THE USE OF DEADLY FORCE TO ARREST:
CONFLICTING AND UNCERTAIN
STANDARDS IN THE COURTS

INTRODUCTION

Historically, the use of deadly force in law enforcement has been regulated exclusively by state law.\(^1\) To the extent that police conduct has fallen within the parameters of applicable state rules governing the use of deadly force the conduct has been privileged, insulating the officer from civil and criminal liability.\(^2\) In recent years, however, plaintiffs in actions brought under 42 U.S.C. § 1983\(^3\) have argued that the federal constitution imposes more restrictive standards on the use of deadly force to arrest than those imposed by applicable state statutes.\(^4\)

The federal courts have usually responded to this contention by viewing the state rule as a valid exercise of the police power, and have rejected these constitutional challenges in upholding the validity of the state law.\(^5\) The Eighth Circuit Court of Appeals, however, has twice indicated a willingness to impose independent constitutional standards upon the use of deadly force to arrest.\(^6\)

This comment will explore the conflicting standards governing police liability for the use of deadly force under 42 U.S.C. § 1983 in light of the Eighth Circuit Court of Appeals decisions of Mattis v.

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2. See, e.g., Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975); People v. Klein, 305 Ill. 141, 137 N.E.145 (1922); Lamma v. State, 46 Neb. 236, 64 N.W. 956 (1895). See generally Note, Legalized Murder of a Fleeing Felon, 15 VA. L. REV. 582 (1929) [hereinafter cited as Legalized Murder].
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.
5. See cases cited in note 4 supra.
It will focus upon the general principles governing actions brought under section 1983, the varied standards of constitutional review used by courts to scrutinize police use of deadly force to arrest, and will develop an analysis of deadly force arrests under the fourth and fourteenth amendments. Although police officers may be found liable under state law and state civil rights provisions for use of deadly force to arrest, this comment will be limited to the issue of federal statutory liability under section 1983.11

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10. See, e.g., NEB. REV. STAT. § 20-148 (Reissue 1975), which provides in pertinent part:

Any person . . . who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

Id.


The shared common law origin of the differing bases of liability has been explicitly recognized in the case law. See, e.g., Pierson v. Ray, 386 U.S. 547, 544 (1967); Monroe v. Pape, 365 U.S. 167, 187 (1961), both stating that § 1983 is to be construed against the background of common law tort doctrines.

However, not every case which supports a claim under state law will support an
SECTIONS 1983 was enacted by Congress as part of the Civil Rights Act of 18711 to enforce the provisions of the fourteenth amendment generally13 and, specifically, to provide a remedy for parties deprived of constitutional rights, privileges and immunities by a state official's abuse of power.14 The Act overrides state laws whose operation causes a deprivation of constitutional or civil rights, provides a federal remedy where state remedies are inadequate or unavailable in practice, and supplements remedies available under state law.15

There are two general elements which plaintiff must show to recover under section 1983: (1) he has been deprived of rights, privileges, or immunities secured by the Constitution and laws of the United States16 and (2) the deprivation occurred under color of any statute, ordinance, regulation, custom, or usage, of any state or territory.17 The Act does not reach purely private conduct18 nor does it make actionable every tort19 or every violation of state law.20 However, since section 1983 is to be read against the general background of common law tort21 the actions generally take the
form of proving an analogous tort, such as false arrest, malicious prosecution, false imprisonment, libel, or assault and battery. Furthermore, it has been held that malice and specific intent are not elements of proof under section 1983 since under general tort law, the actor is to be held accountable for the natural and probable consequences of his acts.

A police officer is subject to liability under section 1983 for conduct in the course of his duty which causes a person to suffer a deprivation of some right or privilege secured by the Constitution and laws of the United States. This potential for liability spans the complete course of the officer’s involvement with a particular arrestee.

It is uniformly held that police officers are liable under section 1983 for the use of excessive force when effecting an arrest. While it is generally stated that the use of excessive force in arrest is a denial of due process sufficient to trigger liability under section

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An officer is liable for arrests made without probable cause, e.g., Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968); Rue v. Snyder, 249 F. Supp. 740 (E.D. Tenn. 1968), and for arrests based on probable cause but made pursuant to a statute which the officer knew or should have known was unconstitutional, see Pierson v. Ray, 386 U.S. 547, 557 (1967). The officer is also liable for conduct which results in a deprivation of rights even though the initial arrest was valid, see, e.g., Delaney v. Dias, 415 F. Supp. 1331, 1333 (D. Mass. 1976), and the plaintiff is later found guilty, see Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972). Liability will attach where the officer attempts to coerce a confession, see, e.g., Hardwick v. Hurley, 289 F.2d 529 (7th Cir. 1961), denies medical treatment, see Simms v. Reiner, 419 F. Supp. 468 (N.D. Ill. 1976), or detains without permitting the arrestee to contact his family or attorney, see Davis v. Turner, 197 F.2d 847 (5th Cir. 1952). If charged with the operation of a jail, the officer may incur liability if the prisoner is subjected to unreasonable conditions, see, e.g., Campise v. Hamilton, 382 F. Supp. 172 (S. D. Tex. 1974), or if he fails to release the prisoner at the required time, see Bryan v. Jones, 530 F.2d 1210, 1212 (5th Cir. 1976).

1983, some few cases give a more detailed analysis of the nature of the deprivation. Some courts have found excessive force to be a violation of the injured party's right to be free from unreasonable searches and seizures under the fourth and fourteenth amendments.

Where death results from excessive force, the courts agree that the basis of the action under section 1983 is the deprivation of the decedent's specifically enumerated right to life without due process of law. However, where state rules permitting a police officer to use deadly force to arrest a nonviolent fleeing felon are challenged, the courts are in sharp conflict as to whether such force is constitutionally permissible. Furthermore, the courts exhibit some uncertainty as to the appropriate standard of state rules governing the use of deadly force in law enforcement.

THE EVOLUTION OF STANDARDS FOR THE USE OF DEADLY FORCE TO ARREST

COMMON LAW

The common law approach linked the rules of justification


33. In Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), the court held that the Constitution affords the citizen a right to remain free from unreasonable interference by police officers under the fourth amendment which provides "security from 'arbitrary intrusion by the police.'" Id. at 1231. Accord, Palmer v. Hall, 380 F. Supp. 120, 133 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).


