Saint Louis University Public Law Review

Volume 21
Number 1 *The Jury's Role in Administering Justice in the United States (Volume XXI, No. 1)*

Article 12

2002

Duty, Power, and Limits of Police Use of Deadly Force in Missouri

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DUTY, POWER, AND LIMITS OF POLICE USE OF DEADLY FORCE IN MISSOURI

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I. INTRODUCTION

The social phenomenon of recent police shootings or woundings in effecting arrests appears to have reached a crescendo. More and more killings are done to effect an arrest; more and more people flee from, or resist, arrest; more and more policemen and law enforcement officers are wounded or killed in the line of duty; civil rights groups demonstrate; the African-American community is tense and suspicious and demands reform; law suits are filed, damages are paid; people get quite emotional and sometimes riots occur after a police incident. We have all seen the story—from Rodney King, to Waco, to Ruby Ridge, and more. The problem is nation-wide and even international. The phenomenon is not isolated to Missouri or the metropolitan area. If one surfs the internet, one can find the same problem world-wide. While the Uniform Crime Reports show that crime in the United States may be decreasing, nation-wide,[1] fifty-one law enforcement officers were feloniously killed in the line of duty in 2000.[2]

Many questions abound—how to maintain a proper balance between the duty of law enforcement officers to protect us all, without trampling on the rights of citizens allegedly involved in crime? How did we come to such a point? What to do about the problem? What has caused this modern spurt of police incidents? What can government or the individual citizen do about it? What are the limits of police authority and the responsibility of the citizen not to flee or resist when involved in an arrest?

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The author is indebted to Ms. Heather Allman, a third year law student for her energetic research and suggestions.

1. Press Release, U.S. Department of Justice, Federal Bureau of Investigation, Crime Index Trends, 2000 Preliminary Figures (May 30, 2001), *at* http://www.fbi.gov/pressrel/pressrel01/ucrprelim2000.htm.

2. Press Release, U.S. Department of Justice, Federal Bureau of Investigation (May 15, 2001), *at* http://www.fbi.gov/pressrel/pressrel01/leoka051501.htm.

This article deals with the law of Missouri only. It does not deal with the vast issue of § 1983 lawsuits.[3] It deals with (1) the recent events of shootings by law enforcement officers, (2) the common law of Missouri, (3) the interpretation of the various statutes prior to the adoption of the new criminal code in 1979, (4) the modern decisions in Missouri relating to the law of police shootings, (5) the present polices of selected police departments in the state, (6) a summary of the present law, and (7) suggestions for reform.

The subject is a vast one and numerous studies have been made.[4] The literature is voluminous.[5]

3. *See* Saucier v. Katz, 194 F.3d 962, 968 (9th Cir. 1999), *cert. granted*, 531 U.S. 991 (2000) (on qualified immunity of officers).

4. Many studies have been made on police use of deadly force. *See* AND JUSTICE FOR ALL: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE (William A. Geller & Hans Toch eds., 1995); CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE (1977) (a study of seven cities); U.S. DEP'T OF JUSTICE, COMMUNITY RELATIONS SERVICE, POLICE USE OF DEADLY FORCE: A CONCILIATION HANDBOOK FOR CITIZENS AND THE POLICE (1982); U.S. DEP'T. OF JUSTICE, RECOMMENDATIONS OF EXPERTS FOR IMPROVEMENTS IN FEDERAL LAW ENFORCEMENT AFTER WACO (1994).

5. General treatises include: JOEL PRENTISS BISHOP, 2 BISHOP ON CRIMINAL LAW § 648 (John M. Zane & Carl Zollman eds., 9th ed. 1923); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 124 (15th ed. 1994). There are a great number of law journal articles on the subject. The following list is not exhaustive. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 180 (1983); Jill I. Brown, *Defining "Reasonable" Police Conduct: Graham v. Connor and Excessive Force During Arrest*, 38 UCLA L. REV. 1257 (1991); Herbert E. Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEV.-MARSHALL L. REV. 397 (1967); Jerome Hall, *Revision of Criminal Law – Objectives and Methods*, 33 NEB. L. REV. 383 (1954); Robert Berkley Harper, *Accountability of Law Enforcement in the Use of Deadly Force*, 26 HOW. L.J. 119 (1983); Van R. Mayhall, Jr., *Use of Deadly Force in the Arrest Process*, 31 LA. L. REV. 131 (1970); Bruce C. McDonald, *Use of Force by Police to Effect Lawful Arrest*, 9 CRIM. L.Q. 435 (1966-67); Karl G. Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957 (1930); Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201 (1940); John Scurlock, *The Law of Arrest in Missouri*, 29 U. KAN. CITY L. REV. 117, 212 (1961); Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 7 KAN. J.L. & PUB. POL'Y 100 (1998) (showing list of cases when force is appropriate or inappropriate); Francis H. Bohlen & Harry Shulman, Comment, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485 (1927); James P. Crews, Comment, *Criminal Law – Use of Deadly Force in Preventing Escape of Fleeing Minor Felon*, 34 N.C. L. REV. 122 (1955); Nicholas John DeRoma, Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12 WM. & MARY L. REV. 67 (1970); Floyd R. Finch, Jr., Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV. 361 (1976); Peter D. W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975); Comment, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566 (1961); Comment, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582 (1929); Edward E. Mansur, Jr., Comment, *The Use of Deadly Force in the Arrest of Misdemeanants*, 5 MO. L. REV. 93 (1940); William Henry Sandweg III, Comment, *The Use of Deadly Force in Arizona by Police Officers*, 1973 LAW & SOC. ORDER 481 (1973); Richard J. Smith, Comment, *The Use of Deadly Force by*

