CR. Sent. 2-23-88

GOVERNOR'S OFFICE OF CRIMINAL JUSTICE SERVICES

State of Ohio
Richard F. Celeste/Governor
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108033

MODEL USE-OF-FORCE POLICY

AND

MODEL LEGISLATION

STUDY COMMITTEE

Governor's Law Enforcement Liaison Committee, Subcommittee on the Use of Force*

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INTRODUCTION

The succeeding pages contain a summary discussion on the "Use of Force", a suggested model policy on the "Use of Force", suggested written guidelines, suggested state legislation, and information regarding the U.S. Supreme Court decision Garner v. Tennessee. This work was developed by representatives from the Ohio Highway Patrol, Buckeye Sheriffs Association, Ohio Association of Chiefs of Police, Ohio Association of Public Safety Directors/Ohio Municipal League, and the Governor's Office of Criminal Justice Services to be used as reference and suggested guidelines for the establishment of written policies and procedures governing the use of force in state and local jurisdictions in Ohio.

The model use-of-force policy, subject areas, and recommended legislation evolved from a comprehensive review of federal and state court cases concerning use of force as well as legislation from other states. Recent court decisions have placed a heavy responsibility on police administrators and municipal officials in insuring that their respective agencies have properly trained personnel as well as a sound system of policies and procedures governing police practices. During the development of the report, the U.S. Supreme Court made a final ruling in the case Garner v. Tennessee. Some of the background discussion that follows was developed prior to this ruling, but the decision was taken into consideration in drafting the suggested written guidelines and legislation.

Ohio has no general statute governing police use of force. Specific guidance in Ohio for police use of force is based on case law and English common law. The lack of a general statute and the changeable nature of applicable case law cause diverse use-of-force policies to be present in Ohio's many police jurisdictions. Some agencies have no use-of-force policies at all.

> The unwarranted application of force, especially the shooting of a citizen, may severely damage the trust that may have taken years to build between the police and the community. Resentment is especially high if the police chief in the face of such action fails to discipline the offending officers. It follows that the issue of force, especially deadly force, has become a major concern of the police chief. Unless clear guidelines are developed to help officers exercise judgment, and unless procedures for accountability are established, police use of force will continue to present problems. [1]

Therefore, this document has been developed in an attempt to assist police agencies throughout Ohio in providing a legally sound framework to develop use-of-force policies and procedures. This document should not be construed as a legal opinion or as an all inclusive review. Any agency adopting use-of-force policies and procedures should consult their respective legal counsel for the appropriate legal review.

USE OF WORDS

Throughout the report, the words police officer, law enforcement officer, police chief, and law enforcement executive are used. For purposes of this report, these words are interchangeable and meant to be used in their general application to law enforcement agencies throughout Ohio. The model guidelines have been written to refer to any law enforcement agency, executive, or officer.

For purposes of technical definitions, Section 2901.01 of the Ohio Revised Code provides the definitions used herein for force, deadly force, physical harm, serious physical harm, and law enforcement officer.

BACKGROUND DISCUSSION

USE OF FORCE

The use of force by police officers occurs during the performance of a substantial portion of their duties. Each law enforcement officer can be reasonably expected to use varying degrees of force numerous times during his/her career. The force used can amount to just leading a suspect to a waiting patrol car with a comealong, or to the use of deadly force. The demands of the citizens to be secure, the judicial system, constitutional law and an officer's job security dictates that appropriate force be used in the performance of his/her duties. The problem, therefore, becomes a question of providing training, policy and laws specific enough to make it unequivocally clear to all law enforcement officers what is acceptable behavior in the use of force.

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Only one Ohio statute specifies when a law enforcement officer may use force, including deadly force, in the performance of his/her job. It is Section 2917.05 of the Ohio Revised Code, justifiable use of force to suppress riot. The law permits police officers and firemen to use force to disperse or apprehend rioters. Deadly force is justified when and to the extent the officer has probable cause to believe such force is necessary to disperse or apprehend rioters whose conduct is creating a substantial risk of serious physical harm to persons.

Many questions arise. What conduct by rioters justifies use of deadly force? What is sufficient probable cause or conduct creating a substantial risk of serious physical harm to one law enforcement officer is not the same as what another officer may consider sufficient. The exercise of deadly force in such situations is normally sudden, reactive and irrevocable. Is there not some means of providing sufficient guidance to the individual officer so that the force he/she exercises is proper? What guidance is necessary to protect the rights of the officer, the department, the city, the county, the state, and above all, the citizens he has sworn to protect?

A case, Garner v. Memphis Police Department, is currently before the U.S. Supreme Court.[2] It concerns the death of a juvenile who was shot by an officer while the boy was fleeing the scene of the burglary of an unoccupied house. An amicus curiae brief was filed with the U.S. Supreme Court by The Police Foundation, nine national and international associations of police and criminal justice professionals, the chiefs of police associations of two states and thirty-one individual law enforcement chief executives. The brief was filed in support of the father of the deceased and not in support of the

police officer. The reason will become clear as the specifics of the brief are discussed. Much of the discussion which follows is equally applicable to the general use of force as it is to the use of deadly force.

But before we discuss the contents of the brief, there should be a short discussion of the police use of force. Situations dictating the use of force by police are not static, but dynamic, everchanging. Each is different and involves different persons, never two alike. The time lapse is always short, compared with the subsequent investigation and court proceedings. Some situations are dictated by the environmental conditions, some by the suspect. Some confrontations can be controlled by the officer, some can't. There are situations where the use of deadly force is at initial contact. There are others which escalate from a simple assist to a misdemeanor violation and finally to a felonious act and the use of deadly force. Sometimes this escalation is not the fault of the suspect, but of lack of training or improper actions by the officer. In any confrontation involving the use of force, the officer's first consideration is, and rightfully should be, his own safety. If he doesn't consider his safety first, can he be expected to put the safety of his fellow officers, the department and innocent persons in their correct place?

To begin the discussion of the amicus brief in the Garner v. Memphis case, a statement of its purpose and argument should be made. The intent of the persons and organizations filing the brief is to improve the effectiveness of the police and to safeguard the basic rights of citizens. It states that, "Laws permitting police officers to use deadly force to apprehend unarmed non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime and do not improve the crime fighting ability of law enforcement agencies."[3] The use of deadly force in this circumstance, "is responsible for unnecessary loss of life, for friction between police and the communities they serve resulting in less effective law enforcement, and for an undue burden upon police officers who must make and live with the consequences of hasty life-or-death decisions."[4] This argument, stated by the amici, can be extended to include use of deadly force in other fleeing felon situations with additional justification.

> The brief goes on to say that, "Laws that authorize the police to employ deadly force to apprehend all fleeing felony suspects do not contribute to the ability of the police to fight crime or to protect themselves. We all know the terrible costs of crime to American society and the dangers criminals present to law-abiding citizens and to police officers. If expansive use of police deadly force had a measurable effect upon crime and public safety; one would expect to find some association between the breadth of police authority to use deadly force and measurements of crime and public and police safety. One would expect that rates of crime and violence would be lowest in jurisdictions in which police authority to use deadly force was most broad, and one would expect that jurisdictions that more clearly defined and limited police officers' authority to use deadly force would experience increased

crime rates and decreases in the safety of the public and the police."[5]

All the available evidence indicates that expansive use of police deadly force to apprehend fleeing suspects is in no way associated with reduced rates of crime or with increased safety of the public or the police. For example, in 1968, the Oakland, California Police Department established an administrative policy prohibiting use of deadly force to apprehend fleeing auto theft and burglary suspects. In a 1971 evaluation of the effects of that policy, then Police Chief Charles Gain reported that:

> "There is absolutely no evidence supporting the proposition that restrictive (deadly force) policies adversely affect the arrest rate for burglary and auto-theft. Our own experience in Oakland indicates that the institution of a policy restricting the use of deadly force against burglars had no effect one way or the other, upon the arrest rate for burglary . . . . There is no evidence whatever to support the contention that police authority to shoot is a deterrent to the commission of the crime . . . . It cannot be demonstrated that police firearms policies have had any effect, one way or the other, on the increase in the incidence of crime."
>
> "Not a single police officer has been injured, killed or placed in jeopardy because of the restrictions upon his authority to fire."[6]

A 1979 study of the effects of a New York City Police Department regulation that restricted officers' authority to employ deadly force against fleeing suspects reached similar findings. It reported that implementation of the Police Department regulation was followed by a 75 percent decrease in incidents in which officers fired shots at fleeing suspects who presented no imminent threat to life. The number of people shot and non-fatally wounded by the police decreased by 41 percent and the number of fatal shootings declined by 38 percent. These declines, however, had no adverse effect on rates of crime or arrest rates. Police injuries and deaths decreased following the directive.[7]

A study published just last year of police use of deadly force in Atlanta similarly reported that restriction of police shooting discretion in that city was accompanied by a decrease in police use of deadly force and that there was no effect upon violent crime rates, arrest rates or police injury and death rates.

There is no available evidence that establishes any public benefit flowing from broad use of deadly force.[8]

Broad police deadly force statutes actually work against the primary police responsibility to protect life and enforce the law. Whenever police officers kill citizens, tensions between police and the communities they serve are likely to increase, especially when police take the lives of per-

sons who present no clear and present danger to officers or others. Consequently, it becomes more difficult for the police to obtain public cooperation in their daily efforts to protect life and to fight crime. Police inability to obtain cooperation and information ultimately results in failure to identify violent offenders and in further loss of life.[9]

Public reaction to instances of police use of force and deadly force has included violence, public disorder and further loss of life. Police shootings in New York City, Miami, New Orleans, Los Angeles, Atlanta, Tampa, San Francisco and St. Louis are but a few examples of shootings which escalated to riot or near riot conditions. The primary police responsibility of protecting life and enforcing law is best served by reducing use of force, including deadly force, to an absolute minimum by providing meaningful guidelines for officer discretion. The police as well as the public will benefit from standards which are carefully thought out and tailored to individual jurisdictions.

SUMMARY

1985 - U.S. SUPREME COURT DECISION - GARNER CASE

See also Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983), aff'd and remanded 53 USLW 4410 (1985). In Garner, the Supreme Court held that the Tennessee statute was unconstitutional insofar as it authorized use of deadly force against, in this case, an apparently unarmed, nondangerous fleeing suspect. Such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. The Supreme Court agreed that the officer had acted in good faith reliance on that Tennessee statute and therefore was within the scope of a qualified immunity. However, the court left for remand whether the Police Department and City are liable--in light of Monell-whether any unconstitutional municipal conduct flowed from "a policy or custom" or whether, in this instance, the city should enjoy a qualified immunity.[10]

> (Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. Amici note that "after extensive research and consideration, they have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies." Brief for Police Foundation et al. as Amici Curiae 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all fleeing felons. See supra, at 8-9, and n. 10.)