38. Under the common law two distinct privileges were accorded in the use of deadly force. The first, crime prevention, permitted any person to use deadly force when necessary to prevent a felony. See F. HARPER & F. JAMES, THE LAW OF TORTS § 3.19 (1956); Comment, The Use of Deadly Force in the Protection of Property Under the Model Penal Code, 59 COLUM. L. REV. 1212, 1217 (1959) [hereinafter cited as Protection of Property]. The second privilege, arrest, permitted the use of deadly force
for the use of deadly force in law enforcement to the conduct of the individual.\textsuperscript{39} For example, deadly force could never be employed to arrest a misdemeanant;\textsuperscript{40} however, it was permissible when reasonably necessary to effect the arrest of a fleeing felon.\textsuperscript{41} Apparently the basis for this distinction was that, at early English law, all felonies were punishable by death while misdemeanors were punishable by less drastic means.\textsuperscript{42} The theory was that the felon, whose life was threatened by the gallows if captured, presented a greater danger to the community than did the misdemeanant.\textsuperscript{43}

As statutes enacted by legislative assemblies created new classes of felons, the distinction between felony and misdemeanor involved in the use of deadly force became less tenable.\textsuperscript{44} Courts and legislatures began to search for new criteria upon which to base the distinction and limit the use of such force. These efforts proceeded in two directions. The scope of the privilege was reduced on the one hand by subjecting its operation to strict judicial hindsight. This took the form of requiring either that the use of deadly force be actually necessary to effect the arrest,\textsuperscript{45} or that the person being sought have actually committed a felony,\textsuperscript{46} or both.\textsuperscript{47}


\textsuperscript{40} See Tsimbinos, The Justified Use of Deadly Force, 4 CRIM. L BULL. 3, 17 (1968); Comment, Justification for the Use of Force in the Criminal Law, 13 STAN. L. REV. 666, 572 (1961) [hereinafter cited as Justification of Force].

\textsuperscript{41} People v. Klein, 305 Ill. 141, 137 N.E. 145, 146 (1922); State v. Smith, 127 Iowa 534, 536-37, 103 N.W. 944, 945 (1905); Head v. Martin, 85 Ky. 486, 487, 3 S.W. 622, 623 (1887); Moreland, The Use of Force in Effecting or Resisting Arrest, 33 Neb. L. REV. 408, 419 (1954), Tsimbinos, supra note 39, at 17.

\textsuperscript{42} E.g., Stinnet v. Virginia, 55 F.2d 44, 645 (4th Cir. 1932); Lamma v. State, 46 Neb. 236, 239, 64 N.W. 956, 957 (1899); Love v. Bass, 145 Tenn. 522, 523, 238 S.W. 94, 96 (1922).

\textsuperscript{43} E.g., Jones v. Marshall, 528 F.2d 132, 138 (2d Cir. 1975); United States v. Coppersmith 4 F.198, 201 (W.D. Tenn. 1880). See Arrest Process, supra note 9, at 132-33.

\textsuperscript{44} E.g., Petrie v. Cartwright, 114 Ky. 103, 107, 70 S.W. 297, 299 (1902) (since all felonies were punishable by death, felon's life was forfeited); Head v. Martin, 85 Ky. 486, 487, 3 S.W. 622, 623 (1887) (court noted that a misdemeanant could be easily captured by a posse but felons-at-large threatened life and property).

\textsuperscript{45} See United States v. Clark, 31 F. 710, 713 (E.D. Mich. 1877); MODEL PENAL CODE § 3.07, at 56-57, Comment (Tent. Draft No. 8, 1958); Legalized Murder, supra note 2, at 583-83.

\textsuperscript{46} See Union Indemn. Co. v. Webster, 218 Ala. 468, 118 So. 794, 803 (1928); Richards v. Burgin, 159 Ala. 282, 287, 49 So. 294 (1909); Note, 38 Ky. L.J. 609, 618-19 (1950), wherein the author discusses the three views of necessity of the use of deadly force, actual, reasonable, and reasonable if in fact a felony has been committed.

\textsuperscript{47} E.g., Wiley v. State, 19 Ariz. 346, 170 P. 869 (1918); Petrie v. Cartwright, 114
In effect, these rules imposed absolute liability on the police officer for the improper use of a deadly force. To avoid liability a police officer was required to know with certainty that the person against whom he was about to act was in fact a felon and could not in fact be captured except by use of deadly force.

The second method utilized to restrict the scope of privileged deadly force was to identify the specific felonies or crimes of a certain class which were sufficiently "atrocious" to warrant the use of deadly force to prevent the escape of the perpetrator. In addition to the misdemeanor-felony distinction noted above, the use of deadly force was permitted only in the event that the crime was one that endangered human life, accompanied by force or accomplished through surprise.

The common law rule and its several variations have been criticized for failing to give consideration to the competing social and individual interests at stake when deadly force is used to arrest. The inordinate focus on the conduct of the fleeing suspect gives the rules a penal focus, leading some commentators to urge that deadly force be confined to arrests involving crimes for which the death penalty is available.

49. See Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902), wherein the court stated that the officer acts at his peril if he does not know with certainty that the suspect has committed a felony. Id. at —, 70 S.W. at 299.
50. See Stinnett v. Virginia, 55 F.2d 644 (4th Cir. 1932); Moreland, supra note 40, at 409; Arrest Process, supra note 9, at 139 n.35 (distinguishing between felonies accomplished by violence and "silent" felonies).

One commentator, however, suggested the elimination of the misdemeanor-felony distinction altogether, permitting deadly force to effect the arrest of any fleeing suspect. Waite, Some Inadequacies in the Law of Arrest, 28 Mich. L. Rev. 448, 466 (1940).
52. See Tsimbinos, supra note 39, at 17; Justification of Force, supra note 39, at 582-84.
53. Justification of Force, supra note 39, at 582. See MODEL PENAL CODE § 3.07, at 56-57, Comment (Tent. Draft No. 8 1958); Legalized Murder, supra note 2, at 584-85.
54. Professor Mikell has argued that since society does not impose the death penalty for theft or flight from arrest, the use of deadly force to arrest is irrational. 9 ALI PROCEEDINGS 186-87 (1931), quoted in Mattis v. Schnarr, 547 F.2d 1007, 1014-15.
In light of modern concern with imposition of the death penalty and the concern with improvident use of deadly force by police, the American Law Institute proposed new rules governing the use of deadly force in law enforcement. Section 3.07 of the Model Penal Code operates to limit the use of deadly force to instances in which the officer believes that such force is necessary to effect the arrest and believes the individual sought has either committed a crime involving deadly force or will create a substantial risk of death or serious bodily harm unless apprehended immediately. As the comment to this section of the Code suggests, the proposed rule is designed to eliminate the possibility of absolute liability under criminal law, and to recognize the competing social and personal interests at stake. Under this approach, the inquiry must determine what interests the conduct threatens and which of those threatened interests are sufficient to override the fleeing suspect's interest in his own life. Although the Model Penal Code has been adopted in a number of jurisdictions, it is only one alternative among many variations on the common law rules which are currently in force.


56. Model Penal Code § 3.07(2) (Proposed Official Draft 1962) provides in pertinent part:

(b) The use of deadly force is not justifiable under this Section unless:
(i) the arrest is for a felony; and
(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
(iv) the actor believes that:
(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
(2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Id.