Over the long history of the United States, many law enforcement officers have been killed in the line of duty. The Law Enforcement memorial Association, Inc. reports discloses that:

The first officer known killed was in 1717;

The second officer known killed was in 1724;

The first female officer known killed was in 1916;

The first Negro officer known killed was in 1871;

The first American Indian officer killed was in 1852;

The first Pacific Island officer killed was in 1903; and

The youngest officer killed was 17.

Since the beginning of the Missouri Highway Patrol twenty-one officers have been killed.[6] The Kansas City Police Department has lost 118 officers.[7] The St. Louis City Police Department, in its long history since it began in 1808 with four officers, has had 152 officers killed in the line of duty.[8] The worst disaster occurred in Milwaukee in 1917 when a bomb went off at a police station and nine officers were killed. In the history of Missouri, over 500 law enforcement officers have been killed.[9]

a Peace Officer in the Apprehension of a Person in Flight, 21 U. PITT. L. REV. 132 (1959); Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM L. REV. 1212 (1959); Spiros A. Tsimbinos, *The Justified Use of Deadly Force*, 4 CRIM. L. BULL. 3 (1968); Horace A. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541 (1924); James O. Pearson, Jr., Annotation, *Modern Status: Right of Peace Officer to Use Deadly Force in Attempting to Arrest Fleeing Felon*, 83 A.L.R.3d 174 (1978).

6. Missouri State Highway Patrol, Officers Killed in the Line of Duty, *at* http://www.mshp.state.mo.us/hp32p001.nsf (last visited Apr. 2, 2002); *See also* State v. Mallett, 732 S.W.2d 527 (Mo. 1987), *cert. denied*, 494 U.S. 1009 (1990) (stating names of various officers killed). Mallett was recently executed for killing Trooper James Froemsdorf in 1985.

7. Kansas City Missouri Police Department, KCPD Memorial, *at* http://www.kcpd.org/images/memorial/KCPD_Memorial.htm (last visited Apr. 3, 2002).

8. Information furnished by the Legal Division of the St. Louis Metropolitan Police Department.

9. *See Missouri Fraternal Order of Police*, In Memoriam, *at* http://www.mofop.org/fallena.html (last visited Apr. 3, 2002); *see also* State v. McDonald, 661 S.W.2d 497 (Mo. 1983) (en banc), *cert. denied*, 471 U.S. 1009 (1985); State v. Baker, 636 S.W.2d 902 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1183 (1983); State v. Shaw, 636 S.W.2d 667 (Mo. 1982) (en banc), *cert. denied sub nom.*, Tucker v. Zant, 459 U.S. 928; State v. Thomas, 625 S.W.2d 115 (Mo. 1981); State v. Tate, 731 S.W.2d 846 (Mo. Ct. App. 1987); State v. Lomax, 712 S.w.2d 698 (Mo. Ct. App. 1986); State v. Sargent, 702 S.W.2d 877 (Mo. Ct. App. 1985).

II. RECENT EVENTS

In recent months, the police use of force, and especially deadly force, has risen to a crescendo causing massive publicity and talk show comments and has raised the emotions of various groups of people. One such instance in St. Louis involved Officer Robert Dodson and another involved Thomas Moran, two St. Louis, Missouri police officers. In the *Moran* case, two police officers, Richard Booker and Steven Petty, responded to a report of a burglar alarm at a private residence. Inside the apartment the officers encountered Gregory Bell, a mentally retarded teenager who had difficulty explaining that he lived there. Thinking him a burglar, the officers attempted to place him under arrest. He resisted and was struck with metal batons. One of the officers placed an "officer in need of aid call." Sergeant Moran went to the scene. Officers eventually subdued Bell. The incident left Bell with severe lacerations to the head and a broken ankle. Moran was ultimately accused of having assaulted Bell by striking him about the head with an ASP baton and by spraying mace in his face, after Bell ceased resisting. On May 16, 1997, the Police Department charged Moran with assault, and on June 5, 1997, Moran was indicted on criminal charges. In April, 1998, a jury acquitted Moran of all criminal charges, but it was reported that the Department reached a $250,000 settlement with the Bell family. However, an administrative hearing was held by the Department in June and July, 1998 and eventually the Board of Police Commissioners found that Moran failed to properly exercise his duties for failing to prevent the beating. The Board suspended and demoted him. The Circuit Court, on appeal by Moran, upheld the Board's action. Eventually Moran sued the Police Board and others for violation of his civil rights. The U.S. District Court granted defendant's judgment as a matter of law. The Court of Appeals, however, reversed and remanded the case for further proceedings.[10]

