they shift the burden of deciding when to use deadly force to the discretion of the officer, which, to a great extent, is the current state of policies and regulations. The lack of a firm and understandable policy accentuates the differing views of individual officers.¹⁵³ Although departmental rules cannot themselves eliminate every danger of excessive force, they can perhaps lessen the ineptitude of judgment which creates avoidable risks.¹⁵⁴

In addition to the need for training and written policies, there must be strong enforcement of the defense-of-life policy in each department. This is the only means by which there will be true accountability of law enforcement officers. Police officers are not often disciplined even when their actions are found to be improper. In a national sample conducted by

145. See National Advisory Comm. on Criminal Justice Standards and Goals, Report on Police 389 (1973); 1972 Attorney Gen. First Ann. Rep., Federal Law Enforcement and Criminal Justice Assistance Activities, 42 (1972).

146. Farres, Police Education—The Latest Revolution 5 (1972) ACJS Comm. on Stands).

147. Police Training and Performance Study 186 (1970) Report by the NYC Police Dept.) Cited Quick *infra* note 161 at note 16 page 29.

148. *Id.*

149. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. LAW 25, 29 (1978).

150. Police Training and Performance Study 178-79 (1970) (Report by the N.Y.C. Police Dept.).

151. See Safer *supra*, note 57 at 573-74.

152. Task Force Report, *supra* 47 at 189.

153. Safer, *supra* note 57 at 572.

154. Kobler, *supra* note 9 at 181.

Kobler,¹⁵⁵ it was found that of the 1,500 cases in which it was ruled the killings were not justified, only three resulted in a criminal conviction of a police officer for homicide. In another study conducted in Los Angeles County,¹⁵⁶ of 18 police killings in a two-year period that the various local police departments had ruled unjustified, only one of them was referred to the prosecutor for criminal prosecution. Two of the 18 resulted in dismissal from the department; two resulted in a suspension; and 13 resulted in absolutely no action by the police department or the prosecutor.

There must be a uniform requirement that each police officer report to a superior officer after a gun is discharged, and that an investigation take place to discover the circumstances surrounding the incident. The department must vigorously pursue administrative and legal remedies to enforce the defense-of-life policy in those shootings found to be unjustified. It is only through enforcement of written policy that public safety will be enhanced and official accountability will result.¹⁵⁷

IX. CIVIL REMEDIES HAVE NOT LED TO ACCOUNTABILITY

Law enforcement officers have never had a license to kill or wound citizens. They are subject to the usual constraints of criminal or civil liability when they act beyond the scope of their duty either within or without the discharge of their official functions.¹⁵⁸ But the utility or efficacy of civil and criminal remedies is doubtful.¹⁵⁹ Studies have shown that criminal actions against police officers are seldom successful.¹⁶⁰

Civil suits have been found to be inadequate in either placating citizens or deterring police abuse. It is a costly method, years passing before a case is decided, and it is doubtful that the case will result in an adequate recovery. There is little inducement for citizens to use this remedy in response to police abuse. The main problem in litigation with a police officer is that the jury often sees before it a plaintiff who was suspected of a crime versus a defendant whose major fault is being over-zealous.¹⁶¹ The police officer is in a eminently better position to defend a suit than the civilian plaintiff is to initiate the suit.¹⁶² Given the financial status of a police officer, any substantial judgment against him will probably go unsatisfied. Thus, the deterrent effect of a large judgment against an individual officer will probably be nugatory.

155. Uelman, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 LOY. L.A. L. REV. 1, 40 (1973).

156. Safer, *supra* note 59 at 573; Kobler, *supra* note 9 at 162, it is recommended that police administrators need to stringently enforce the laws and regulations governing police use of deadly force, and that individual officers who kill citizens improperly should be vigorously prosecuted.

157. Rummel, *supra* 61 at 754.

158. Avins, *supra* note 110 at 602.

159. Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526, 529 (1957).

160. A Louis Harris poll of the public's attitude about the justifiability of killing another human being found that "by 77 to 13 percent the public feels that if a policeman shoots a criminal in the course of duty, the killing is justified. *The Seattle Times*, Jan. 25, 1970 cited Kobler, *supra* note 9 at 181.

161. Comment, *Judicial Control of Illegal Searches and Seizure*, 58 YALE L.J. 144, 146 (1948).

162. Ronkowski, *supra* note 59 at 726. Civil liabilities of police officers has the potential to be the strongest curb on the illegal use of deadly weapons. This will have a tremendous impetus for self-restraint.

In those few cases where successful litigation has taken place, it has been found to be an effective tool in the efforts to curb police abuse.¹⁶³ Litigation certainly has a chilling effect, at least for a time, on the defendant officer and the police department for which he works. But litigation will not result in the systematic changes needed to reduce the adversary relationship between the police and the citizenry. Nor will it stop summary executions by the police unless a more restrictive standard is established to determine when an officer can fire at a citizen suspected of a crime.

To think that civil litigation and the payment of money damages will make officers more accountable is far from the truth. Lennox S. Hinds explains this very well:

To prosecute an individual police officer for the wrongful death of a citizen, to pay money to the victim or someone else representing him, is distributive justice and not social justice. Distributive justice means simply 'what's good for the goose is good for the gander.' Social justice, on the other hand, means that the rights of liberty, equality, and security are not elements to be exchanged for money or for property rights; nor should they be expressed in relative terms, that is, greater or less than property rights. One person's life and liberty is the same as the next person's. But in a society that equates the right of private property with human rights, they become inevitably reduced to standards and consequences that value some lives less than others. The system of coercion and punishment is intimately connected with the unequal distribution of wealth, and provides the legitimation under the perverted notion that 'ours is a government of laws' even to kill in order to maintain social priorities based upon property rights. This is the meaning of police killings in American society.¹⁶⁴

X. CONCLUSION

For all the concern in this country about capital punishment, there has been a surprising lack of concern with what is the most frequent means by which the state takes a life. Today the state's law enforcement officers may be responsible for anywhere from four to seven percent of all homicides committed in the United States each year. It is time to reevaluate our policy that permits law enforcement officers to kill suspected fleeing felons and to accept the fact that this doctrine was based upon historical conditions that are no longer present in modern American society.

Professor Davis puts the need this way:

The strongest need and the greatest promise for improving the quality of justice to individual parties in the entire legal and governmental system are in the areas where decisions necessarily depend more upon discretion than upon rules and principles and where formal hearings and judicial review are mostly irrelevant.¹⁶⁵

When such a decision is made, reasons should be given for the decision and, whenever possible, the community should be allowed to react to the decision and the reasons behind it. The law is gradually coming to recognize that the community is demeaned when it collectively takes the life of any of its mem-

163. Carrington, *supra* note 130.

164. *Id.*

165. Davis Discretionary Justice: A Preliminary Inquiry, Louisiana State University Press, Baton Rouge, 215-16 (1969).

bers, whatever the offense. It is time to restrain police officers in their use of deadly force and to make them more accountable to the society as a whole for the death of a citizen.

The policy of defense-of-life as a standard for all law enforcement officers must be enacted into law for the over-all good of the society. This is a standard that officers can understand and follow without difficulty. It is also a standard that is based upon the legitimate interest of society as to when a life should be taken.