RESTRICTIONS TO POLICE AUTHORITY

There has been a steady move to restrain the police use of deadly force. More than twenty years ago the Model Penal Code proposed to restrict police authority to employ deadly force against all fleeing felony suspects.

In 1967, the President's Commission on Law Enforcement and Administration of Justice observed:

> "Deadly force should be restricted to the apprehension of perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed."

In 1983, the federally funded Commission on Accreditation for Law Enforcement Agencies, which is composed of judicial, legislative, state and local government, academic and law enforcement representatives, adopted the following model policy and commentary on use of deadly force:

> 1.3.2 A written directive states that an officer may use deadly force only when the officer reasonably believes that the action is in defense of human life, including the officer's own life, or in defense of any person in immediate danger of serious physical injury. Commentary: The purpose of this standard is to provide officers with guidance in the use of force in life and death situations and to prevent unnecessary loss of life. Definitions of "reasonable belief" and "serious physical injury" should be included in the directive.
>
> 1.3.3 A written directive specifies that use of deadly force against a "fleeing felon" must meet the conditions required by standard 1.3.2.

A "fleeing felon" should not be presumed to pose an immediate threat to life in the absence of actions that would lead one to believe otherwise, such as a previously demonstrated threat to or wanton disregard for human life.

These standards were drafted and unanimously recommended to the Commission by the International Association of Chiefs of Police. ("IACP'), NOBLE, the National Sheriffs' Association and PERF.

In a United States Department of Justice supported study of police deadly force in 53 American cities with populations over 250,000, the International Association of Chiefs of Police reported that, as of 1980, 46 police departments (86.8 percent) had promulgated administrative rules that prohibited officers from employing deadly force to "arrest any felon", that four (7.5 percent) permitted such deadly force, and that the administrative policies of three (5.7 percent) did not address this issue.

Thus, nearly seven in eight of the major municipal police departments in the United States did not permit officers to use deadly force to apprehend all felons. On the basis of its analysis, IACP recommended the following guideline on use of deadly force to effect apprehensions:

> "An officer may use deadly force to effect the capture or prevent the escape of a suspect whose freedom is reasonably believed to represent an imminent threat of grave bodily harm or death to the officer or other person(s)."[11]

A 1982 survey of the deadly force policies of 75 police departments whose chief executives were members of PERF by that organization's staff found that 74 prohibited use of deadly force to apprehend all fleeing felony suspects.

These statements and the IACP and PERF findings regarding the small number of police agencies adhering to the rule that deadly force is permisssible to apprehend all fleeing felony suspects demonstrate that the law enforcement community generally considers this standard reprehensible.

Very few police departments actually use deadly force to stop fleeing suspects. Only a small minority of police firearm discharges nationwide are for the purpose of stopping fleeing felony suspects. This use of deadly force is insignificant to the ability of the police to make felony arrests.

Laws and policies that authorize police use of deadly force to apprehend fleeing felony suspects can fail to adequately guide a police officer's discretion. The adoption of restrictive administrative policies governing deadly force in states with laws otherwise authorizing police use of deadly force to apprehend all fleeing felony suspects is largely dependent upon the individual predilections and philosophies of police chiefs.[12]

A logical question follows: Should this be the case in Ohio with its many police agencies with overlapping jurisdictions and responsibilities?

Where there are no administrative guidelines, shooting is left to the discretion of the individual police officer. The question of when police officers are permitted to take a life should no more be a matter of unlimited administrative prerogative or unguided officer discretion than should the imposition of capital punishment be totally at the discretion of local juries.

The discretion given an officer to shoot to kill anytime a fleeing suspect may have committed some felony is less tolerable in the current society with a well-ordered system of criminal justice. Is it fair to place the burden of this irrevocable decision on an individual officer, considering the time and facts available to him? Or can the burden of making the decision be removed from the officer? There can be little doubt that when there is more restriction in the discretion in use of deadly force, that the arbitrary exercise of the deadly force will be reduced.

One scholar has conducted an experiment in which he presented hypothetical fact patterns concerning three arrest situations to 25 randomly selected police officers in Connecticut, a state in which the common law allows police to use deadly force to apprehend all fleeing felony suspects. Although all 25 officers were making decisions on the basis of the same state law, they split almost evenly when asked if they would be likely to use deadly force in identical situations.[13]

Another scholar found a correlation between use of deadly force and personal characteristics of the officer based on analysis of the results of a questionnaire administered to 151 patrol officers from two unnamed municipal police departments in the central south and the midwest. The officers were asked to identify eight personal characteristics (officer's age, assignment, sex, race, length of police service, if officer had been victim of a felonious assault, military experience) and judge the appropriateness of using deadly force in twelve hypothetical police situations. A high degree of agreement among these officers was found in eleven of these situations. Of the twelfth hypothetical, a "classic fleeing felon situation (in which) an officer sees and shoots a burglar fleeing the scene of his crime," however, the officers' assessments of the appropriateness of using deadly force varied significantly with seven of the eight personal characteristics analyzed. Officers with high educational levels were significantly less likely than less well educated officers to regard shooting in the fleeing felon hypothetical as appropriate. The study also found that:

> "Older officers were less likely to agree with the use of a firearm to apprehend a fleeing burglar suspect than respondents in other age groups. Younger officers may be in the "badge is heavy" phase of their career as police officers. They are most likely to be cynical, alienated and definite in their opinions. They may also be the group of police officers most likely to shoot someone."[14]

NOTES

[1] Local Government Police Management: International City Management Association, Second Edition.

[2] The U.S. Supreme Court ruled in the Garver v. Tennessee case on March 27, 1985. The text of the opinion is attached herewith as an exhibit.

[3] Garner v. Memphis Police Department, 710F.2d 240, 241 (6th Cir. 1983) Amicus curiae brief filed with U.S. Supreme Court, October, 1984 by The Police Foundation, nine national and international associations of police and criminal justice professionals, the chiefs of police associations of two states, and thirty-one law enforcement chief executives.

[4] Ibid.

[5] Ibid.

[6] Gain, Discharge of Firearms Policy: Effecting Justice Through Administrative Regulation - A Position Paper (Report released December 23, 1971 by Oakland Police Chief Charles Gain in explanation of a change in departmental deadly force policy), cited in W. A. Geller & K. J. Karales, Split-Second Decisions: Shootings of & by Chicago Police at 67-68 (1981).

[7] J. Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J. Crim. Just. 309 (1979).

[8] L. Sherman, Reducing Police Gun Use, in M. Punch, Control in the Police Organization 98 (1983).

[9] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 144 (1967).

[10] "Civil Liability Against Municipalities and Its Officers", by Michael W. Hawkins and Jeffrey S. Shoskin from the law firm of Dinsmore & Shohl, Cincinnati, Ohio.

[11] K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police at 161 (1982).

[12] G. Uelman, Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County, 6 Loy. L.A. Legal Review 1 (1973), cited in U.S. Department of Justice, A Community Concern: Police Use of Deadly Force at 88-89 (1979).

[13] G. Hayden, Police Discretion in the Use of Deadly Force: An Empirical Study of Information Usage in Deadly Force Decision Making (1979); an unpublished paper available at the University of New Haven, cited in

L. Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. at 95 N. 150 (1980).

[14] Brown, Use of Deadly Force By Police Officers: Training Implications, 12 J. Pol. Sci. & Adm. 133 at 139 (1984).

MODEL USE OF FORCE POLICY

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Each law enforcement officer shall utilize any and all legal means available to prevent or halt the commission of a criminal offense or to apprehend a criminal offender, when it is within the officer's power and authority to do so, alone or with available assistance.

A law enforcement officer acting within the scope of his employment shall use only that force which he reasonably believes is necessary to effect an arrest, detention or mission.

A law enforcement officer acting within the scope of his employment shall be justified in the use of deadly force under the following circumstances:

- To defend himself from what is reasonably believed to be an imminent threat of serious physical harm or death.
- To defend another person from what is reasonably believed to be an imminent threat of serious physical harm or death.
- When engaged in suppressing riot or in protecting persons or property during riot when and to the extent he has probable cause to believe such force is necessary to dispense or apprehend rioters whose conduct is creating a substantial risk of serious physical harm to persons.
- To effect the capture or prevent the escape of a suspect if there is a substantial risk that a person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

SUGGESTED POLICY AND PROCEDURE

AREAS TO HAVE WRITTEN GUIDELINES

After careful research of incidents in which force was used, particularly in circumstances that led to litigation, several areas were identified that should be addressed by written guidelines. For reference by law enforcement executives, these areas are discussed in succeeding pages, including a listing of reference sources.

This information should be considered as an information and reference source only and reflects minimum suggested guidelines. Law enforcement executives should tailor written guidelines to the needs of their respective jurisdictions and should consult with legal counsel concerning technical points of law.

Governor's Law Enforcement Liaison Committee

STATEMENT OF POLICY/COMMUNITY STANDARD

USE OF FIREARMS

The value of human life is immeasurable in our society. Law enforcement officers have been delegated the awesome responsibility to protect life and property and apprehend criminal offenders. The apprehension of criminal offenders and protection of property must at all times be subservient to the protection of life. The officer's responsibility for protecting life must include his own.

MODEL USE OF FORCE POLICY

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- When engaged in suppressing riot or in protecting persons or property during riot when and to the extent he has probable cause to believe such force is necessary to dispense or apprehend rioters whose conduct is creating a substantial risk of serious physical harm to persons.

- To effect the capture or prevent the escape of a suspect if there is a substantial risk that a person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

DISPLAYING OF FIREARMS

Every law enforcement executive should establish written policy prohibiting unprofessional conduct in the display or use of firearms and non-lethal defensive tools.

1. Use of agency issued equipment should be prohibited outside the scope of employment.

2. Formal written procedures for the administration of internal discipline should be established.

Reference

Failure To Discipline - McKenna v. City of Memphis, 544F. Supp. 415 (1982)

Sims v. Adams 537F. 2d 829 (5th Cir 1976)

Smith v. Ambrogio 456F. Supp. 1130 (D. Conn 1978)

Accidental Firing Other Than During Arrest - Defense Manual 79-3 p. 19

District of Columbia v. Davis (Horseplay at Party)

Peer v. City of Newark (Dropped Gun)

Hacker v. City of New York (Cleaning Loaded Gun)

Martin v. Garlotte (Quick Draw)

Truog v. American Bonding Co. (Shooting at Bird)

Horn v. I.B.I. Security Service of Flonda, Inc. (Quick Draw)

OFF-DUTY SITUATIONS AND WEAPONS

Every law enforcement executive should establish written procedures for the carrying of weapons while off duty.

1. Every law enforcement agency should establish written specifications for agency-approved sidearms and ammunition to be carried when off duty.