The other case of Robert Dodson is bizarre. Dodson was an officer with twenty years service. On April 24, 1999, three burglars climbed to the rooftop of a pawnshop in St. Louis. They carried sledges and an axe; they beat a hole through the roof, dropped to the floor below, broke through an interior brick wall, and attempted to pound open a gun safe made of cast iron. A motion detector set off an alarm. Two men, Julius Thurman, a 19 year old, and William Smith, were later apprehended on the roof—the third was "nabbed" elsewhere on the premises. Thurman was injured and died several days later of a skull fracture. Dodson and Officer Steven Capkovic were on the roof and arrested Thurman. Capkovic was cleared, but Dodson was charged with murder. A star witness and a convicted felon gave conflicting stories. Dodson

10. *See* Moran v. Clarke, 247 F.3d 799 (8th Cir. 2001), *reh'g granted*, 258 F.3d 904.

was suspended from the force for two years.[11] Eventually a trial was held in March, 2001. Dodson was acquitted by a jury, but on May 30, 2001, he was retired from the Police Department without facing any internal police charges. He also received $79,000 in back pay and a pension. Thurman's family has filed a civil suit for damages.

Another recent case in the St. Louis area which is still pending is the "Jack-in-the-Box shooting" in St. Louis County. On June 12, 2000, Earl Murray and Ron Beasley were killed at a parking lot at a Jack-in-the-Box in Berkeley, in St. Louis County, in the afternoon when they were sought for a drug investigation. They were black. They were in an automobile. The St. Louis County prosecutor did not prosecute—saying that the use of deadly force was not a crime.

On June 23, 2001, sixteen year old Torrence Mull was shot and killed by a black St. Louis police officer when the sixteen year old started to pull out a BB gun which resembled a .45 caliber revolver.[12] There are other publicized cases

11. M.W. Guzy, Editorial, *How a Bungled Burglary Became a Crime Against a Cop*, ST. LOUIS POST-DISPATCH, Mar. 12, 2001, at C7; Tim Bryant & Bill Bryan, *Dodson Will Retire From Force Under Deal With Police Board; Officer Acquitted of Murder Won't Face Internal Charges*, ST. LOUIS POST-DISPATCH, May 30, 2001, at A1 ("Lizz Brown, a radio personality who has organized protests against Dodson . . . said Dodson's case represents 'a very volatile situation that will not be lost on the African community.'").

12. Bill Bryan, *Suspected Burglar Shot by Officer is Identified as City Teen*, ST. LOUIS POST-DISPATCH, May 10, 2001, at C2; *Too Real to be Ignored*, ST. LOUIS POST-DISPATCH, Oct. 30, 2001, at B6; Denise Hollinshed & Valerie Schremp, *Police Kill Two on Parking Lot in Berkeley; Men May Have Been Sought in Drug Investigation; Shooting Occurred at Restaurant*, ST. LOUIS POST-DISPATCH, June 13, 2000, at D1. In the "Jack in the Box" case, calls by "civil rights activists" for the release of the videotapes were made. At the funeral of Earl Murray, speakers demanded to see the tapes. A blockage of Highway 40 was threatened, but civil rights activists were not united. The Post called for a civilian review board and a special prosecutor. The County Executive, Buzz Westfall, indicated he would appoint a review board to look into the killings of Annette Green and the shootings at the Jack in the Box. Phil Sutton, *Westfall Wants Panel to Review Killings by Police; Committee Might also Look at Deaths in Drug Bust Last Year*, ST. LOUIS POST-DISPATCH, Feb. 20, 2001, at B1. Other fatal shootings by or of St. Louis area police officers in the past year include:

> Oct. 31, 2000: St. Louis County police Sergeant Richard Weinhold, 44, was killed by a drifter who barricaded himself inside a house in north St. Louis County.
>
> October 8, 2000: A St. Louis officer killed Thomas A. Mack, 18, of St. Louis, while Mack held a hostage in a fried chicken restaurant with a track-meet starter pistol. Police said Mack had threatened to kill the female hostage . . . .
>
> Sept. 27, 2000: A St. Louis detective killed Antonio Donahue, 21, of St. Louis, while trying to arrest him on suspicion of the rape and murder of Crystal Williams, 15. Police said Donahue had tried to grab the officer's pistol.

which have been the subject of media attention. Annette Green, a drug suspect, was killed in her home while standing on the stairs allegedly holding a cordless phone on February 6, 2001, by police in St. Louis County. [13]