58. Id. In answer to this inquiry, the comments to § 3.07 suggest that the only interest of sufficient importance to justify the use of deadly force is human life. Id. Cf. Tsimbinos, supra note 39, at 17 (author argues that New York Penal law properly balances the criminal's life against the interest which he threatens).


60. See Wiley v. Memphis Police Dept., 548 F.2d 1247 (6th Cir. 1977), cert. denied, 494 U.S. 822 (1978); Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975); Schumann v. McGinn, 307 Minn. 446, 240 N.W.2d 525 (1976) and the following state statutes which confer a broader privilege upon police officers for the use of deadly force than
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RECENT CASES CHALLENGING THE CONSTITUTIONALITY OF STATE RULES PERMITTING THE USE OF DEADLY FORCE TO ARREST

The Eighth Circuit Court of Appeals has twice considered the constitutionality of the use of deadly force to arrest a nonviolent fleeing felon. 61 Mattis v. Schnarr 62 was a challenge to the validity of Missouri statutes authorizing police officers to use deadly force when reasonably necessary to effect the arrest of a nonviolent fleeing felon. 63 The action was brought under section 1983 by the father of a seventeen year-old boy who had been killed by police while attempting to flee during the burglary of a golf course office. 64 Finding that the Missouri deadly force statutes created a presumption that all fleeing felons pose a threat to the physical


The Eighth Circuit Court of Appeals had earlier formulated the constitutional basis for a § 1983 claim in a case involving a police officer's use of deadly force against a traffic offender in Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir. 1976). However, since its decision in Mattis, the Eighth Circuit Court of Appeals had not addressed the question of deadly force against a nonviolent fleeing felon prior to its decision in Landrum.


63. 547 F.2d at 1009. The statutes challenged by the plaintiffs provided in pertinent part: "Homicide shall be deemed justifiable when committed by any person . . . when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed . . . ." Mo. ANN. STAT. § 558.040 (Vernon 1953), and: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." Mo. ANN. STAT. § 544.190 (Vernon 1953).

The former provision of the Missouri Criminal Code was subsequently repealed in 1977. See MO. ANN. STAT. § 563.046 (Vernon Spec. Supp. 1978), which reads in pertinent part:

A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only

. . . .

(2) When he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

(a) Has committed or attempted to commit a felony, or

(b) Is attempting to escape by use of a deadly weapon, or

(c) May otherwise endanger life or inflict serious physical injury unless arrested without delay.

. . . .

64. 547 F.2d at 1009.
security of pursuing policemen and to the public at large, a presumption which the state had failed to support with sufficient facts, the court declared the statutes invalid on the ground that they operated to deprive the suspect of his life without due process of law. The court's holding in Mattis was later vacated by the United States Supreme Court in a per curiam decision which focused upon issues of justiciability without reaching the merits.

In Landrum v. Moats, the Eighth Circuit Court of Appeals again considered constitutional limits on the use of deadly force to arrest a nonviolent fleeing felon. This case, however, was not a challenge to a state statute, but rather a challenge to the constitutional reasonableness of the actions of individual police officers. This action under section 1983 arose from an incident in which police officers has killed a suspect as he fled from the scene of a service station burglary. It was undisputed that the suspect had not used violence in the commission of the crime nor had he threatened, used, or reasonably appeared to threaten violence against the police or other persons. The court found the police use of deadly force actionable under section 1983 as a deprivation of the decedent's right to life without due process of law.

65. Id. at 1019-20.
68. Id. at 1323-24.
69. Id. at 1325 n.6.
70. Id. at 1323.
71. Id. at 1325. The police officers argued that they had reasonable cause to fear for their own safety because Landrum was fleeing in the dark of night into a predominantly black neighborhood. The court wisely rejected that contention. Id. at 1325 n.7. Cf. Palmer v. Hall, 380 F. Supp. 120, 134 (M.D. Ga. 1974) (court rejected similar self-defense claim by police officer charged with unlawful use of deadly force against fleeing 13-year-old carrying a B-B gun), modified, 517 F.2d 705 (5th Cir. 1975).
72. 576 F.2d at 1323-25, 1327. The court also found that the police officers' conduct violated the provisions of Neb. Rev. Stat. § 28-839 (Reissue 1975), which statute was held to apply equally to civilians and police officers alike with respect to the use of deadly force in law enforcement. 576 F.2d at 1326-27. Neb. Rev. Stat. § 28-839 (Reissue 1975) provides in pertinent part:

(1) Subject to the provisions of this section and of section 28-841, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to effect a lawful arrest.
(2) The use of force is not justifiable under this section unless:
   (a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
   (b) When the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.
(3) The use of deadly force is not justifiable under this section unless:
   (a) The arrest is for a felony;
   (b) Such person effecting the arrest is authorized to act as a peace officer;
Although the decision in *Landrum* obscures the distinction between the officers' violation of state law and their deprivation of the decedent's constitutional rights that the court found actionable under section 1983, it is nonetheless clear in result. Like *Mattis*, *Landrum* concludes that the use of deadly force to effect an arrest is constitutionally permissible only when (1) a felony suspect can-

- officer or is assisting a person whom he believes to be authorized to act as a peace officer;
- The actor believes that the force employed creates no substantial risk of injury to innocent persons; and
- The actor believes that:
  - (i) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
  - (ii) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

*Id.*


73. The court in *Landrum* reached the constitutional result by implication, failing to set forth clearly the relationship between the violation of state law, see note 72 supra, and the deprivation of constitutional rights actionable under § 1983.

The constitutional result of *Landrum* must be pieced together a posteriori as follows: in an action arising under § 1983, the plaintiff must show that "a specific articulable, constitutional right" has been violated. 576 F.2d at 1324. *Accord*, *Miller v. Carson*, 563 F.2d 757, 760 (5th Cir. 1977). The court in *Landrum* identified this right at the outset as the fundamental right to life, "protected against unreasonable takings by the procedural due process safeguards of the fifth and fourteenth amendments." 576 F.2d at 1325. *Accord*, *Mattis v. Schnarr*, 547 F.2d 1007, 1017-19 (8th Cir. 1976), *vacated sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977).

Since under § 1983 a mere violation of state law is not actionable unless the conduct transgresses a constitutional right as well, *Miller v. Carson*, 563 F.2d 757, 760 n.7 (5th Cir. 1977); *Sigler v. Lowrie*, 404 F.2d 659, 662 (8th Cir. 1968), cert. denied, 395 U.S. 940 (1969); *Mueller v. Powell*, 203 F.2d 797, 800 (8th Cir. 1953); *Wadleight v. Newhall*, 136 F. 941, 946 (9th Cir. 1905); *Boyer v. Wisconsin*, 345 F. Supp. 564, 564 (D. Wis. 1972), it follows that the police officers' conduct in *Landrum*, which violated state limitations on the use of deadly force, could be actionable under § 1983 only if it transgressed constitutional limitations on the use of deadly force as well; yet these constitutional limitations were never independently articulated by the court in imposing § 1983 liability.