2. Written procedures should be developed to cover those details in which an officer is actually off duty but may be required to address duty situations that occur from the off-duty assignment or occur in close physical proximity to the officer.

Reference

AELE Defense Manual 78-6, p. 19

AELE Defense Manual 79-3, pp. 19, 22, 23

Reece v. City of Seattle, 503P2d 64 (Wash. 1972)
(White officers dining with wives, assaulted by blacks who fled and were fired upon.)

District of Columbia v. Dairs, 386A 2d 1195 (DC Ct. ARP 1978)
(Unholstering at a party, employer liable due to requirement to carry firearm at all times.)

Peer v. City of Newark, 178A. 2d 249 (N.J. Supere 1961)
(Gun dropped injuring a child in an apartment.)

Hacker v. City of New York, 261 N.Y.S. 2d 751 (Misc. 1965)
(Cleaning a loaded firearm.)

Corridan v. City of Bayonne, 324A. 2d 42 (N.J. App. 1974)
(Employer liable, knew officer often drunk in bar while off duty.)

McCrink v. City of New York, 71 N.E. 2d 219 (N.Y. 1947)
(Employer liable, knew officer had alcohol problem, disciplined three times.)

EQUIPMENT REQUIREMENTS

Every law enforcement executive should specify the type of firearms, ammunition, and auxiliary equipment to be used by the agency's law enforcement officers. To enhance efficiency, personal equipment items should be interchangeable among all officers of the agency. Once established, these specified standards should be maintained by frequent periodic inspections and appropriate disciplinary action when agency regulations are violated.

1. Every law enforcement agency should establish written specifications for agency-approved sidearms and ammunition to be carried by officers on uniformed duty, or plainclothes duty, or off duty. The specifications should include the type, caliber, barrel length, finish and style of the sidearms, and the specific type of ammunition.

2. Every law enforcement agency which permits use of shotguns should establish an easily accessible, secure location for the storing of the weapon in vehicles. Training and qualification in use of the shotgun should be required of any officer authorized to use the weapon.

3. Every law enforcement agency should designate all items of auxiliary equipment to be worn or carried by its uniformed officers. To insure intra-agency uniformity, the approved type, size, weight, color, style and other relevant variables of each auxiliary equipment item, along with the position on the uniform or belt where it is to be worn or carried should be specified in writing.

4. Every law enforcement agency should initiate a program of frequent, regular equipment inspections to insure that personal equipment items conform to agency specifications and are maintained in a presentable and serviceable condition. To insure that each officer's weapon functions properly, firearm practice should be required for all officers periodically and all firearms should be examined at regular intervals by a qualified armorer.

5. To insure shooting competency, every agency's policy relative to fireams practice should require each officer to participate in firearms qualification situations. A minimum qualifying score in the firearms practice course should be adopted.

Reference

National Advisory Commission on Criminal Justice Standards & Goals, Task Force on Police, Standard 21.2

Defense Manual 79-3, pp. 19-20, Liability for Equipment

Defense Manual 75-4, p. 20, "Litigation Challenging the Choice of Ammunition and Lethal Weapons."

FIREARMS SAFETY PRACTICES

Every law enforcement executive should establish written policy regarding firearms safety practices while at firing range, while on duty, and while off duty.

1. Specific safety procedures should be established to govern the operation of an agency's firing range and the officer's conduct while on the range.

2. Specific security and safety procedures should be written to govern the carrying and storage and handling of weapons on duty, off duty, in patrol vehicles and at headquarters.

Reference

Mozingo v. Barnhart, W. Va. 285 SE 2d 497 (Lack of Training)

Harden v. United States, 688F. 2d 1025 (1982) pp. 1025, 1027

AELE Defense Manual, 79-3 pp. 18, 20

Everett v. City of New Kensington, 396A. 2d 467 (Pa. 1978) (Cocked Gun)

Bucholz v. Sioux Falls, 91 N.W. 2d 606 (S. D. 1958) (Firing Range)

Gaines v. Wyoming, 66 N.E. 2d 162 (Ohio App. 1947) (Firing Range)

Martin v. Garlotte, 270 So. 2d 252 (LA App. 1973) (Negligent Handling)

Meistinsky v. New York, 140 N. Y. S. 2d 212 (1955) (Negligent Handling)

Peer v. Newark, 176A. 2d 249 (N. J. Super 1961) (Negligent Handling)

Hacker v. New York, 261 N. Y. S. 2d 751 (N. Y. Super 1965) and 275 N. Y. S. 2D 146 (Negligent Handling)

Truog v. American Bonding Co., 107 P 2d 203 (Ariz. 1940) (Negligent Handling)

Benway v. Watertown, 151 N. Y. S. 2d 485 (1956) (Controlling Access To and Use of Firearms)

Bucholz v. Sioux Falls, 77 S. D. 322 (1958) (Controlling Access To and Use of Firearms)

USE OF SHOTGUNS AND RIFLES

Every law enforcement executive should establish written specifications for agency-approved shotguns and rifles and their use.

1. Every law enforcement agency should specify gauge, barrel length, and ammunition of shotguns that are made available in each patrol vehicle.

2. Law enforcement agency policy should state that shotguns should be uniformly loaded and immediately accessible to the patrol officer, and in a uniform standard location.

3. Every law enforcement agency should prohibit the carrying of shotguns or rifles for which there is no demonstrated proficiency, qualification procedures or periodic training.

4. Periodic training, inspection and qualification in the use of the shotgun and rifle should be an established written policy of each law enforcement agency. Training and qualification should be conducted in a manner approaching as close as possible to real-life situations.

Reference

Sager v. City of Woodland Park 543F. Supp. 282 (1982)
(Suspect spread eagled on ground with shotgun held to head with one hand.)

AELE Law Enforcement Legal Defense Manual, 79-3, p. 25
(Grudt v. City of Los Angeles) (Firing shotgun at fleeing assault vehicle.)

Clark v. Ziedonis, 368F. Supp. 544
(E. D. Wise, 1973) aff'd 513F. 2d 79 (7th Cir. 1975)

Smaltz v. Sowash, No. 39964 Richmond Co. Ct. Com. Pls. (Ohio Dec. 1964)
(Marshall fired shotgun at boy soaping police chief's car.)

TRAINING -- TAILORED TO JURISDICTION

Every law enforcement executive should establish written policy requiring documentation that all officers are thoroughly trained in the law as it applies to the use of force, the agency's shooting policy, and the vicarious liability of the agency.

1. An agency should maintain complete training records on each officer.

2. Every law enforcement agency should provide periodic in-service training in the use of force. Both theoretical and practical use of force training should be tailored to the peculiar environmental aspects of the community.

3. Firearms qualification should use ammunition matching duty loads.

4. Minimum qualification standards should be in written policy for all firearms an officer is authorized to use, including off-duty weapons.

5. All officers should be trained in the use of all authorized non-lethal weapons he/she might use.

Reference

McKenna v. City of Memphis 544F. Supp. 415 (1982)

Sager v. City of Woodland Park 543F. Supp. 282 (1982)

Garner v. Memphis Police Dept. 710F. 2d 240 (1983)

AELE Law Enforcement Legal Defense Manual, 79-3, p. 21

Law and Order, August 1983, "Qualifying Ammo, It Should Match Duty Loads."

MINIMUM QUALIFYING STANDARDS

Every law enforcement executive should establish written policy specifying the type of firearms, ammunition, and auxiliary equipment to be used by the agency's law enforcement officers.

1. Firearms and ammunition used in qualification should match duty equipment.

2. Minimum qualification standards should be established in written form. The situation the officer is placed in during qualification should closely approximate real life situations, including lighting conditions, stress, time and environment.

3. All officers carrying firearms, who may be exposed to an enforcement situation, must meet the minimum qualification standards for each firearm they might use, in order to continue performing their normal duty assignment.

4. All officers must meet minimum qualification standards established by the respective jurisdiction.

5. Minimum qualification standards must be met with a "second gun" or "off-duty" gun before it may be carried.

6. Qualification standards must also include training in when not to shoot, in the law as it applies to the use of force and in the agency's shooting policy.

Reference

Mozingo v. Barnhart, W. Va., 285 S.E. 2d 497 p. 498

McKenna v. Memphis, 544F. Supp. 415 (1982) p. 416

AELE Defense Manual, 79-3, pp. 19, 22, 23

McAndrew v. Mularchuk, 162 A. 2d 820 (N.J. 1960)

Piotkouski v. State, 251 N.Y.S. 2d 354 (AD 1964)

Martin v. Garlotte, 270 So. 2d (La. App. 1972)

Peer v. City of Newark, 176 A 2d 249 (N.J. App. 1961)

City of Cumming v. Chastain, 102 SE 2d 97 (Ga. 1958)

Van Oosting v. Duber, 129 Cal. Rptr. 173 (App. 1976)

Defender v. City of McLaughlin, 228F. Supp. 615 (D.S.D. 1964)

Bates v. City of McComb, 179 So. 737 (Miss. 1938)

MOVING VEHICLES

1. Every law enforcement executive should establish written policy prohibiting the use of firearms while in a moving vehicle unless in self-defense or in defense of other persons in imminent threat of serious physical harm.

2. Every law enforcement executive should establish written policy prohibiting the use of firearms from either a stationary or moving position in an attempt to disable a moving vehicle unless the officer or other persons are in imminent threat of serious physical harm.

3. Every law enforcement executive should establish written policy on the use of and participation in road blocks or rolling road blocks. Very specific guidelines should be established to insure that other motorists and bystanders are protected. Officers should be guided that the use of a patrol car in an offensive posture to stop a fleeing suspect can proximately result in the use of deadly force and innocent persons exposed to injury.

Reference

Mozingo v. Barnhart, W. Va., 285 S.E. 2d 497 p. 498

McKenna v. Memphis, 544F. Supp. 415 (1982) p. 416

AELE Defense Manual, 79-3, pp. 13, 14, 25

Arnold v. State of New York, 20 N.E. 2d 774 (N.Y. 1939)

Bassinger v. U.S.F. & G., 58F. 2d 573 (8th Cir.), 287 U.S. 622 (1932)

State ex. rel. Harlen v. Dunn, 282 S.W. 2d 203 (Tenn. 1943)

Jones v. State, 253 S.W. 2d 740 (Tenn. 1952)

Edgin v. Talley, 276 S.W. 591 (Ark. 1925)

Stevens v. Adams, 2 S.W. 2d 299 (Ark. 1930)

State ex. rel. Kaercher v. Roth, 49 S.W. 2d 109 (Mo. 1932)

American Guaranty Co. v. McNiece, 146 N.E. 77 (Ohio 1924)

Carlton v. Geer, 203 N.W. 2d 45 (Wis. 1923)

Johnson v. Jackson, 230 S.E. 2d 756 (Ga. App. 1976)

Smith v. Jones, 379F. Supp. 201 (M.D. Tenn. 1973)

Grudt v. City of Los Angeles, 468P. 2d 825 (Cal. 1970)

WARNING SHOTS

Every law enforcement executive should establish written policy prohibiting the use of warning shots.