> Sept. 21, 2000: A St. Louis officer killed Bobby Jones, 30, of St. Louis, when Jones refused to stop a stolen car the officer was clinging to.
>
> Sept. 19, 2000: A Ferguson officer killed Joseph C. Cole, 21, after Cole fired a shot at the officer, striking his protective vest.
>
> Aug. 8, 2000: St. Louis officer Robert J. Stanze, 29, was killed by a handcuffed suspect who had hidden a pistol behind his back. The shot entered an opening in Stanze's protective vest. The suspect was sought in the wounding of a Berkeley officer on July 22. [At this time his wife was pregnant and later gave birth to twins.] Harold Richardson pleaded guilty on December 14, 2001 and was sentenced to life imprisonment without parole.
>
> June 12, 2000: Two undercover officers, one from Dellwood and one from the DEA, killed Earl Murray of Northwoods and Ronald Beasley of St. Louis, both 36, at a fast-food-restaurant in Berkeley. Police said Murray tried to run them down with his vehicle. Beasley, a passenger, was not a suspect. Several protests were held over the shootings, but a grand jury declined to indict the officers.
>
> March 13, 2000: A St. Charles officer killed Emil M. Bachman, 60, of St. Charles, inside Bachman's apartment. Police said they went there because of loud noises, and Bachman lunged at an officer with a hunting knife.
>
> Feb. 27, 2000: A Pagedale officer killed Arthur G. Dobbins, 19, of Pagedale, during a traffic stop. Police said Dobbins tried to grab the officer's pistol.
>
> Feb. 23, 2000: A St. Louis officer killed Jovan Young, 23, of St. Louis, during a chase after a robbery. Police said Young ignored an officer's order to drop a pistol.

Other Fatal Shootings by or of St. Louis Area Police Officers in the Past Year, ST. LOUIS POST-DISPATCH, Feb. 11, 2001, at A6.

In 1996, St. Louis police officer, Heriberto "Eddie" Sanchez shot and killed Garland Carter Jr. Sanchez resigned from the force just before the Police Board prepared to hold a hearing. Sanchez shot Carter on January 8, 1996 as Carter fled in the Carr Square Village public housing complex in St. Louis. Carter was suspected of robbery; Sanchez said he had a gun, others claimed that he was unarmed. The grand jury declined to indict. Bill Bryan, *Officer in Disputed Shooting Quits After Pleading His Case*, ST. LOUIS POST-DISPATCH, Apr. 30, 1996, at A1.

Tabb Henderson, age 16, was fatally shot in May, 2001 by an off-duty police officer in the officer's home. He was suspected of burglary. Bill Bryan, *Suspected Burglar Shot by Officer is Identified As City Teen*, ST. LOUIS POST-DISPATCH, May 10, 2001, at C2.

13. Valerie Schremp, *Officer's Shooting of Wellston Woman was Justified, Grand Jury Rules*, ST. LOUIS POST-DISPATCH, Mar. 10, 2001, at 11; Valerie Schremp & William C. Lhotka, *Police Say Wellston Woman was Shot After Ignoring Two Commands to Stop; Family Disputes Police Version of Episode; Victim was Drug Suspect*, ST. LOUIS POST-DISPATCH, Feb. 8, 2001, at A1 (the police denied it was a cordless phone and said it was a silver-colored carriage bolt. Green had sold drugs before).

In April, 2001, at about 1:30 a.m., outside the Spotlight Banquet Center on North Broadway, police shot Jason Marton, twenty-one, who was holding a semiautomatic pistol and refused to drop it after being ordered to do so several times, and Steven Morrison, twenty-three, a stealing suspect was shot and wounded.[14]

A summary of recent incidents in St. Louis follows:

> May 24 [,2001]: Two bank robbers exchange shots with pursuing police and escape in a chase through University City. No officers are hit.
>
> April 3 [,2001]: A 16-year-old suspect is wounded during a running gunbattle with police, who said he and two others fired on officers loading drug suspects into a cruiser near Fairground Park. No officers are injured.
>
> Jan. 29 [,2001]: St. Louis police shoot and critically wound burglary suspect James T. Guyon of St. Peters, who they said tried to run down two officers with a van.
>
> Nov. 25, 2000: Murder suspect Johnie Wilkerson is wounded in an exchange of fire with pursuing off-duty police officers. They are not hurt.
>
> Oct. 31, 2000: St. Louis County police Sgt. Richard Weinhold is killed confronting a drifter who barricaded himself inside a house in north St. Louis County.
>
> Sept. 26, 2000: St. Louis County police Officer Kevin Stevener was hit in the shoulder with shotgun pellets in a hostage standoff in a Bel-Ridge neighborhood.
>
> Sept. 21, 2000: Clinging to the side of a moving car, a St. Louis police officer fatally shoots the driver, Bobby Jones, when Jones refuses repeated demands to stop.
>
> Sept. 19, 2000: A Ferguson officer shoots and kills Joseph C. Cole in what police say is self-defense after a shot by Cole strikes the officer's bullet-resistant vest just over his badge. The officer, not publicly identified, is not seriously hurt.
>
> Aug. 8, 2000: St. Louis police Officer Robert J. Stanze is fatally shot while arresting a suspect in the wounding of Berkeley Officer Antwan Easterwood.

14. Valerie Schremp, *Two More People are Shot, Wounded by Police in Area*, ST. LOUIS POST-DISPATCH, Apr. 7, 2001 at 7; Alex Posorske, *Mayor Says Kinloch Will Investigate Officer's Fitness for Duty; Officer's Killing of Pagedale Man Last Year Raises Concern*, ST. LOUIS POST-DISPATCH, May 21, 2001 at 3 (Officer Charles Hubbard of the Kinloch police department was investigated for shooting a man).