Thus, unless the court in *Landrum* was discussing the plaintiffs' separate state law tort claim against the officers, which it clearly was not, see 576 F.2d at 1324, 1327-28 nn.15 & 16, the implied basis of its holding, never clearly stated, was that the use of deadly force is constitutionally limited to the parameters set forth in Neb. Rev. Stat. § 28-839 (Reissue 1975), which embodied the approach found in the Model Penal Code § 3.07. Compare 576 F.2d at 1324, 1328 nn.15 & 16 and *Mattis v. Schnarr*, 547 F.2d 1007, 1020 (8th Cir. 1976) with Model Penal Code § 3.07 (Tent. Draft No. 8, 1958) and Neb. Rev. Stat. § 28-839 (Reissue 1975).

If the holding in *Landrum* presents a theory that the violation of state law by a police officer is unconstitutional per se it confuses the color of law element of § 1983 with the deprivation of rights and privileges element. *See Monroe v. Pape*, 365 U.S. 167 (1961). Such an approach would, in effect, adopt a constitutional theory of fifty separate due process standards.
not otherwise be apprehended and (2) the suspect has used deadly force in the commission of the felony or there is reason to believe that he will employ deadly force against the officer or others if not immediately apprehended.74 These requirements are substantially the same as those provided by the Model Penal Code.75

In effect, the Eighth Circuit Court of Appeals in Mattis and Landrum has adopted the approach set forth in section 3.07 of the Model Penal Code as a constitutional standard for the permissible use of deadly force to arrest.76 Other courts, however, have rejected this approach, permitting legislatures to fashion rules that allow more liberal use of deadly force to be employed in the arrest process.77

In Jones v. Marshall,78 the Second Circuit Court of Appeals was presented with a challenge to the constitutionality of a Connecticut statute which permitted a police officer to use deadly force when he reasonably believed it necessary to arrest a fleeing suspect whom the officer had reason to believe had committed a felony.79 The action was brought under section 1983 following a police officer's fatal shooting of a teenager suspected of auto theft.80 The teenager possessed no weapons nor otherwise threatened physical injury to the officer or any other person.81

The plaintiff in Jones urged the adoption of the rules for use of deadly force set forth in the Model Penal Code as the constitutional standard applicable through section 1983 to civil rights ac-

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74. Compare 576 F.2d at 1324-25 with 547 F.2d at 1020.
76. See notes 73-75 supra.
78. 528 F.2d 132 (2d Cir. 1975).
79. CONN. GEN. STAT. § 53a-22 (1977) provides in pertinent part that:
(c) A peace officer or authorized official of the department of correction is justified in using deadly physical force upon another person for the [purposes of effecting an arrest or preventing escape from custody] only when he reasonably believes that such is necessary to: (1) Defend himself or a third person from the use or imminent use of deadly physical force; or (2) Effect an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed or attempted to commit a felony.
80. 528 F.2d at 133-34. Connecticut statutes in force at the time classified automobile theft as a felony, and "joy-riding" (the use of an auto without the owner's permission) as a misdemeanor. Id. at 135. However, the stipulated facts of Jones indicated that there was reasonable cause to believe the deceased had committed a felony. Id. at 135 n.4. For a case holding deadly force unjustified in the teenage joy-riding situation, see Sauls v. Hutto, 304 F. Supp. 124, 132 (E.D. La. 1969).
81. 528 F.2d at 134.
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In actions for damages, however, the court, though agreeing that a federal and not a state standard applied in actions brought under section 1983, found the Model Penal Code standards too narrow to adopt as constitutional restrictions upon the state. The court reasoned that in an area where different rules abound, "characterized by shifting sands and obscured pathways," some leeway must be provided under the constitution and section 1983 for different rules to prevail. The minimum constitutional requirements imposed upon police use of deadly force to arrest compel a rule which "neither permits brutal police conduct, . . . nor allows such application of undue force that the police conduct shocks the conscience." To determine whether these minimum requirements have been met, the court must analyze the need for force in light of the interests at stake, and must decide whether the force was applied in a good faith effort to serve the state interests.

Although the court found that the Connecticut rule was subject to criticism, it was not so fundamentally unfair as to exceed the constitutional limitations on the use of deadly force to arrest. In dicta the court set forth the basic rules it believed to be constitutionally sufficient: the police officer must actually believe and reasonably believe (1) that the person is a felony suspect; and (2) that deadly force is necessary under the circumstances to make the arrest.

Several cases decided by the Sixth Circuit Court of Appeals are in direct conflict with the Mattis-Landrum approach to constitutional standards for the use of deadly force. Cunningham v. Ellington was a challenge to the constitutionality of a Tennessee statute permitting an officer to use deadly force whenever he reasonably believes that a person has committed a felony, has notified the person of his intent to arrest him and reasonably believes that deadly force is necessary under the circumstances to make the arrest. The opinion stated

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82. Id. at 135-36.
83. Id. at 137.
84. Id. at 139-40.
85. Id. at 141.
86. Id. at 142.
87. Id. at 139.
88. Id.
89. Id. at 142.
90. Id.
91. Id. at 142-43.
93. TENN. CODE ANN. § 40-808 (1975) provides in pertinent part 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." Id.
94. This tripartite statutory requirement evolved from several prior decisions
no facts other than the decedent was killed by police officers while fleeing the scene of a burglary to avoid arrest. Plaintiff alleged that the statute permitted cruel and unusual punishment, was overbroad, vague, and violated the equal protection clause of the fourteenth amendment.

The court rejected plaintiff's theory of cruel and unusual punishment on the ground that the application of deadly force to arrest a fleeing felon was not "punishment" within the meaning of the eighth amendment. Secondly, the court found that the doctrine of overbreadth, used mainly to review legislation which encroaches upon the exercise of free speech, was designed to safeguard constitutionally protected activity which fell within the ambit of a restrictive statute, and was inapplicable to the facts presented in Cunningham. Thirdly, the court rejected the plaintiff's assertion that the statute was vague, finding that felonies were clearly defined by Tennessee law and did not leave undue discretion in the hands of the police officer. Finally, the court rejected plaintiff's contention that the statute denied equal protection of the law. Without discussing fully the implications of a classification impinging upon a fundamental right, the court concluded that the statute provided equal treatment to persons similarly situated. In reaching its decision, the court impliedly rejected the adoption of the standards delineated in section 3.07 of the Model Penal Code as constitutional standards applicable through section 1983 to civil rights actions.

The Sixth Circuit Court of Appeals again considered the constitutionality of the Tennessee deadly force provisions in Wiley v. of the Tennessee court. See, e.g., Scarbrough v. State, 168 Tenn. 106, 76 S.W.2d 106 (1934).