Reference

Army Regulation 190-28, Military Police, Use of Force (24 May 1971)

AELE Defense Manual, 79-3 p. 14

Harden v. United States 688F. 2d 1025 (1982)
(Warning shot from motor vehicle.)

United States v. Jasper 222F. 2d 632 (1958)
(Ricochet.)

Bernstine v. City of Natchioches 335 So. 2d 51 (LA App. 1976)

Jones v. Wittenberg University 534F 2d 1203 (6th Cir. 1976)
(Errant warning shot)

Young v. Kelley 21 NE 2d (Ohio 1938)
(Bystander struck by warning shot meant to scare misdemeanant.)

Locke v. Bralley 50 SW 2d 240 (Tx. 1932)
(Used to frighten; ricochet.)

Havier v. Partin, 492P. 2d 761 (ARIZ. App. 1972)
(Warning shot killed fleeing misdemeanant when officer's arm struck by another person.)

Davis v. Hellwig, 122A 2d 497 p. 498 (N.J. 1956)

Geiger v. Maoden, 58PA. 616 (PA. Super, 1915)

State v. Cunningham, 65 SO. 115 (Miss. 1914)

Edgin v. Talley, 276 SW 591 (Ark. 1925)

AGE OF SUSPECT

Every law enforcement executive should establish written policy concerning the use of deadly force against a person known to be a juvenile unless that person is presenting an imminent threat of serious physical harm to any person. Other means of force to eliminate the threat must be reasonably believed to be inadequate. In other words, the use of deadly force must be a last resort.

1. With respect to juveniles, an officer should protect himself and others from what the officer reasonably believes to be an imminent threat of death or grave bodily harm, regardless of the age of the aggressor.

2. In addition, precautionary measures should be adopted to take into consideration that juveniles are many times irrational risk takers and will resort to flight to avoid arrest more often than adults.

Reference

Garner v. Memphis Police Department, 710F. 2d 240 (1983)

Harden v. United States, 688F. 2d 1025 (1982)

AELE Defense Manual, 79-3, pp. 13, 14, 21

Murphy v. Murray, 241 P. 938 (Cal. App. 1925)

Smith v. Jones, 379F. Supp. 201 (M.D. Tenn. 1973)

Wimberly v. Peterson, 183A 2d 621 (N.J. App.)

Walsh v. Oehlert, 508 S.W. 2d 222 (MO. App. 1974)

Kenneth J. Matulia, A Balance of Forces, International Association of Chiefs of Police, 1982.

INVESTIGATION OF FIREARMS DISCHARGE

It is recommended that every law enforcement executive have written policies and procedures covering the investigation of a firearms discharge. Suggested language for initial policy could be: "Every incident of firearms discharge by a department member will be investigated except for target practice, ballistic examinations, and incidents involving the destroying of an animal."

POST-SHOOTING TRAUMA

Under any circumstances, the taking of a life produces trauma for the individual law enforcement officer and for his family. Use of force under circumstances that are legally justified in Ohio under the common law, but which subsequently raise questions of judiciousness, fairness and propriety, cause that trauma to be increased.

The lack of adequate laws, policies or standards that provide guidance in the use of force serve to encourage excessive use of force, and subject law enforcement officers to criticism, trauma and civil liability. In many situations, the criticism, trauma and liability are far more attributable to the inadequacy of the laws and rules under which an officer acts than they are to his own actions. This fact has been a strong contributor to the proliferation of recent civil litigation.

The Delaware Police Chiefs' Council eloquently stated the forces that work upon law enforcement officers in use of force confrontations which culminate in the use of deadly force:

> "The decision to employ deadly force against another human being is in all probability the most serious and difficult decision a law enforcement officer will be faced with. The primary responsibility of the police is that of protecting life. This responsibility dictates the need for consideration of not only the legal aspect of the use of deadly force, but also the moral issues arising from a reverence for the value of life. It is, therefore, in the interest of both the public and the law enforcement officer that uniformly accepted guidelines clearly govern the use of firearms in the enforcement of the law."[15]

Laws authorizing law enforcement officers to employ deadly force to apprehend all fleeing felony suspects include no such clear guidelines. Indeed, they place officers who serve under those statutes in the terrible position of having to live forever with the consequences of the instantaneous decision, made without real legislative guidance as to where and when it is appropriate to take the life of a fleeing felony suspect. Thus, laws that authorize law enforcement officers to employ deadly force to apprehend all fleeing felony suspects are likely to lead to arbitrariness in the taking of life by law enforcement officers. This increases the exposure of officers to censure, trauma and civil liability. Conversely, because such laws so inadequately define appropriate law enforcement officer behavior, officers who refrain from using deadly force will always be uncertain that they have acted correctly. In either case, the long-term effects of inadequate laws upon both sets of law enforcement officers is bad for their understanding of and respect for the law. The duties they perform and their general effectiveness and morale suffer.

Suggested Policy

Every law enforcement agency should adopt policies and procedures covering measures to be taken after an officer is involved in a shooting in which a person was seriously wounded or killed. Areas to be addressed include legal counsel, counseling services available, and administrative leave.

1. Based upon research in the field and recent trends, it has been found helpful for officers involved in shootings to be provided with supportive counseling.

NOTES CONT.

[15]J. Kienoski, "Administrative Police Statements: Deadly Force" (May 21, 1981).

MODEL LEGISLATION

FOR ADOPTION BY

THE OHIO GENERAL ASSEMBLY

MODEL LEGISLATION

FOR ADOPTION BY

THE OHIO GENERAL ASSEMBLY

Current state statutes and case law, including the Garner decision, may be sufficient for the purpose of regulating use of force in Ohio.

However, in response to inquiries-as to potential new legislation that could be adopted, a suggested draft law has been prepared for reference. This work reflects the principle elements of the Garner decision as well as points recommended by representatives of the Ohio Chiefs of Police Association, Ohio Highway Patrol, Buckeye Sheriffs Association, Ohio Association of Public Safety Directors and the Ohio Judicial Conference.

A B I L L

To enact section 2901.25 of the Revised Code to regulate the use of force or deadly force by law enforcement officers and provide for an affirmative defense.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 2901.25 of the Revised Code be enacted to read as follows:

Sec. 2901.25. (A) Each law enforcement officer shall utilize any and all legal means available to prevent or halt the commission of a criminal offense or to apprehend a person whom he has probable cause to believe is a criminal offender, when it is within the officer's power and authority to do so, alone or with available assistance.

(B) A law enforcement officer acting within his power and authority shall be justified in using only that force which he reasonably believes is necessary to effect an arrest or detention.

(C) A law enforcement officer acting within his power and authority shall be justified in the use of deadly force under the following circumstances:

(1) To defend himself from what he reasonably believes to be an imminent threat of serious physical harm or death;

(2) To defend another person from what he reasonably believes to be an imminent threat of serious physical harm or death; or

(3) If there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm, and the law enforcement officer believes deadly force is necessary to prevent escape.

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

(D) When and where possible, a law enforcement officer shall give a verbal warning before using deadly force.

(E) This section shall be in addition to any other provisions of the Revised Code relating to the use of force and deadly force.

(F) It shall be an affirmative defense to any action, criminal or civil, against a law enforcement officer, municipality, university, or other political subdivision where force was used in accordance with this section 2901.25.

Chapter 2901

GENERAL PROVISIONS

Note: Former Chapter 2901, 2901.01 to 2901.45, repealed by 1972 H 511, 1973 H 716, eff. 1-1-74.

LEGISLATIVE SERVICE COMMISSION NOTE (1973)

Chapter 2901. deals with a variety of matters applicable to the criminal law in general, including penal provisions found in the Revised Code outside the criminal code proper, from Title 1 through Title 61.

Terms which recur frequently are defined, and offenses are classified into degrees according to a uniform scheme. A number of concepts basic to the criminal law are covered, including the declaration that common law crimes do not exist in Ohio, the requirements for statutorily defining an offense, rules for construing substantive and procedural criminal provisions, the burden and degree of proof, and the burden of going forward with the evidence of an affirmative defense. Broad rules on jurisdiction and venue are provided as well as a statute of limitations which includes limitations on prosecution of felonies of the first or lesser degrees, not formerly subject to limitation.

The fundamental requirements for criminal liability are stated, and four degrees of guilty mind are defined, i.e., purpose, knowledge, recklessness, and negligence. Rules for holding an organization criminally liable for any offense are spelled out, together with rules for holding individuals accountable for offenses committed by an organization.

IN GENERAL

JURISDICTION, VENUE, AND LIMITATIONS OF PROSECUTIONS

CRIMINAL LIABILITY

CROSS REFERENCES

See Ohio Administrative Code, rule 5120:1-1-01

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23 Clev St L Rev 1 (1974). Several articles on the 1974 Criminal Code.

IN GENERAL

2901.01 Definitions

As used in the Revised Code:

(A) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(B) "Deadly force" means any force which carries a substantial risk that it will proximately result in the death of any person.

(C) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

(D) "Physical harm to property" means any tangible damage to property which, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

(E) "Serious physical harm to persons" means any of the following:

(1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(2) Any physical harm which carries a substantial risk of death;

(3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;

(4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;

(5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

(F) "Serious physical harm to property" means any physical harm to property which does either of the following:

(1) Results in substantial loss to the value of the property, or requires a substantial amount of time, effort, or money to repair or replace;

(2) Temporarily prevents the use or enjoyment of the property, or substantially interferes with its use or enjoyment for an extended period of time.

(G) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(H) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

(I) "Offense of violence" means any of the following:

(1) A violation of sections 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2909.02, 2909.03, 2909.04, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2917.01, 2917.02, 2917.03, 2917.31, 2921.03, 2921.34, 2921.35, 2923.12, and 2923.13 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section listed in division (I)(1) of this section;

(3) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(4) A conspiracy or attempt to commit, or complicity in committing any offense under division (I)(1), (2), or (3) of this section.

(J) "Property" means any property, real or personal, tangible or intangible, and any interest or license in such property.

(K) "Law enforcement officer" means any of the following:

(1) A sheriff, deputy sheriff, constable, marshal, deputy marshal, municipal police officer, or state highway patrolman;

(2) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of such statutory duty and authority;

(3) A mayor, in his capacity as chief conservator of the peace within his municipality;

(4) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of such member's appointment or commission;

(5) A person lawfully called pursuant to section 311.07 of the Revised Code to aid a sheriff in keeping the peace, for the purposes and during the time when such person is called;

(6) A person appointed by a mayor pursuant to section 737.01 of the Revised Code as a special patrolman or officer during riot or emergency, for the purposes and during the time when such person is appointed;

(7) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;

(8) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor.