> July 22, 2000: Berkeley Officer Antwan Easterwood is wounded by a motorist after a traffic stop on Interstate 170, east of Lambert Field.
>
> June 16, 2000: St. Louis police Officer Christina Gonzales is wounded when a gunman she is chasing fires numerous shots at her and other officers.
>
> June 12, 2000: A drug suspect and his companion were shot by DEA agent and a Dellwood detective in the parking lot of a fast food restaurant in Berkeley. Police say they were afraid the driver was about to run over them with his car.
>
> March 15, 2000: Missouri Highway Patrol Trooper Allen Flannery is beaten with his own metal baton after a traffic stop in Jefferson County.
>
> March 12, 2000: A St. Charles police officer shoots a knife-wielding man in what authorities said was self-defense. Emil M. Bachman, 60, died after being shot twice in the stomach.
>
> Feb. 27, 2000: A Pagedale police officer shoots Arthur G. Dobbins, 19, after Dobbins allegedly tries to yank a pistol from the holster of another officer. [15]

The City of Kansas City, Missouri, also has had its share of shooting tragedies:

In 1998, Kansas City officers shot a man while serving a search warrant in a drug raid at a south Kansas City dwelling. Police officers burst into the house and were met by a man with a gun who approached the officers.[16]

After a routine traffic stop, Carol A. Kerns, age thirty-seven, who was pregnant and had a number of offenses, was shot by an eighteen-year veteran of the police force. Kerns ran a red light and accelerated toward the officer. There were conflicting accounts of what happened.[17] The shooting followed the death on November 9, 1998 of Timothy Wilson, age thirteen, who was killed following a car chase.[18]

The Missouri Highway Patrol is also is not immune from the phenomenon. In 1999, one of its troopers shot an unarmed man to death because the trooper mistakenly thought the man had fired at him. An object in the man's hand turned out to be a hat, and the gunfire had come from another trooper's weapon. Two officers were trying to serve an arrest warrant for a felony on

15. Bill Bryan, *Attack Shows How Routine Patrol Can Turn Violent; City Chief Says More Police are Getting Shot At*, ST. LOUIS POST-DISPATCH, June 6, 2001, at A1.

16. *Metro Digest*, KANSAS CITY STAR, Aug. 12, 1998, at C2.

17. Christine Vendel et al., *Authorities Examine Differing Accounts by Witnesses of Fatal KC Police Shooting*, KANSAS CITY STAR, Jan. 14, 1999, at A1.

18. *Id.*

Roger W. Seiner; one trooper's weapon accidentally discharged wounding the second trooper. The trooper then killed Seiner. Seiner was known to be violent. He was pronounced dead at the scene.[19] A civil lawsuit followed.[20]

In January, 2000, a man was shot during an altercation with the police in which he grabbed the gun of an officer. The officers stopped a car because its license plates indicated there was a warrant for the arrest of the owner. During the check, the driver got out of the car and ran through a wooded area. The officers caught him, they began fighting, and as they wrestled the gun went off.[21] It was the third time in the month that Kansas City police used deadly force in subduing a victim, and the fifth time that officers were shot at in the line of duty.[22]

The recent riots and chaos in Cincinnati were sparked by the fatal shooting on April 7, 2001, of Timothy Thomas, a nineteen year old unarmed black youth, who authorities said ran from the police. He was fatally wounded by Stephan Roach, a white officer who said that Thomas was reaching for a gun. The shooting led to the worst racial unrest in the city since 1968. Dozens of people were injured, more than 800 were arrested and at least 163 people were indicted. There were three days of violence. Mayor Charles Luken issued an order for a city-wide curfew. A grand jury was convened to investigate the shooting.[23] A grand jury returned two misdemeanor charges of negligent homicide and obstruction of official business. United States Attorney General John Ashcroft announced an inquiry into the shooting. A federal judge authorized the police to fire beanbags to quell the rioters. The mayor lifted the curfew on April 17, 2001.[24] At the funeral of Thomas, protestors waved signs saying, "It's right to rebel" and "It's time to shoot back." A black teenager was accused of a hate crime when he was accused of pulling a white driver from his truck and beating him. *Time Magazine* reported the rioting in its

19. Erica Wood, *Trooper's Bullets Kill Unarmed Man*, KANSAS CITY STAR, Apr. 17, 1999, at A1.

20. Erica Wood, *Family Sues Patrolman Over Fatal Shooting in '99*, KANSAS CITY STAR, Feb. 13, 2001, at B3.

21. Malcolm Garcia & Matt Stearns, *Man Shot in Police Dispute; Struggle for Officer's Gun Leads to Shooting*, KANSAS CITY STAR, Jan. 28, 2000, at B1.