95. 323 F. Supp. at 1074.
96. Id. at 1074-76.
97. Id. at 1075. This reading of the eighth amendment is consonant with the Supreme Court's decision in Ingraham v. Wright, 430 U.S. 651, 671 & n.40 (1977), which states that the eighth amendment is inapplicable until the state has afforded notice and hearing; prior to that, the violation is in the nature of a denial of due process. Contra, Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. C.R.-C.L. L. Rev. 361, 381-83 (1976) [hereinafter cited as Triggering Constitutional Review], wherein the author argues that deadly force to arrest is penal in effect if not in intent, and suggests the invalidation of deadly force rules on eighth amendment grounds.
98. 323 F. Supp. at 1075-76.
99. Id. at 1076.
100. Id.
101. Id.
102. Having declared the Tennessee statute to be constitutional, the court impliedly rejected the more rigid standards of § 3.07 of the Model Penal Code as a constitutional model for police use of deadly force. Compare 323 F. Supp. at 1074-76 with Model Penal Code § 3.07 (Proposed Official Draft 1962).
Memphis Police Department. The section 1983 action arose from the fatal shooting of a burglary suspect who was fleeing from a sporting goods store. The court rejected the plaintiff's contention that the statute deprived the arrestee of his constitutional rights. Although its standard of review was uncertain, the court found that "legislative bodies have a clear state interest in enacting laws to protect their own citizens against felons, and a right, if not a duty, to do so. When the burglar escapes pursuit he is free to commit other felonies." Therefore, the felony-misdemeanor distinction implicit in the Tennessee statute was not irrational, but a reasonable exercise of legislative discretion. The court criticized the Eighth Circuit's holding in Mattis as an unworkable and unwarranted protection of the felon at the expense of an unprotected public and noted that the majority opinion in Mattis "does not suggest how law enforcement officers are to make the on-the-spot constitutional analysis called for by its proposal and still react quickly enough to meet the exigencies of an emergency situation." Accordingly, the court affirmed the district court decision upholding the Tennessee statute.

DISCUSSION: 42 U.S.C. § 1983 AND CONSTITUTIONAL STANDARDS FOR THE USE OF DEADLY FORCE TO ARREST

As the foregoing discussion indicates both the state rules and

104. Id. at 1248-49. The decedent and two other persons were discovered by police in a sporting goods store after its closing. Police officers ordered the suspects out of the store. The decedent fled through a rear door into a dark, open field. After warning the decedent, the officers fired their weapons and killed him. Id.
105. Id. at 1248. The plaintiffs had contended violations of the decedent's rights guaranteed by the fourth, fifth, sixth, eighth, thirteenth and fourteenth amendments.
106. The court never stated which standard of review or theory or constitutional law supported its decision. However, it did cite Terry v. Ohio, 392 U.S. 1 (1968), which interpreted the fourth amendment, in the process of identifying the relevant state interests which support the use of deadly force to arrest. 548 F.2d at 1251.
107. Id. at 1252.
108. The three-part requirements of the Tennessee statute limited the use of deadly force to felons, thus embodying the common law felony-misdemeanor distinction. See notes 93-94 and accompanying text supra.
109. 548 F.2d at 1252.
110. Id.
111. Id. at 1253.
112. Id. at 1254. In addition to cases discussed herein, several other courts have refused by implication to adopt § 3.07 of the Model Penal Code or an equivalent rule as a constitutional standard for the use of deadly force. See Schumann v. McGinn, 307 Minn. 446, 240 N.W.2d 525 (1976); Aldridge v. Mullins, 377 F. Supp. 850 (M.D. Tenn. 1972), aff'd per curiam, 474 F.2d 1192 (6th Cir. 1973), cert. denied, 419 U.S. 857 (1974).
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constitutional standards governing the use of deadly force to arrest lack uniformity. The propriety of using deadly force to arrest the nonviolent fleeing felon has been seriously contested, yet no court has developed a constitutional approach to the problem which adequately assesses the competing interests involved in the deadly force arrest situation. Courts have either given inadequate attention to the appropriate standard for constitutional review of deadly force rules or have inadequately assessed the competing interests to be reconciled.

Cases challenging the constitutional sufficiency of deadly force rules generally arise as actions under section 1983. Every case brought under section 1983 alleging that the use of deadly force to arrest has deprived plaintiff of rights, privileges or immunities secured by the Constitution and laws of the United States raises two general questions. The first question is whether the defendant was acting under "color of state law." This element under section 1983 has been given an expansive reading by the courts and rarely presents a problem. A defendant has acted under color of law for purposes of section 1983 if he acts clothed with the authority of his position by virtue of state law, regardless of whether he misuses his power in violation of state law or conforms his conduct to its dictate. Therefore, a police officer acting in his official capacity but exceeding the bounds of state law has, for the purposes of section 1983, acted under "color of state law."

The second question raised in a section 1983 action is whether the defendant's conduct has deprived the plaintiff of a right, privilege or immunity secured by the Constitution and laws of the

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113. With respect to state laws governing the use of deadly force, see Statutory Survey, supra note 1.


USE OF DEADLY FORCE TO ARREST

United States. This question is clearly the more difficult of the two because it requires the court to engage in a constitutional analysis of the interests at stake in the deadly force arrest. Moreover, the court must recognize the general principle that a mere violation of state law does not by its own force and effect give rise to a deprivation of constitutional rights. Therefore, the defendant’s conduct must exceed constitutional or federal statutory limitations existing independently of state-created rights. This is an important distinction that is not always clearly recognized by the courts.

The court’s constitutional analysis should proceed by identifying the rights affected by the use of deadly force and the applicable standard of constitutional review. Although several different approaches to the analysis of deadly force arrests are suggested, two in particular seem most appropriate: the fourth amendment’s restrictions on searches and seizures, and the fourteenth amendment’s protections of substantive rights. Under either approach the court must clearly delineate the competing interests brought into direct conflict when deadly force is employed to make an arrest.

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123. See, e.g., Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975).
124. See notes 20 and 73 and accompanying text supra.
125. See, e.g., Miller v. Carson, 563 F.2d 757, 760 n.7 (5th Cir. 1977). Cf. Screws v. United States, 325 U.S. 91 (1941), wherein the Court stated that “Congress... did not undertake to make all torts of state officials federal crimes,” but only “specified acts done ‘under color’ of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.” Id. at 108-09.
128. See Triggering Constitutional Review, supra note 97, at 375, which suggests that, in addition to substantive due process and fourth amendment analysis, analysis under the equal protection clause and the eighth amendment be employed. Equal protection analysis seems inapposite, however, since the critical issue raised by deadly force to arrest is what state interest is sufficient to permit a deprivation of human life. See Mattis v. Schnarr, 547 F.2d 1007, 1019 (8th Cir. 1976), vacated sub nom. Ashcroft v. Mattis, 431 U.S. 171 (1977).
129. For an analysis under the eighth amendment, see Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977), which precludes use of the cruel and unusual punishments theory suggested in Triggering Constitutional Review, supra note 97, at 382.
130. See Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970).
The fourth amendment protects the individual from arbitrary and unreasonable interference at the hands of police officers. Its protective shield extends to citizens on the street in order to protect individual physical integrity from arbitrary injury inflicted by police officers.