(L) "Privilege" means an immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity.

HISTORY: 1972 H 511, eff. 1-1-74

Note: Former 2901.01 repealed by 1972 H 511, eff. 1-1-74; 1953 H 1; GC 12399, 12400. See 2903.01 for provisions analogous to former 2901.01.

LEGISLATIVE SERVICE COMMISSION NOTE (1973)

"Force" is defined to include all kinds of force which may be exerted physically against a person or thing, but to exclude coercive acts sometimes loosely called force, such as the compulsion exerted by blackmail through fear of exposure. "Deadly force" is defined as physical force carrying a strong possibility that it will result in death.

"Physical harm to persons" is conceived as personal, physical harm including, but not limited to, personal injury. In the context of tort law personal injury implies a trauma, but in the context of the criminal law a precedent trauma is not viewed as a necessary requirement before it can be held that personal harm is caused or threatened, such as when an offender deliberately, through other than traumatic means, sets out to drive his victim mad or arranges for his victim to contract pneumonia.

It should be noted that while physical illness is included in the concept of physical harm to persons, mental illness is not. Serious mental conditions are reserved for the definition of serious physical harm to persons, but the milder mental disturbances cannot be pinpointed with sufficient precision for use in the criminal law.

The definition of "physical harm to property" includes any tangible damage to property no matter how slight, but excludes intangible injuries, such as loss of value to securities because of market fluctuations.

The definition of "serious physical harm to persons" includes: mental illness requiring hospitalization or prolonged psychiatric treatment; any physical harm carrying a substantial risk of death; any physical harm involving permanent though partial disability, such as permanent limp or the loss of the full use of a limb; any physical harm involving temporary though substantial disability, such as an injury or illness requiring more or less prolonged hospitalization or bed rest which temporarily interferes with the victim's ability to work, as with a broken limb or mononucleosis; any physical harm involving permanent though partial disfigurement, or temporary though serious disfigurement repairable through plastic surgery; pain which is unbearable or nearly so, though short-lived, and pain which is long-lasting or difficult to relieve, though not as keen.

"Serious physical harm to property" is defined to include physical harm resulting in substantial loss to value or requiring considerable time, labor, or substance to repair, or which, regardless of value or repairability, renders the property temporarily unusable or interferes with its use.

"Offense of violence" includes 31 listed offenses, as well as substantially equivalent offenses, offenses committed purposely or knowingly and involving personal harm, and conspiracy, attempt, and complicity with respect to the preceding.

"Law enforcement officer" includes various persons having either general or special law enforcement powers.

"Privilege" is broadly defined to include any immunity, license, or right acquired in various listed ways.

CROSS REFERENCES

See Schroeder-Katz, Ohio Criminal Law, Crim R 24, Author's Text (4); Crim R 31, Author's Text (1)

See Merrick-Rippner, Ohio Probate Law (3rd Ed.), Text 263.11

See Ohio Administrative Code, rules 5120:1-1-37, 5120:1-1-39

U.S. SUPREME COURT DECISION

GARNER V. TENNESSEE

MARCH 27, 1985

Full Text of Opinions

Nos. 83–1035 AND 83–1070

TENNESSEE, APPELLANT
83–1035 v.
CLEAMTEE GARNER, ETC., ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMPHIS POLICE DEPARTMENT, ET AL., PETITIONERS
83–1070 v.
CLEAMTEE GARNER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Syllabus

No. 83–1035. Argued October 30, 1984—Decided March 27, 1985*

A Tennessee statute provides that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all the necessary means to effect the arrest." Acting under the authority of this statute, a Memphis police officer shot and killed appellee-respondent Garner's son as, after being told to halt, the son fled over a fence at night in the backyard of a house he was suspected of burglarizing. The officer used deadly force despite being "reasonably sure" the suspect was unarmed and thinking that he was 17 or 18 years old and of slight build. The father subsequently brought an action in Federal District Court, seeking damages under 42 U. S. C. § 1983 for asserted violations of his son's constitutional rights. The District Court held that the statute and the officer's actions were constitutional. The Court of Appeals reversed.

Held: The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against, as in this case, an apparently unarmed, nondangerous fleeing suspect: such force may not be used unless necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

(a) Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. To determine whether such a seizure is reasonable, the extent of the intrusion on the suspect's rights under that Amendment must be balanced against the governmental interests in effective law enforcement. This balancing process demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.

(b) The Fourth Amendment, for purposes of this case, should not be construed in light of the common-law rule allowing the use of whatever force is necessary to effect the arrest of a fleeing felon. Changes in the legal and technological context mean that that rule is distorted almost beyond recognition when literally applied. Whereas felonies were formerly capital crimes, few are now, or can be, and many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Also, the common-law rule developed at a time when weapons were rudimentary. And, in light of the varied rules adopted in the States indicating a long-term movement away from the common-law rule, particularly in the police departments themselves, that rule is a dubious indicium of the constitutionality of the Tennessee statute. There is no indication that holding a police practice such as that authorized by the statute unreasonable will severely hamper effective law enforcement.

(c) While burglary is a serious crime, the officer in this case could not reasonably have believed that the suspect—young, slight, and unarmed—posed any threat. Nor does the fact that an unarmed suspect has broken into a dwelling at night automatically mean he is dangerous.

710 F. 2d 240, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, POWELL and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined.

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

I

At about 10:45 p. m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house.[1] She told them she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the back yard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. App. 41, 56; Record 219. He thought Garner was 17 or 18 years old and about 5' 5" or 5' 7" tall.[2] While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture,[3] Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance

*Together with No. 83–1070, *Memphis Police Department et al. v. Garner et al.*, on certiorari to the same court.

[1] The owner of the house testified that no lights were on in the house, but that a back door light was on. Record 160. Officer Hymon, though uncertain, stated in his deposition that there were lights on in the house. Record 209.

[2] In fact, Garner, an eighth-grader, was 15. He was 5' 4" tall and weighed somewhere around 100 or 110 pounds. App. to Pet. for Cert. A5.

[3] When asked at trial why he fired, Hymon stated:

"Well, first of all it was apparent to me from the little bit that I knew about the area at the time that he was going to get away because, number 1, I couldn't get to him. My partner then couldn't find where he was because, you know, he was late coming around. He didn't know where I was talking about. I couldn't get to him because of the fence here, I couldn't have jumped this fence and come up, consequently jumped this fence and caught him before he got away because he was already up on the fence, just one leap and he was already over the fence, and so there is no way that I could have caught him." App. 52.

He also stated that the area beyond the fence was dark, that he could not have gotten over the fence easily because he was carrying a lot of equipment and wearing heavy boots, and that Garner, being younger and more energetic, could have outrun him. *Id.*, at 53–54.

Published each Tuesday except first Tuesday in September and last Tuesday in December by The Bureau of National Affairs, Inc., 1231 Twenty-fifth Street, N.W., Washington, D.C. 20037. Subscription rates (payable in advance) $412.00 first year and $396.00 per year thereafter. Second class postage paid at Washington, D.C., and at additional mailing offices.

to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body.[1]

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40–7–108 (1382).[2] The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. App. 140–144. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action. App. 57.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U. S. C. § 1983 for asserted violations of Garner's constitutional rights. The complaint alleged that the shooting violated the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. It named as defendants Officer Hymon, the Police Department, its Director, and the Mayor and city of Memphis. After a 3-day bench trial, the District Court entered judgment for all defendants. It dismissed the claims against the Mayor and the Director for lack of evidence. It then concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." App. to Pet. for Cert. A10.

The Court of Appeals for the Sixth Circuit affirmed with regard to Hymon, finding that he had acted in good-faith reliance on the Tennessee statute and was therefore within the scope of his qualified immunity. 600 F. 2d 52 (1979). It remanded for reconsideration of the possible liability of the city, however, in light of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), which had come down after the District Court's decision. The District Court was directed to consider whether a city enjoyed a qualified immunity, whether the use of deadly force and hollow point bullets in these circumstances was constitutional, and whether any unconstitutional municipal conduct flowed from a "policy or custom" as required for liability under *Monell*. 600 F. 2d, at 54–55.

The District Court concluded that *Monell* did not affect its decision. While acknowledging some doubt as to the possible immunity of the city, it found that the statute, and Hymon's actions, were constitutional. Given this conclusion, it declined to consider the "policy or custom" question. App. to Pet. for Cert. A37–A39.

The Court of Appeals reversed and remanded. 710 F. 2d 240 (CA6 1983). It reasoned that the killing of a fleeing suspect is a "seizure" under the Fourth Amendment,[3] and is therefore constitutional only if "reasonable." The Tennessee statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes—"the facts, as found, did not justify the use of deadly force under the Fourth Amendment." *Id.*, at 246. Officers cannot resort to deadly force unless they "have probable cause . . . to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large." *Ibid.*[4]

The State of Tennessee, which had intervened to defend the statute, see 28 U. S. C. § 2403(b), appealed to this Court. No. 83–1035. The city filed a petition for certiorari. No. 83–1070. We noted probable jurisdiction in the appeal and granted the petition. 465 U. S. —— (1984).

II

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975). While it is not always clear just when minimal police interference becomes a seizure, see *United States* v. *Mendenhall*, 446 U. S. 544 (1980), there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

A

A police officer may arrest a person if he has probable cause to believe that person committed a crime. *E. g.*, *United States* v. *Watson*, 423 U. S. 411 (1976). Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U. S. 696, 703 (1983); see *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 555 (1976). We have described "the balancing of competing interests" as "the key principle of the Fourth Amendment." *Michigan* v. *Summers*, 452 U. S. 692, 700, n. 12 (1981). See also *Camara* v. *Municipal Court*, 387 U. S. 523, 536–537 (1967). Because

[1] Garner had rummaged through one room in the house, in which, in the words of the owner, "[a]ll the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over." App. 34. The owner testified that his valuables were untouched but that, in addition to the purse and the 10 dollars, one of his wife's rings was missing. The ring was not recovered. App. 34–35.

[2] Although the statute does not say so explicitly, Tennessee law forbids the use of deadly force in the arrest of a misdemeanant. See *Johnson* v. *State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938).

[3] "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U. S. Const., Amdt. 4.

[4] The Court of Appeals concluded that the rule set out in the Model Penal Code "accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons." 710 F. 2d, at 247. The relevant portion of the Model Penal Code provides:

"The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." American Law Institute, Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962).

The court also found that "[a]n analysis of the facts of this case under the Due Process Clause" required the same result, because the statute was not narrowly drawn to further a compelling state interest. 710 F. 2d, at 246–247. The court considered the generalized interest in effective law enforcement sufficiently compelling only when the the suspect is dangerous. Finally, the court held, relying on *Owen* v. *City of Independence*, 445 U. S. 622 (1980), that the city was not immune.

one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out. *United States* v. *Ortiz*, 422 U. S. 891, 895 (1975); *Terry* v. *Ohio*, 392 U. S. 1, 28–29 (1968).