22. *Id.*

23. *Nation & World Briefs*, ST. LOUIS POST-DISPATCH, Apr. 21, 2001, at 21; *Grand Jury Will Examine Killing by Police That Led to Cincinnati Riots*, ST. LOUIS POST-DISPATCH, May 2, 2001, at A12; *Cincinnati Lifts Curfew as Mayor Targets Police; Community Leaders Discuss Ways to Address the Causes of Violence*, ST. LOUIS POST-DISPATCH, Apr. 17, 2001, at A2; *Cincinnati Officer Faces Minor Charges in Shooting; Ashcroft Announces Inquiry into Police Department*, ST. LOUIS POST-DISPATCH, May 8, 2001, at A1.

24. *Cincinnati Lifts Curfew as Mayor Targets Police; Community Leaders Discuss Ways to Address the Causes of Violence*, ST. LOUIS POST-DISPATCH, Apr. 17, 2001, at A2.

article, *Nights of Rage*.[25] A few months after the riots, the police hesitated to enforce the law and as a result crime has surged. The newspapers indicate a cloudy future for policing.

Other cities have had their problems too. In the year 2001, two suspected serial robbers were killed in shootouts with police after car chases. In the recent past in Sussex County, Pennsylvania, James Ashley, a drug dealer, was killed. The officers were cleared of misconduct.

In May, 2001, a Houston, Texas police officer was killed at an apartment complex in Southwest Houston where officers were escorting some drug suspects. A nineteen-year old suspect was taken into custody. And another officer was killed while investigating a dispute between brother and sister. Jesus Flores, age eighteen was arrested.

According to a report in 1998 in Chicago, police officers shot seventy-one people, the highest total in a decade according to the civilian arm of the Chicago Police Department.[26] Between 1990 and 1998, police recorded 505 shootings including 139 deaths. Eighty-two were black, sixteen were Latinos, twelve were white and two were Asian.

Amadou Diallo, a West African immigrant received national attention when, on February 4, 1999, New York police killed him in a hail of forty-one bullets. No weapon was found at the scene.

In Detroit, a twenty-five page report released this year indicated that the Department "is broken and needs to be fixed." The panel was appointed by Chief Benny Napoleon after a string of police shootings.[27]

In a series of articles by Jeff Leen, in November 1998, the Washington Post reported that the District of Columbia's Police Department had shot and killed more people per resident in the 1990s than any other large American city police force. Such cases have resulted in nearly eight million dollars in settlements and judgments.

The March 2001 report of the Bureau of Justice Statistics of the Department of Justice shows the magnitude of the problem in other American

25. Amanda Ripley et al., *Nights of Rage*; *Another Police Killing, and Cincinnati Explodes. Why were the Warnings Ignored?*, TIME, Apr. 23, 2001, at 44.

26. Danielle Gordon, *Police Shootings Hit Decade High*, THE CHICAGO REPORTER ¶¶ 1, 2, 3 (Mar. 1999), *at* http://www.chicagoreporter.com/1999/03-99/0399shoot.htm.

27. David A. Fahrenthold, *U.S. Faults D.C. Police Use of Force in the '90s; City Agrees to Monitoring of Department for 5 Years*, THE WASHINGTON POST, June 14, 2001, at BO1; *see also* Rebecca Leung, *NYPD Under the Gun*; *Nation's Largest Police Force Faces Allegations of Police Brutality Against Minorities* (March 26, 1999), *available at* http://www.abcnews.go.com/sections/us/DailyNews/police_brutality990326.htm (last modified Dec. 17, 2000).

cities.[28] Police justifiably kill on average nearly 400 felons each year, ninety-eight percent of which are males. Ninety-seven percent of the felons who killed an officer are also males. Fifty-six percent of felons killed by police are white and forty-two percent are black. Almost all are between the ages of eighteen and thirty. The highest rates of justifiable homicide are of young black males. Since 1976, an average of seventy-nine police officers have been killed each year in the line of duty.[29] A table shows the magnitude of the problem.[30]

III. THE COMMON LAW AND EARLY MISSOURI STATUTORY HISTORY

A. The Common Law

At common law, and still today, the peace officer is the law's "concrete" representative to preserve the peace, and to secure the person who allegedly committed a crime for a trial to determine guilt or innocence—not to injure or kill the offender. The officer represents the majesty of the law and is clothed with its sanctity. The officer's duties are important, difficult and dangerous; they require courage, care, caution, coolness, and discretion; they are under special protection but have no immunity for "unlawful" acts. Under the common law, the officer had no right to use deadly force except in cases of "real necessity," "inevitable necessity," or "indispensable necessity." The rule was simple and direct—the officer could use deadly force to arrest for a felony. Under the common law the circumstances justifying wounding or deadly force in the case of a felony were resistance, or flight.[31] The officer or "citizen" may take a life for the purpose of *preventing* a felony.[32]

28. JODI M. BROWN & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, POLICING AND HOMICIDE, 1976-98: JUSTIFIABLE HOMICIDE BY POLICE, POLICE OFFICERS MURDERED BY FELONS, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ph98.pdf (Mar. 2001).

29. *Id.* at 3, 4.

30. *Id*. at 3.