The paradigm for review of police procedures under the fourth amendment is suggested by Terry v. Ohio. The appellant in Terry sought to have certain evidence excluded at trial because it was seized in a search conducted without probable cause pursuant to a 'stop and frisk' procedure. The Court applied a three-step analysis to determine the reasonableness of the procedure. First, it identified the "governmental interest which allegedly justifies official intrusion into the constitutionally protected interests of the private citizen," and the specific facts which, when combined with reasonable inferences, objectively justify the intrusion. Second, the Court evaluated the nature and quality of the resulting intrusion into protected zones of individual rights which must be accepted if the proposed procedure is to be approved. Third, it balanced the identified interests to determine whether the need to seize justified the invasion of interests that the seizure entailed. No court has applied this fourth amendment analysis to determine the constitutionality of rules governing the use of deadly force by police officers, although a few courts have used it to articulate the nature of the deprivation inflicted when excessive force was used to make an arrest.

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132. Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975); Jenkins v. Averrett, 424 F.2d 1228, 1231 (4th Cir. 1970). U.S. Const. amend. IV provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

133. Terry v. Ohio, 392 U.S. 1, 9 (1968).

134. See Screws v. United States, 325 U.S 91 (1941); Stringer v. Dilger, 313 F.2d 536, 540-41 (10th Cir. 1963); Brazier v. Cherry, 293 F.2d 401, 405 (5th Cir. 1961), cert. denied, 368 U.S. 921 (1961).


136. 392 U.S. at 4-5.

137. Id. at 21.

138. Id.

139. Id. at 24-25.

140. Id. at 21.

141. See Jenkins v. Averrett, 424 F.2d 1228, 1231-32 (4th Cir. 1970); Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963).
Applying the *Terry* standard of reasonableness under the fourth amendment, there are several governmental interests at stake when a suspect attempts to flee from a police officer to avoid arrest. One interest is protection of the viability of the arrest process itself.\(^{142}\) Arrest is the first stage in the criminal process, society's method of protecting its interest in obedience to the law.\(^{143}\) Persons who flee from arrest disrupt the orderly process of the law; those who successfully escape defeat the legal order and are free to engage in future criminal activity.\(^{144}\) To this extent, such persons pose a continuing threat to society's interests.\(^{145}\) In addition to maintaining the viability of the arrest process, society has an important interest in the capture of persons whose activities endanger lives or inflict direct serious harms on the person of another.\(^{146}\) The state also has an interest in protecting its police officers from unreasonable risks in an already dangerous profession.\(^{147}\) Finally, society has an interest in protecting the property of its citizens from wrongful interferences by others,\(^{148}\) though naked property interests without more have rarely been considered sufficient to justify the taking of human life.\(^{149}\)

The fleeing suspect's interests are several and, like the interests of the state, vary in importance. At the outset it should be noted that the suspect has an interest in liberty expressed as his constitutional right to remain free from unnecessary restraint on his freedom of movement.\(^{150}\) The constitution protects this inter-

\(^{142}\) Waite, *supra* note 51, at 466-67.

\(^{143}\) *Terry v. Ohio*, 392 U.S. 1, 26 (1967).

\(^{144}\) Waite, *supra* note 51, at 466-67.


\(^{146}\) Wiley v. Memphis Police Dep't., 548 F.2d 1247, 1252 (6th Cir. 1977), cert. denied, 434 U.S. 822 (1978). There the court states that "legislative bodies have a clear state interest in enacting laws to protect their own citizens against felons, and a right, if not a duty, to do so. When the burglar escapes pursuit he is free to commit other felonies." *Id.* at 1252.

\(^{147}\) Roberts v. Louisiana, 431 U.S. 633, 636 (1977); *Terry v. Ohio*, 392 U.S. 1, 23-24 & n.21 (1968). In 1975, more law enforcement officers were killed while attempting arrest than in any other circumstances. During the ten-year period between 1966 and 1975, over one thousand officers were killed nationally due to felonious criminal action. The arrest process continues to be one of the most dangerous situations faced by police officers today. FBI, *Uniform Crime Reports* 1975, at 223-25 (1976).

\(^{148}\) See Bohlen & Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 Yale L.J. 525 (1926) [hereinafter cited as *Mechanical Devices*]; *Protection of Property, supra* note 66.


est by requiring that there must be probable cause to make an ar-
rest.\textsuperscript{151} Escape subsequent to probable cause for arrest is not a
constitutionally protected interest.\textsuperscript{152}

The most important interest at stake for the fleeing felon is the
interest he has in his own life, although courts have held that this
interest is not given absolute protection by the constitution.\textsuperscript{153}
The nature of the intrusion upon the suspect's interest resulting
from the use of deadly force to arrest him is the most severe possi-
ble—total, irreversible deprivation of life in many instances\textsuperscript{154} and
serious physical injury in others.

The balance drawn between these competing social and indi-
vidual interests must be devised to provide optimum constitu-
tional protection to the individual without sacrificing the important
interests of the society to those of the criminal.\textsuperscript{155} A proper bal-
ance will ensure that the fleeing suspect is provided with the basic
protection of the fourth amendment—probable cause,\textsuperscript{156} and the
best possible due process protection under the circum-
stances—notice of arrest.\textsuperscript{157} The authority granted police to use
deadly force should be narrowly drawn to reflect only the serious
social and individual interests harmed or threatened by the sus-
pect's conduct.\textsuperscript{158}

The remaining problem is to determine what combination of
social and individual interests is sufficiently important such that
its sacrifice is seen as more serious than the deprivation of life that