Applying these principles to particular facts, the Court has held that governmental interests did not support a lengthy detention of luggage, *United States* v. *Place*, *supra*, an airport seizure not "carefully tailored to its underlying justification," *Florida* v. *Royer*, 460 U. S. 491, 500 (1983) (plurality opinion), surgery under general anesthesia to obtain evidence, *Winston* v. *Lee*, —— U. S. —— (1985), or detention for fingerprinting without probable cause, *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Hayes* v. *Florida*, —— U. S. —— (1985). On the other hand, under the same approach it has upheld the taking of fingernail scrapings from a suspect, *Cupp* v. *Murphy*, 412 U. S. 291 (1973), an unannounced entry into a home to prevent the destruction of evidence, *Ker* v. *California*, 374 U. S. 23 (1963), administrative housing inspections without probable cause to believe that a code violation will be found, *Camara* v. *Municipal Court*, *supra*, and a blood test of a drunk-driving suspect, *Schmerber* v. *California*, 384 U. S. 757 (1966). In each of these cases, the question was whether the totality of the circumstances justified a particular sort of search or seizure.

B

The same balancing process applied in the cases cited above demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement.[4] It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the police's entire system of law enforcement." Brief for Petitioners 14.

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. Cf. *Delaware* v. *Prouse*, *supra*, at 659. The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion. And while the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts,[4] the presently available evidence does not support this thesis.[5] The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. See *infra*, at 16–17. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. See *Schumann* v. *McGinn*, 307 Minn. 446, 472, 240 N. W. 2d 525, 540 (1976) (Rogosheske, J., dissenting in part). Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life.

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where

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[3] The dissent emphasizes that subsequent investigation cannot replace immediate apprehension. We recognize that this is so, see *infra*, n. 13; indeed, that is the reason why there is any dispute. If subsequent arrest were assured, no one would argue that use of deadly force was justified. Thus, we proceed on the assumption that subsequent arrest is not likely. Nonetheless, it should be remembered that failure to apprehend at the scene does not necessarily mean that the suspect will never be caught.

In lamenting the inadequacy of later investigation, the dissent relies on the report of the President's Commission on Law Enforcement and Administration of Justice. It is worth noting that, notwithstanding its awareness of this problem, the Commission itself proposed a policy for use of deadly force arguably even more stringent than the formulation we adopt today. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 189 (1967). The Commission proposed that deadly force be used only to apprehend "perpetrators who, in the course of their crime threatened the use of deadly force, or if the officer believes there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if his apprehension is delayed." In addition, the officer would have "to know, as a virtual certainty, that the suspect committed an offense for which the use of deadly force is permissible." *Ibid.*

[4] We note that the usual manner of deterring illegal conduct—through punishment—has been largely ignored in connection with flight from arrest. Arkansas, for example, specifically excepts flight from arrest from the offense of "obstruction of governmental operations." The commentary notes that this "reflects the basic policy judgment that, absent the use of force or violence, a mere attempt to avoid apprehension by a law enforcement officer does not give rise to an independent offense." Ark. Stat. Ann. § 41–2802(3)(a) (1977) and commentary. In the few States that do outlaw flight from an arresting officer, the crime is only a misdemeanor. See, *e. g.*, Ind. Code § 35–44–3–3 (1982). Even forceful resistance, though generally a separate offense, is classified as a misdemeanor. *E. g.*, Ill. Rev. Stat., ch. 38, § 31–1 (1984); Mont. Code Ann. § 45–7–301 (1984); N. H. Rev. Stat. Ann. § 642:2 (Supp. 1983); Ore. Rev. Stat. § 162.315 (1983).

This lenient approach does avoid the anomaly of automatically transforming every fleeing misdemeanant into a fleeing felon—subject, under the common-law rule, to apprehension by deadly force—solely by virtue of his flight. However, it is in real tension with the harsh consequences of flight in cases where deadly force is employed. For example, Tennessee does not outlaw fleeing from arrest. The Memphis City Code does, § 30–15, subjecting the offender to a maximum fine of $50. § 1–8. Thus, Garner's attempted escape subjected him to (a) a $50 fine, and (b) being shot.

[5] See Sherman, Reducing Police Gun Use, in Control in the Police Organization 98, 120–123 (M. Punch, ed. 1983); Fyfe, Observations on Police Deadly Force, 27 Crime & Delinquency 376, 378–381 (1981); W. Geller & K. Karales, Split-Second Decisions 67 (1981); App. 84 (Affidavit of William Bracey, Chief of Patrol, New York City Police Department). See generally Brief for Police Foundation et al. as *Amici Curiae*.

feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

III

A

It is insisted that the Fourth Amendment must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant. As stated in Hale's posthumously published Pleas of the Crown:

> "[I]f persons that are pursued by these officers for felony or the just suspicion thereof . . . shall not yield themselves to these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony." 2 M. Hale, Historia Placitorum Coronae 85 (1736). See also 4 W. Blackstone, Commentaries *289.

Most American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant, coupled with a general privilege to use such force to stop a fleeing felon. *E. g., Holloway* v. *Moser*, 193 N. C. 185, 136 S. E. 375 (1927); *State* v. *Smith*, 127 Iowa 534, 535, 103 N. W. 944, 945 (1905); *Reneau* v. *State*, 70 Tenn. 720 (1879); *Brooks* v. *Commonwealth*, 61 Pa. 352 (1869); *Roberts* v. *State*, 14 Mo. 138 (1851); see generally R. Perkins & R. Boyce, Criminal Law 1098–1102 (3d ed. 1982); Day, Shooting the Fleeing Felon: State of the Law, 14 Crim. L. Bull. 235, 286–287 (1978); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 798, 807–816 (1924). But see *Storey* v. *State*, 71 Ala. 329 (1882); *State* v. *Bryant*, 65 N. C. 327, 328 (1871); *Caldwell* v. *State*, 41 Tex. 86 (1874).

The State and city argue that because this was the prevailing rule at the time of the adoption of the Fourth Amendment and for some time thereafter, and is still in force in some States, use of deadly force against a fleeing felon must be "reasonable." It is true that this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. See, *e. g., United States* v. *Watson*, 423 U. S. 411, 418–419 (1976); *Gerstein* v. *Pugh*, 420 U. S. 103, 111, 114 (1975); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925). On the other hand, it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton* v. *New York*, 445 U. S. 573, 591, n. 33 (1980). Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry.

B

It has been pointed out many times that the common-law rule is best understood in light of the fact that it arose at a time when virtually all felonies were punishable by death.[11] "Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected." American Law Institute, Model Penal Code §3.07, Comment 3, p. 56 (Tentative Draft No. 8, 1958) (hereinafter Model Penal Code Comment). Courts have also justified the common-law rule by emphasizing the relative dangerousness of felons. See, *e. g., Schumann* v. *McGinn*, 307 Minn., at 458, 240 N. W. 2d, at 533; *Holloway* v. *Moser*, *supra*, at 187, 136 S. E., at 376 (1927).

Neither of these justifications makes sense today. Almost all crimes formerly punishable by death no longer are or can be. See, *e. g., Enmund* v. *Florida*, 458 U. S. 782 (1982); *Coker* v. *Georgia*, 433 U. S. 584 (1977). And while in earlier times "the gulf between the felonies and the minor offences was broad and deep," 2 Pollock & Maitland 467, n. 3; *Carroll* v. *United States*, 267 U. S. 132, 158 (1925), today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Wilgus, 22 Mich. L. Rev., at 572–573. These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a "felon" is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.[12]

There is an additional reason why the common-law rule cannot be directly translated to the present day. The common-law rule developed at a time when weapons were rudimentary. Deadly force could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk. Handguns were not carried by police officers until the latter half of the last century. L. Kennett & J. Anderson, The Gun in America 150–151 (1975). Only then did it become possible to use deadly force from a distance as a means of apprehension. As a practical matter, the use of deadly force under the standard articulation of the common-law rule has an altogether different meaning—and harsher consequences—now than in past centuries. See Wechsler & Michael, A Rationale for the Law of Homicide: I, 37 Colum. L. Rev. 701, 741 (1937).[13]

One other aspect of the common-law rule bears emphasis. It forbids the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe. See *Holloway* v. *Moser*, 193 N. C., at 187, 136 S. E., at 376; *State* v. *Smith*, 127 Iowa, at 535, 103 N. W., at 945. See generally Annot., 83 A. L. R. 3d 238 (1978).

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[11] The roots of the concept of a "felony" lie not in capital punishment but in forfeiture. 2 F. Pollock & F. Maitland, The History of English Law 465 (2d ed. 1909) (hereinafter Pollock & Maitland). Not all felonies were always punishable by death. See *id.*, at 466–467, n. 3. Nonetheless, the link was profound. Blackstone was able to write that "[t]he idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them: and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law implies that is shall be punished with death, viz. by hanging, as well as with forfeiture . . . ." 4 W. Blackstone *98. See also R. Perkins & R. Boyce, Criminal Law 14–15 (3d ed. 1982); 2 Pollock & Maitland 511.

[12] White collar crime, for example, poses a less significant physical threat than, say, drunken driving. See *Welsh* v. *Wisconsin*, 466 U. S. —— (1984); *id.*, at —— (BLACKMUN, J., concurring). See Model Penal Code Comment, at 57.

[13] It has been argued that sophisticated techniques of apprehension and increased communication between the police in different jurisdictions have made it more likely that an escapee will be caught than was once the case, and that this change has also reduced the "reasonableness" of the use of deadly force to prevent escape. *E. g.*, Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71, 76 (1980). We are unaware of any data that would permit sensible evaluation of this claim. Current arrest rates are sufficiently low, however, that we have some doubt whether in past centuries the failure to arrest at the scene meant that the police had missed their only chance in a way that is not presently the case. In 1983, 21% of the offenses in the FBI crime index were cleared by arrest. Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 159 (1984). The clearance rate for burglary was 15%. *Ibid.*

In short, though the common law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.

B

In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions. See, *e. g., United States* v. *Watson*, 423 U. S., at 421–422. The rules in the States are varied. See generally Comment, 18 Ga. L. Rev. 137, 140–144 (1983). Some 19 States have codified the common-law rule,[14] though in two of these the courts have significantly limited the statute.[15] Four States, though without a relevant statute, apparently retain the common-law rule.[16] Two States have adopted the Model Penal Code's provision verbatim.[17] Eighteen others allow, in slightly varying language, the use of deadly force only if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested.[18] Louisiana and Vermont, though without statutes or case law on point, do forbid the use of deadly force to prevent any but violent felonies.[19] The remaining States either have no relevant statute or case-law, or have positions that are unclear.[20]

It cannot be said that there is a constant or overwhelming trend away from the common-law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the common-law rule.[21] Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.