31. Rex v. Daunt, 1 Crawf. & Dix. (Ir.) 166, 167 n.b (1830) ("A constable, in the execution of his duty, is justified in taking away life, if it be indispensably necessary, but not otherwise.") *See also* Wilgus, *supra* note 5, at 808 (1924).

32. Wilgus, *supra* note 5, at 809. *See also* In re Neagle, 135 U.S. 1 (1890), involving the prevention of the killing of Justice Field of the United States Supreme Court. David Neagle, a deputy U.S. marshal, killed David S. Terry to prevent him from killing the Justice, while the Justice was at breakfast in a train station. Neagle was charged with murder and filed a writ of habeas corpus in the U.S. District Court of Northern California, which was ultimately granted by the Supreme Court. The case arose out of a domestic dispute between David and Sarah Terry to declare a marriage certificate invalid. When the Terrys' case came before the Supreme Court, Justice Field, along with the other Justices, heard oral arguments. During the presentation Sarah Terry made excited comments and was removed from the courtroom. David Terry struck a marshal and likewise was removed. He then drew a Bowie knife and said he would horsewhip Justice Field. Years later, when Justice Field was on a train trip, accompanied by Marshal

Blackstone,[33] and East[34] both say that "in case of felony, if the felon fly . . . it is the duty of every man to arrest and if in pursuit the felon be killed . . . the homicide is justifiable . . . ." An officer may use such force as is necessary to capture the felon, even to killing him when in flight. Blackstone[35] stated that:

> Arrests by officers without warrant may be executed: 1. By a justice of the Peace . . . . 2. The sheriff . . . . 3. The coroner . . . . 4. The constable . . . . And in case of felony actually committed . . . he may upon probable suspicion arrest the felon; and for that purpose is authorized . . . to break open doors and even to kill the felon if he cannot otherwise be taken; and, if he . . . . be killed in attempting such arrests, it is murder in all concerned.[36]

Hale also says:

> And hence it is, that these officers . . . may without any other warrant, . . . arrest felons . . . and if they be assaulted and killed in the execution of their office, it is murder.[37]

The authority to arrest under the common law has had a long and obscure and even technical history. It developed out of outlawry, vengeance, the hue and cry, and "arrest."[38] Under the early common law the felon was a *caput lupinem* a wolf's head outside the law and could be hunted down as a wolf. In the "hue and cry" when the cry of "Out! Out!" was heard, all had to turn out with bows and arrows and knives to arrest the felon. In primitive times it differed little from lynch law.[39]

Neagle, the Terrys, who were also on the train, took the opportunity to again confront the Justice when the train stopped for breakfast. Field went into the train station dining room, followed by David Terry and his wife. Terry struck Justice Field in the face. Neagle shouted, "stop, stop!" Terry thrust his hand in an effort to retrieve his Bowie knife whereupon Neagle fired two shots, killing Terry. The Supreme Court granted habeas corpus. "[T]here is positive law investing the marshal . . . with powers which not only justify what Marshal Neagle did . . . but which imposed it upon him as a duty." *Id.* at 68.

33. Rex v. Hunt, 168 Eng. Rep. 1198 (1825).

34. 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 298 (London, A. Strahan 1803).

35. 4 WILLIAM BLACKSTONE, COMMENTARIES 237, *cited in* State v. Nolan, 192 S.W.2d 1016 (Mo. 1946).

36. State v. Nolan, 192 S.W.2d 1016, 1018-19 (Mo. 1946) (quoting 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 85 (London, E. Rider, Little-Britain 1800)); *see also* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 120, chs. 12 & 15 (8th ed., London, S. Sweet 1824); 1 JOSEPH D. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 15(a) (London, J. Butterworth 1820).

37. HALE, *supra* note 39, at 85.

38. *See* Wilgus, *supra* note 5, at 545.

39. For a comprehensive history of the common law, see *id.* at 545-48. The common law seems to be similar to the old west in the early days of this country – with its gun fighter and posses. See the excellent Time-Life Book, PAUL TRACTMAN, THE GUNFIGHTERS, THE OLD

Under the principles of the common law and in Missouri, the simple rule was that deadly force could be used by a law enforcement officer if necessary to effect an arrest for a felony.[40] This simple principle reflected the social and legal context of the times of fifteenth the century England and eighteenth century America. Since almost all felonies—murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, larceny, etc.—were punished by death, the use of deadly force was seen as merely accelerating the penal process, without a trial. "It made little difference if the suspected felon were killed in the process of capture, since, in the eyes of the law, he had already forfeited his life by committing the felony."[41]

The common law rules were summed up in Hawkins[42] and Bishop.[43] In Chapter thirteen, "Of Arrests By Public Officers," Hawkins says that arrests without court process may be made by watchmen, constables, bailiffs or justices of the peace. "[I]f any stranger do pass by the watch, he shall be arrested, until morning and if no suspicion is found, he shall go quiet, and if they have cause of suspicion they shall forthwith deliver him to the sheriff . . . . And if they will not obey the arrest, they shall levy hue and cry upon them . . . . until they are taken."[44] Night walkers could be detained.