\textsuperscript{151} Gerstein v. Pugh, 420 U.S. 103, 111-13 (1975).
\textsuperscript{152} Wiley v. Memphis Police Dept., 548 F.2d 1247, 1253 (6th Cir. 1977), cert.
\textsuperscript{153} See Gregg v. Georgia, 428 U.S. 153, 176-87 (1976); Mattis v. Schnarr, 547 F.2d
\textsuperscript{154} Cf. Furman v. Georgia, 408 U.S. 238 (1972), wherein it is stated that "[t]he
penalty of death differs from all other forms of criminal punishment, not in degree
but in kind. It is unique in its total irrevocability . . . ." Id. at 306 (Stewart, J.,
concurring).
\textsuperscript{155} See Terry v. Ohio, 392 U.S. 1, 21-30 (1968).
\textsuperscript{156} See Aldridge v. Mullins, 377 F. Supp. 850, 859 (M.D. Tenn. 1972), aff'd, 474
\textsuperscript{157} Cf. Boddie v. Connecticut, 401 U.S. 371 (1971) (basic protection of due proc-
ess is notice). Several states presently incorporate a notice requirement in their
statutes governing deadly force to arrest. See, e.g., CONN. GEN. STAT. § 53a-22 (1977);
TENN. CODE ANN. § 40-808 (1975).
\textsuperscript{158} Compare Terry v. Ohio, 392 U.S. 1, 27 (1968) with Sibron v. New York, 392
U.S. 40 (1968). In these companion cases, the Supreme Court balanced the state
interest in the policeman's safety against the intrusion into a defendant's privacy,
concluding that police authority must be narrowly drawn to reflect the threatened
state interest. This is the general rule with regard to state activity which infringes a
379, 489-90 (1960). This rule is triggered in a deadly force arrest both by the threat to
the suspect's fourth amendment right to be free from unreasonable seizures and
the suspect's right to life protected by the fourteenth amendment.
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may result from the use of deadly force to arrest. Society has an interest in protecting its members from serious threats to important personal interests, in safeguarding lives, and in maintaining the legal order as a prerequisite to the survival of the democratic state. The importance of these interests exceeds, or at least equals, the importance of the suspect's fundamental rights. But society's interest in order, when considered in the abstract, doesn't seem to justify the intrusion upon individual rights which must be accepted if police officers are allowed to employ deadly force to make an arrest. More specific interests and facts must be present, together with reasonable inferences which demonstrate that those specific interests are threatened; such specificity is required if the protections of the fourth amendment are to have force and effect.

Although the rules permitting use of deadly force to arrest persons who are suspected of having committed certain types of crimes have been criticized, several states have utilized deadly force standards based upon the nature of the crime and the partic-

159. See Model Penal Code § 3.07, at 58-59, Comment (Tent. Draft No. 8, 1958), wherein the drafters state that "the use of deadly force should only be justifiable in those situations where the immediate apprehension of the person to be arrested overrides all competing considerations." Id. Cf. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974) wherein the Court stated that official interests served by mandatory maternity leave must be sufficient to justify the deprivation of plaintiff's fundamental right to bear children. By analogy, the state interest served by using deadly force to arrest must be sufficient to justify the infringement upon the fleeing suspect's fundamental right to life.

160. See Wiley v. Memphis Police Dept., 548 F.2d 1247, 1252 (6th Cir. 1977), cert. denied, 434 U.S. 822 (1978); Tsminios, supra note 39, at 17, wherein the author states that "the community need to arrest such criminals mandates no less a degree of force in this case [i.e. rape] than that for other felonies which are embelished by the use of deadly weapons." Id.


162. Cf. Gregg v. Georgia, 428 U.S. 153, 183-87 (1976), wherein the Court noted that society's interest in deterrence of crime and moral retribution, as interests served by the death penalty, are on equal standing with the defendant's fundamental right to life. The deterrent and retributive aspects of the death penalty are analogous to the personal security and legal order interests supporting the use of deadly force to arrest, which remain on equal standing with the suspect's rights. See generally Tsminios, supra note 39, at 17; Waite, supra note 51.

163. Cf. Terry v. Ohio, 392 U.S. 1 (1968), wherein the Court, in analyzing a "stop and frisk" search for weapons made without probable cause for arrest, required more than society's general interest in law enforcement to justify the particular police procedure being challenged by the defendant. By analogy, the use of deadly force to arrest, a much more severe intrusion on fundamental rights, must be supported by more than a general interest in law and order.


ular interests threatened by it.\textsuperscript{167} Indeed, standards based upon these distinctions are supported by the argument that society's interests may be greater or less depending upon the nature of the specific interests which the suspect's conduct threatens; such standards also promote society's more general interest in order, law enforcement, and the viability of the arrest process itself.\textsuperscript{168}

This provides the underlying rationale for those who would adopt section 3.07 of the Model Penal Code as a constitutional standard.\textsuperscript{169}

Accordingly, to meet the standards of reasonableness demanded by the fourth amendment, deadly force should be permitted only where: (1) there is probable cause to make an arrest;\textsuperscript{170} (2) there is reason to believe that the fleeing suspect has committed a crime of such nature that it presents a serious direct interference or threat to the person of the victim or to some important social interest;\textsuperscript{171} (3) the officer is able to point to specific facts which justify a reasonable belief that the fleeing suspect threatens such a serious social interest;\textsuperscript{172} and (4) the officer, after having given notice of arrest to the fleeing suspect,\textsuperscript{173} has reason to believe that deadly force is necessary to make the arrest.\textsuperscript{174} Thus drawn, the reasonableness of the use of deadly force under the fourth amendment will ordinarily be a question of fact to be determined by the trier of fact, subjecting the police officer to the more detached, neutral scrutiny of a jury which must evaluate the reasonableness of the officer's conduct in light of the particular cir-

\textsuperscript{167} See notes 50-51 and accompanying text \textit{supra}. See generally Statutory Survey, \textit{supra} note 1, at 68-69.

\textsuperscript{168} See, e.g., State v. Bryant, 65 N.C. 327, 328 (1871). Cf. Terry v. Ohio, 392 U.S. 1, 22-23 (1968), wherein the Court found that society's special interest in protecting an arresting officer from danger, along with its general interest in crime prevention and investigation, were determinative in justifying a fourth amendment intrusion. The same interests are threatened by the fleeing felon.

\textsuperscript{169} MODEL PENAL CODE § 3.07, Comment (Tent. Draft No. 8, 1958) states that "[t]he draft proceeds upon the principle that use of deadly force should only be justifiable in those situations where the immediate apprehension of the person to be arrested overrides all competing considerations." \textit{Id.} at 58-59. The comment concludes that only serious threats to human life are of sufficient interest to the state to justify the use of deadly force, although it rejects the attempt to specify a list of serious felonies. \textit{Id.} at 59.


\textsuperscript{172} \textit{See} notes 164-165 and accompanying text \textit{supra}.

\textsuperscript{173} \textit{See} note 157 and accompanying text \textit{supra}.

SUBSTANTIVE ANALYSIS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Prior to 1937, substantive analysis under the fourteenth amendment was a major tool for the review of legislation affecting the economic interests of individuals. This method of analysis was subjected to the frequent criticism that courts used it as a device to substitute their own economic philosophies as a system of values for those of legislatures. Although substantive review of economic legislation was finally rejected by the United States Supreme Court in 1937, this mode of analysis has been utilized in recent years to review legislation which intrudes upon fundamental, noneconomic, individual interests in such a manner that procedural protections appear to be inapposite.