This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common-law rule. C. Milton, J. Halleck, J. Lardner, & G. Abrecht, Police Use of Deadly Force 45–46 (1977). The Federal Bureau of Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to prevent death or grievous bodily harm. *Id.*, at 40–41; App. 83. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where "the officer reasonably believes that the action is in defense of human life . . . or in defense of any person in immediate danger of serious physical injury." Commission on Accreditation for Law Enforcement Agencies, Inc., Standards for Law Enforcement Agencies 1–2 (1983) (italics deleted). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. Boston Police Department, Planning & Research Division, The Use of Deadly Force by Boston Police Personnel (1974), cited in *Mattis* v. *Schnarr*, 547 F. 2d 1007, 1016, n. 19 (CA8 1976), vacated as moot *sub nom. Ashcroft* v. *Mattis*, 431 U. S. 171 (1977). Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police 161 (1982) (table). See also Record 1108–1368 (written policies of 44 departments). See generally W. Geller & K. Karales, Split-Second Decisions 33–42 (1981); Brief for Police Foundation et al. as *Amici Curiae*. In light of the rules adopted by those who must actually administer them, the older and fading common-law view is a

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[14] Ala. Code § 13A-3-27 (1982); Ark. Stat. Ann. § 41-510 (1977); Cal. Penal Code Ann. § 196 (West 1970); Conn. Gen. Stat. § 53a-22 (1972); Fla. Stat. § 776.05 (1983); Idaho Code § 19-610 (1979); Ind. Code § 35-41-3-3 (1982); Kan. Stat. Ann. § 21-3215 (1981); Miss. Code Ann. § 97-3-15(d) (Supp. 1984); Mo. Rev. Stat. § 563.046 (1979); Nev. Rev. Stat. § 200.140 (1983); N. M. Stat. Ann. § 30-2-6 (1984); Okla. Stat., Tit. 21, § 732 (1981); R. I. Gen. Laws § 12-7-9 (1981); S. D. Codified Laws §§ 22-16-32, -33 (1979); Tenn. Code Ann. § 40-7-108 (1982); Wash. Rev. Code § 9A.16.040(3) (1977). Oregon limits use of deadly force to violent felons, but also allows its use against any felon if "necessary." Ore. Rev. Stat. 161.239 (1983). Wisconsin's statute is ambiguous, but should probably be added to this list. Wis. Stat. § 939.45(4) (1981–1982) (officer may use force necessary for "a reasonable accomplishment of a lawful arrest"). But see *Clark* v. *Ziedonis*, 368 F. Supp. 544 (Wis. 1973), aff'd on other grounds, 513 F. 2d 79 (CA7 1975).

[15] In California, the police may use deadly force to arrest only if the crime for which the arrest is sought was "a forcible and atrocious one which threatens death or serious bodily harm," or there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed. *Kortum* v. *Alkire*, 69 Cal. App. 3d 325, 333, 138 Cal. Rptr. 26, 30–31 (1977). See also *People* v. *Ceballos*, 12 Cal. 3d 470, 483–484, 526 P. 2d 241, 245–250 (1974); *Long Beach Police Officers Assn.* v. *Long Beach*, 61 Cal. App. 3d 364, 373–374, 132 Cal. Rptr. 348, 353–354 (1976). In Indiana, deadly force may be used only to prevent injury, the imminent danger of injury or force, or the threat of force. It is not permitted simply to prevent escape. *Rose* v. *State*, 431 N. E. 2d 521 (Ind. App. 1982).

[16] These are Michigan, Ohio, Virginia, and West Virginia. *Werner* v. *Hartfelder*, 113 Mich. App. 747, 318 N. W. 2d 825 (1982); *State* v. *Foster*, 60 Ohio Misc. 46, 59–66, 396 N. E. 2d 246, 255–258 (Com. Pl. 1979) (citing cases); *Berry* v. *Hamman*, 203 Va. 596, 125 S. E. 2d 861 (1962); *Thompson* v. *Norfolk & W. R. Co.*, 116 W. Va. 706, 711–712, 182 S. E. 880, 883–884 (1935).

[17] Haw. Rev. Stat. § 703-307 (1976); Neb. Rev. Stat. § 28-1412 (1979). Massachusetts probably belongs in this category. Though it once rejected distinctions between felonies, *Cranock* v. *Lima*, 359 Mass. 749, 750, 269 N. E. 2d 670, 671 (1971), it has since adopted the Model Penal Code limitations with regard to private citizens, *Commonwealth* v. *Klein*, 372 Mass. 823, 363 N. E. 2d 1313 (1977), and seems to have extended that decision to police officers, *Julian* v. *Randazzo*, 380 Mass. 391, 403 N. E. 2d 931 (1980).

[18] Alaska Stat. Ann. § 11.81.370(a) (1983); Ariz. Rev. Stat. Ann. § 13-410 (1978); Colo. Rev. Stat. § 18-1-707 (1978); Del. Code Ann., Tit. 11, § 467 (1979) (felony involving physical force *and* a substantial risk that the suspect will cause death or serious bodily injury *or* will never be recaptured); D. C. Code § 16-3-21(a) (1984); Ill. Rev. Stat., ch. 38, § 7-5 (1984); Iowa Code § 804.8 (1983) (suspect has used or threatened deadly force in commission of a felony, or would use deadly force if not caught); Ky. Rev. Stat. § 503.090 (1984) (suspect committed felony involving use or threat of physical force likely to cause death or serious injury, *and* is likely to endanger life unless apprehended without delay); Me. Rev. Stat. Ann., Tit. 17-A, § 107 (1983) (commentary notes that deadly force may be used only "where the person to be arrested poses a threat to human life"); Minn. Stat. § 609.066 (1984); N. H. Rev. Stat. Ann. § 627:5(II) (Supp. 1983); N. J. Stat. Ann. § 2C-3-7 (West 1982); N. Y. Penal Law § 35.30 (McKinney Supp. 1984–1985); N. C. Gen. Stat. § 15A-401 (1983); N. D. Cent. Code § 12.1-05-07.2.d (1976); Pa. Stat. Ann., Tit. 18, § 508 (Purdon); Tex. Penal Code Ann. § 9.51(c) (1974); Utah Code Ann. § 76-2-404 (1978).

[19] See La. Rev. Stat. Ann. § 14:20(2) (West 1974); Vt. Stat. Ann., Tit. 13, § 2305 (1974 and Supp. 1984). A Federal District Court has interpreted the Louisiana statute to limit the use of deadly force against fleeing suspects to situations where "life itself is endangered or great bodily harm is threatened." *Sauls* v. *Hutto*, 304 F. Supp. 124, 132 (ED La. 1969).

[20] These are Maryland, Montana, South Carolina, and Wyoming. A Maryland appellate court has indicated, however, that deadly force may not be used against a felon who "was in the process of fleeing and, at the time, presented no immediate danger to . . . anyone . . . ." *Giant Food, Inc.* v. *Scherry*, 51 Md. App. 586, 589, 596, 444 A. 2d 483, 486, 489 (1982).

[21] In adopting its current statute in 1979, for example, Alabama expressly chose the common-law rule over more restrictive provisions. Ala. Code pp. 67–68 (1982). Missouri likewise considered but rejected a proposal akin to the Model Penal Code rule. See *Mattis* v. *Schnarr*, 547 F. 2d 1007, 1022 (CA8 1976) (Gibson, C. J., dissenting), vacated as moot *sub nom. Ashcroft* v. *Mattis*, 431 U. S. 171 (1977). Idaho, whose current statute codifies the common-law rule, adopted the Model Penal Code in 1971, but abandoned it in 1972.

dubious indicium of the constitutionality of the Tennessee statute now before us.

C

Actual departmental policies are important for an additional reason. We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today. *Amici* note that "[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies." Brief for Police Foundation et al. as *Amici Curiae* 11. The submission is that the obvious state interests in apprehension are not sufficiently served to warrant the use of lethal weapons against all fleeing felons. See *supra*, at 8–9, and n. 10.

Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. See Brief for Petitioners 25; Brief for Appellant 11. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S., at 20, 27. Nor is there any indication that in States that allow the use of deadly force only against dangerous suspects, see *supra*, nn. 15, 17–19, the standard has been difficult to apply or has led to a rash of litigation involving inappropriate second-guessing of police officers' split-second decisions. Moreover, the highly technical felony/misdemeanor distinction is equally, if not more, difficult to apply in the field. An officer is in no position to know, for example, the precise value of property stolen, or whether the crime was a first or second offense. Finally, as noted above, this claim must be viewed with suspicion in light of the similar self-imposed limitations of so many police departments.

IV

The District Court concluded that Hymon was justified in shooting Garner because state law allows, and the Federal Constitution does not forbid, the use of deadly force to prevent the escape of a fleeing felony suspect if no alternative means of apprehension is available. See App. to Pet. for Cert. A9–A11, A38. This conclusion made a determination of Garner's apparent dangerousness unnecessary. The court did find, however, that Garner appeared to be unarmed, though Hymon could not be certain that was the case. *Id.*, at A4, A23. See also App. 41, 56; Record 219. Restated in Fourth Amendment terms, this means Hymon had no articulable basis to think Garner was armed.

In reversing, the Court of Appeals accepted the District Court's factual conclusions and held that "the facts, as found, did not justify the use of deadly force." 710 F. 2d, at 246. We agree. Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. The District Court stated in passing that "[t]he facts of this case did not indicate to Officer Hymon that Garner was 'non-dangerous.'" App. to Pet. for Cert. A34. This conclusion is not explained, and seems to be based solely on the fact that Garner had broken into a house at night. However, the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. *Post*, at 8, 11. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. See Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States 1 (1984).[a] Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. See also *Solem* v. *Helm*, 463 U. S. 277, 296–297, and nn. 22–23 (1983). In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973–1982, only 3.8% of all burglaries involved violent crime. Bureau of Justice Statistics, Household Burglary, p. 4 (1985).[b] See also T. Reppetto, Residential Crime 17, 105 (1974); Conklin & Bittner, Burglary in a Suburb, 11 Criminology 208, 214 (1973).

V

We wish to make clear what our holding means in the context of this case. The complaint has been dismissed as to all the individual defendants. The State is a party only by virtue of 28 U. S. C. § 2403(b) and is not subject to liability. The possible liability of the remaining defendants—the Police Department and the city of Memphis—hinges on *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), and is left for remand. We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. As for the policy of the Police Department, the absence of any discussion of this issue by the courts below, and the uncertain state of the record, preclude any consideration of its validity.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The Court today holds that the Fourth Amendment prohibits a police officer from using deadly force as a last resort to apprehend a criminal suspect who refuses to halt when flee-

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[a] In a recent report, the Department of Corrections of the District of Columbia also noted that "there is nothing inherently dangerous or violent about the offense," which is a crime against property. D. C. Department of Corrections, Prisoner Screening Project 2 (1985).