Under substantive review, once it is shown that certain fundamental rights are involved, the regulations infringing upon these rights must be justified by a compelling state interest served by legislation "narrowly drawn to express only the legitimate interests at stake." Not only must the interests which justify the use of deadly force be compelling, but it must also be demonstrated that the available alternatives be ineffective to secure that compel-

175. Cf. Terry v. Ohio, 392 U.S. 1, 21 (1968), wherein the Court required the reasonableness of a "stop and frisk" search for weapons to be determined under objective standards, thus subjecting the police officer's conduct to the more detached neutral scrutiny of a judge. By analogy, the reasonableness of a seizure in which the police officer employed deadly force must be determined under objective standards, subjecting the police officer's conduct to the neutral scrutiny of the trier of fact.

176. U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.


ling interest. Additionally, the method selected must operate only within the narrow confines of the compelling state interest.

The governmental interests secured by rules permitting police officers to utilize deadly force to secure the arrest of a fleeing suspect include: (1) protection of the viability of the arrest process to ensure obedience to the law; (2) the capture and detention of those whose activities present a direct serious threat to the person of another or to some important social interest; and (3) the protection of police officers from unreasonable risks in an already dangerous profession.

These compelling state interests must be further analyzed "in light of less drastic means for achieving the same purpose." One possible alternative to the use of deadly force would be to multiply dramatically the size of the operational police force, thereby providing saturation patrols and more police officers able to give chase. It is unlikely, however, that courts would be willing to place such an onerous financial burden and its consequent reallocation of resources upon local governments in order to protect the interests of those seeking to escape justice. This is especially so given the aversion to reallocating local resources through judicial enforcement of rules which threaten the federalist system.

As a second possible alternative to employing deadly force, the state could permit the fleeing suspect to escape, relying on its secondary law enforcement mechanisms (post-event investigation, evaluation of evidence, and modern crime lab analysis) to capture the suspect. However, except in those few instances where the suspect is known to the police officer or where the crime con-

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182. Cf. Griswold v. Connecticut, 381 U.S. 479, 504-07 (1965) (White, J., concurring) (statutory infringement upon fundamental right "must be viewed in the light of less drastic means for achieving the same purpose").
184. These are the same compelling interests urged in support of the use of deadly force under fourth amendment analysis. See notes 142-147 and accompanying text supra.
186. See President's Commission on Law Enforcement & Administration of Justice, The Challenge of Crime in a Free Society 95 (1967) [hereinafter cited as Challenge of Crime], wherein it is stated: "Presumably, deterrence would be best served by placing a policeman on every corner... But few Americans would tolerate living under police scrutiny that intense, and in any case few cities could afford to provide it." Id.
188. Challenge of Crime, supra note 186, at 96.
sists of behavior not directly threatening individuals, this alternative would require that the compelling state interests be sacrificed in the overwhelming majority of cases.

It therefore seems certain that the use of deadly force will be necessary to protect the state's compelling interests in at least some instances. In such cases the state rule authorizing use of deadly force must meet the additional requirement that it be "narrowly drawn to express only the legitimate state interest at stake." It is immediately apparent that a state rule which permits deadly force to be employed against any felon is not sufficiently narrow to meet this requirement of substantive analysis, since such a rule would reach persons whose activity is not sufficiently threatening to the vital interests of the state.

Under substantive analysis the rule for use of deadly force would be identical to that suggested by analysis under the fourth amendment. This constitutional standard would ensure that the fleeing suspect is protected by the probable cause standard of the fourth amendment, and the notice requirement of due process; and would require the state to narrowly limit the use of deadly force to protect only compelling interests—serious social and individual interests in addition to maintenance of the viability of the legal order. The resulting rules for deadly force arrests would be identical. Failure to comply with these standards when employing deadly force in the arrest process would impose liability upon the police officer under section 1983.

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190. See note 171 and accompanying text supra.
191. See CHALLENGE OF CRIME, supra note 186, at 97.
194. See, e.g., the statutes cited at notes 95 & 109 supra.
196. See notes 170-175 and accompanying text supra.
197. See note 156 supra.
198. See note 157 supra.
200. See notes 170-175 and accompanying text supra.
201. Under the doctrine of Pierson v. Ray, 386 U.S. 547 (1967), the police officer may have a complete defense where he has reasonably relied in good faith on a statute which does not meet the minimum constitutional requirements for deadly force arrests. See notes 11-14 supra.
CONCLUSION

It is certain that police conduct, including the use of force by police officers, is subject to the restraints imposed by the fourth and fourteenth amendments. To the extent that a police officer uses excessive force during an arrest he will be liable under 42 U.S.C. § 1983 for the resulting deprivation of the arrestees' civil rights. Whether the use of deadly force to arrest a nonviolent fleeing felon is excessive per se is uncertain, depending more upon jurisdiction than upon independent constitutional standards governing the use of deadly force. The Eighth Circuit Court of Appeals' decision in Landrum v. Moats has held in effect that the use of deadly force is constitutionally permissible only when employed within the limits set forth in section 3.07 of the Model Penal Code. Other federal courts that have reviewed constitutional challenges to the use of deadly force to arrest have accepted more lenient standards which permit the use of deadly force when necessary to arrest any fleeing felon.

A review of the conflicting decisions indicates that no court has yet developed a constitutional approach to the analysis of deadly force which adequately assesses the competing individual and social interests involved. In developing a constitutional standard for the use of deadly force to arrest, courts should give particular attention to the long tradition of violence which surrounds the American criminal, the effects of crime upon the community generally, and the effect of specific crimes on the individual. In this regard, the comments of the National Advisory Commission of Criminal Justice Standards and Goals are especially pertinent: "The fear of crime is something Americans cannot accept. Modern Americans are moving toward insulation and isolation . . . . Fear of personal injury or loss of possessions can dominate the lives of freedom loving people." The effects of crime on individual liberty, safety and security must be given due consideration when courts assess the reasonableness of the use of deadly force to arrest.

The constitutional standard governing the use of deadly force, therefore, must be carefully drawn to reflect all the important competing social and individual interests. An analysis of deadly force to arrest under the fourth and fourteenth amendments indi-

204. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS & GOALS, POLICE 1-3 (1973).
205. Id. at 1.
icates that neither the "any felony" rule upheld in *Wiley v. Memphis Police Department*,\(^2\) nor the "threat to life" rule applied in *Mattis v. Schnarr*,\(^2\) are appropriate constitutional standards. The former is not narrowly drawn to express only the important social interests and the latter is too restrictive to adequately guard those significant interests. An appropriate constitutional standard would fall somewhere between the two extremes. It should permit the use of deadly force when reasonably necessary to apprehend a fleeing suspect, where the officer has reason to believe that the arrestee has committed a crime of such nature that it presents a serious direct interference with the person of the victim or with some important social interest.

*Thomas J. McCormick—'80*