[b] The dissent points out that three-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home assaults are committed by burglars. *Post*, at 5. These figures mean only that if one knows that a suspect committed a rape in the home, there is a good chance that the suspect is also a burglar. That has nothing to do with the question here, which is whether the fact that someone has committed a burglary indicates that he has committed, or might commit, a violent crime.

The dissent also points out that this 3.8% adds up to 2.8 million violent crimes over a 10-year period, as if to imply that today's holding will let loose 2.8 million violent burglars. The relevant universe is, of course, far smaller. At issue is only that tiny fraction of cases where violence has taken place and an officer who has no other means of apprehending the suspect is unaware of its occurrence.

ing the scene of a nighttime burglary. This conclusion rests on the majority's balancing of the interests of the suspect and the public interest in effective law enforcement. *Ante*, at 6. Notwithstanding the venerable common-law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon, and continued acceptance of this rule by nearly half the States, *ante*, at 13–15, the majority concludes that Tennessee's statute is unconstitutional inasmuch as it allows the use of such force to apprehend a burglary suspect who is not obviously armed or otherwise dangerous. Although the circumstances of this case are unquestionably tragic and unfortunate, our constitutional holdings must be sensitive both to the history of the Fourth Amendment and to the general implications of the Court's reasoning. By disregarding the serious and dangerous nature of residential burglaries and the longstanding practice of many States, the Court effectively creates a Fourth Amendment right allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape. I do not believe that the Fourth Amendment supports such a right, and I accordingly dissent.

I

The facts below warrant brief review because they highlight the difficult, split-second decisions police officers must make in these circumstances. Memphis Police Officers Elton Hymon and Leslie Wright responded to a late-night call that a burglary was in progress at a private residence. When the officers arrived at the scene, the caller said that "they" were breaking into the house next door. App. in No. 81–5605 (CA6), p. 207. The officers found the residence had been forcibly entered through a window and saw lights on inside the house. Officer Hymon testified that when he saw the broken window he realized "that something was wrong inside," *id.*, at 656, but that he could not determine whether anyone— either a burglar or a member of the household— was within the residence. *Id.*, at 209. As Officer Hymon walked behind the house, he heard a door slam. He saw Edward Eugene Garner run away from the house through the dark and cluttered backyard. Garner crouched next to a 6-foot-high fence. Officer Hymon thought Garner was an adult and was unsure whether Garner was armed because Hymon "had no idea what was in the hand [that he could not see] or what he might have had on his person." *Id.*, at 658–659. In fact, Garner was 15-years old and unarmed. Hymon also did not know whether accomplices remained inside the house. *Id.*, at 657. The officer identified himself as a police officer and ordered Garner to halt. Garner paused briefly and then sprang to the top of the fence. Believing that Garner would escape if he climbed over the fence, Hymon fired his revolver and mortally wounded the suspected burglar.

Appellee-respondent, the deceased's father, filed a 42 U. S. C. § 1983 action in federal court against Hymon, the city of Memphis, and other defendants, for asserted violations of Garner's constitutional rights. The District Court for the Western District of Tennessee held that Officer Hymon's actions were justified by a Tennessee statute that authorizes a police officer to "use all the necessary means to effect the arrest," if "after notice of the intention to arrest the defendant, he either flee or forcibly resist." Tenn. Code Ann. § 40–7–108 (1982). As construed by the Tennessee courts, this statute allows the use of deadly force only if a police officer has probable cause to believe that a person has committed a felony, the officer warns the person that he intends to arrest him, and the officer reasonably believes that no means less than such force will prevent the escape. See, *e. g.*, *Johnson* v. *State*, 173 Tenn. 134, 114 S. W. 2d 819 (1938). The District Court held that the Tennessee statute is constitutional and that Hymon's actions as authorized by that statute did not violate Garner's constitutional rights. The Court of Appeals for the Sixth Circuit reversed on the grounds that the Tennessee statute "authorizing the killing of an unarmed, nonviolent fleeing felon by police in order to prevent escape" violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. 710 F. 2d 240, 244 (1983).

The Court affirms on the ground that application of the Tennessee statute to authorize Officer Hymon's use of deadly force constituted an unreasonable seizure in violation of the Fourth Amendment. The precise issue before the Court deserves emphasis, because both the decision below and the majority obscure what must be decided in this case. The issue is not the constitutional validity of the Tennessee statute on its face or as applied to some hypothetical set of facts. Instead, the issue is whether the use of deadly force by Officer Hymon under the circumstances of this case violated Garner's constitutional rights. Thus, the majority's assertion that a police officer who has probable cause to seize a suspect "may not always do so by killing him," *ante*, at 7, is unexceptionable but also of little relevance to the question presented here. The same is true of the rhetorically stirring statement that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Ante*, at 9. The question we must address is whether the Constitution allows the use of such force to apprehend a suspect who resists arrest by attempting to flee the scene of a nighttime burglary of a residence.

II

For purposes of Fourth Amendment analysis, I agree with the Court that Officer Hymon "seized" Garner by shooting him. Whether that seizure was reasonable and therefore permitted by the Fourth Amendment requires a careful balancing of the important public interest in crime prevention and detection and the nature and quality of the intrusion upon legitimate interests of the individual. *United States* v. *Place*, 462 U. S. 696, —— (1983). In striking this balance here, it is crucial to acknowledge that police use of deadly force to apprehend a fleeing criminal suspect falls within the "rubric of police conduct . . . necessarily [involving] swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances. Moreover, I am far more reluctant than is the Court to conclude that the Fourth Amendment proscribes a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures. Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible. See, *e. g.*, *United States* v. *Watson*, 423 U. S. 411, 416–421 (1976); *Carroll* v. *United States*, 267 U. S. 132, 149–153 (1925). Cf. *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 585 (1983) (noting "impressive historical pedigree" of statute challenged under Fourth Amendment).

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries represent not only the illegal entry into a person's home, but also "pos[e] real risk of serious harm to others." *Solem* v. *Helm*, 463 U. S. 277, 315–316 (1983) (BURGER, C. J., dissenting). According to recent Department of Justice statistics, "[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." Bureau of Justice Statistics Bulletin, Household Burglary 1 (January 1985). During the period 1973–1982, 2.8 million such violent crimes were committed in the course of burglaries. *Ibid.* Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertion that "burglaries only rarely involve physical violence." *Ante*, at 19. Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the "harsh potentialities for violence" inherent in the forced entry into a home preclude characterization of the crime as "innocuous, inconsequential, minor, or 'nonviolent.'" *Solem* v. *Helm*, *supra*, at 316 (BURGER, C. J., dissenting). See also Restatement of Torts § 131, Comment *g* (1934) (burglary is among felonies that normally cause or threaten death or serious bodily harm); R. Perkins & R. Boyce, Criminal Law 1110 (3d ed. 1982) (burglary is dangerous felony that creates unreasonable risk of great personal harm).

Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance. Where a police officer has probable cause to arrest a suspected burglar, the use of deadly force as a last resort might well be the only means of apprehending the suspect. With respect to a particular burglary, subsequent investigation simply cannot represent a substitute for immediate apprehension of the criminal suspect at the scene. See Report of President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 97 (1967). Indeed, the Captain of the Memphis Police Department testified that in his city, if apprehension is not immediate, it is likely that the suspect will not be caught. App. in No. 81–5605 (CA6), at 334. Although some law enforcement agencies may choose to assume the risk that a criminal will remain at large, the Tennessee statute reflects a legislative determination that the use of deadly force in prescribed circumstances will serve generally to protect the public. Such statutes assist the police in apprehending suspected perpetrators of serious crimes and provide notice that a lawful police order to stop and submit to arrest may not be ignored with impunity. See, *e. g.*, *Wiley* v. *Memphis Police Department*, 548 F. 2d 1247, 1252–1253 (CA6), cert. denied, 434 U. S. 822 (1977); *Jones* v. *Marshall*, 528 F. 2d 132, 142 (CA2 1975).

The Court unconvincingly dismisses the general deterrence effects by stating that "the presently available evidence does not support [the] thesis" that the threat of force discourages escape and that "there is a substantial basis for doubting that the use of such force is an essential attribute to the arrest power in all felony cases." *Ante*, at 8–9. There is no question that the effectiveness of police use of deadly force is arguable and that many States or individual police departments have decided not to authorize it in circumstances similar to those presented here. But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality. Cf. *Spaziano* v. *Florida*, 468 U. S. ——, —— (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws") (slip op. 16). Moreover, the fact that police conduct pursuant to a state statute is challenged on constitutional grounds does not impose a burden on the State to produce social science statistics or to dispel any possible doubts about the necessity of the conduct. This observation, I believe, has particular force where the challenged practice both predates enactment of the Bill of Rights and continues to be accepted by a substantial number of the States.

Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers. The majority declares that "[t]he suspect's fundamental interest in his own life need not be elaborated upon." *Ante*, at 7. This blithe assertion hardly provides an adequate substitute for the majority's failure to acknowledge the distinctive manner in which the suspect's interest in his life is even exposed to risk. For purposes of this case, we must recall that the police officer, in the course of investigating a nighttime burglary, had reasonable cause to arrest the suspect and ordered him to halt. The officer's use of force resulted because the suspected burglar refused to heed this command and the officer reasonably believed that there was no means short of firing his weapon to apprehend the suspect. Without questioning the importance of a person's interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary. Cf. *Payton* v. *New York*, 445 U. S. 573, 617, n. 14 (1980) (WHITE, J., dissenting) ("[T]he policeman's hands should not be tied merely because of the possibility that the suspect will fail to cooperate with legitimate actions by law enforcement personnel"). The legitimate interests of the suspect in these circumstances are adequately accommodated by the Tennessee statute: to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt.

A proper balancing of the interests involved suggests that use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime burglary is not unreasonable within the meaning of the Fourth Amendment. Admittedly, the events giving rise to this case are in retrospect deeply regrettable. No one can view the death of an unarmed and apparently nonviolent 15-year old without sorrow, much less disapproval. Nonetheless, the reasonableness of Officer Hymon's conduct for purposes of the Fourth Amendment cannot be evaluated by what later appears to have been a preferable course of police action. The officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime.

Because I reject the Fourth Amendment reasoning of the majority and the Court of Appeals, I briefly note that no other constitutional provision supports the decision below. In addition to his Fourth Amendment claim, appellee-respondent also alleged violations of due process, the Sixth Amendment right to trial by jury, and the Eighth Amendment proscription of cruel and unusual punishment. These arguments were rejected by the District Court and, except