Bishop states that:

> [W]hen one refuses to submit to arrest after being touched by the officer, or endeavors to break away after the arrest is effected, he may be lawfully killed, provided this extreme measure is necessary.
>
> In case of felony, the killing is justifiable before an actual arrest is made, ...[45]

This was the rule, at least as late as the 1970's and in at least twenty-four states including Missouri.[46]

The rule was different in the case of misdemeanors. The right to take a life to effect an arrest for a misdemeanor, whether with or without a warrant, depended on the resistance offered—flight did not justify taking a life.[47] If the

WEST (Books 1974). *See also* and GEOFFREY C. WARD, THE WEST: AN ILLUSTRATED HISTORY (1996) (depicting the stories of the Earp brothers, the James brothers, "Wild Bill" (James Butler) Hickock, the Daltons, "Hanging Judge" Isaac Charles Parker who sentenced 160 men to the gallows, and Roy Bean of Langtry, Texas).

40. Mattis v. Schnarr, 547 F.2d 1007, 1011 (8th Cir. 1976).
41. *Id.* at 1012, n.7.
42. HAWKINS, *supra* note 39, at 128.
43. BISHOP, *supra* note 5, at 490.
44. HAWKINS, *supra* note 39, at 130.
45. BISHOP, *supra* note 5, at 491.
46. *See Mattis*, 547 F.2d at 1012; *see also* Wilgus, *supra* note 5; Finch, Jr., *supra* note 5.
47. *See* Wilgus, *supra* note 5, at 814.

misdemeanant resisted in a menacing way such as to imperil life, killing was justified.

The common law rule and the general American rule is that killing is totally out of proportion to the public interest in having criminals arrested for a misdemeanor.[48]

The State of Missouri, at least in recent history, appears to be an exception to this general common law principle. As early as 1885, *State v. McNally*[49] held that an instruction stating that if the jury believed the defendant was a policeman and was in the lawful discharge of his duty in attempting to arrest the deceased for a misdemeanor—a breach of the peace—and in a struggle the arrestee was killed to overcome resistance, then such killing was justifiable, was reversible error. In a strong dissent, the venerable Judge Sherwood expressed his belief that a peace officer has the right to arrest for misdemeanor where the arrest is made *flagrante delicto*.[50]

However, in *State v. Dierberger*,[51] the view of Justice Sherwood prevailed, and it was held in a case of breach of the peace, the law "throws around him a special protection," and the officer is entitled to an instruction to the effect that in making an arrest, he may use all the force necessary to overcome resistance, "even to the taking of life . . . ." Later, however, in a number of cases,[52] the *McNally* doctrine prevailed until *State v. Ford* in 1939,[53] when the law declared in *Dierberger* was adopted as to resistance. If this were not the law, the Court said the peace officer "would be of all men the most miserable."

B. The Statutes

The early Missouri statutes, from the time Missouri was a territory and literally until the adoption of the new criminal code in 1979, were very strict and harsh and gave no quarter to persons committing crimes. The Missouri Criminal Code, for decades in the nineteenth and twentieth centuries, was, to say the least, Draconian. But the code kept the citizenry in check. It was a

48. Scurlock, *supra* note 5, at 213, 221; *see also* Mansur, Jr., *supra* note 5, at 93; Robert L. Ross, Comment, *Amount of Force an Officer May Use to Effect the Arrest of a Misdemeanant*, 14 MO. L. REV. 76 (1949).

49. 87 Mo. at 644, 652 (1885).

50. He cites 1 SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 665 (Philadelphia, T. & J. Johnson, 7th Am. ed. 1853), and BISHOP, *supra* note 5, at § 650. *See also* FOSTER, *supra* note 54, at 308 ("Ministers of Justice, while in the execution of their offices, are under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice. For without it the publik [sic] tranquillity [sic] cannot possibly be maintained, or private property secured. . . .").

51. 10 S.W. 168 (Mo. 1888).

52. *See* State v. Salts, 56 S.W.2d 21 (Mo. 1932); State v. Gartland, 263 S.W. 165 (Mo. 1924); *see also* Mansur, Jr., *supra* note 5, at 93.

53. State v. Ford, 130 S.W.2d 635 (Mo. 1939).

part of the social mores of the times. It was a far cry from modern criminal codes.

Section 6 of the Territorial Laws of 1808 provided:

> If any person in the just and necessary defense of his own life, or the life of any other person, shall kill or slay another person attempting to rob or murder, in the field or highway, or to break into a dwelling house, if he cannot with safety to himself otherwise take the felon, or assailant, or bring him to justice, he shall be deemed guiltless, or *if any person while aiding in the legal execution of process, shall kill the party unlawfully resisting such person shall be deemed guiltless*.[54]

This early criminal code provided that if a person were convicted of murder and executed, his body shall be dissected.[55] If a person broke and entered a dwelling house and actually stole any money or goods such person would be fined three times the value of the property, one-third to be paid to the victim and two-thirds to the territory *and* be whipped on "his or her naked back, not exceeding thirty-nine stripes."[56] Further, if a person committed bigamy, the punishment was whipping on "his or her bare back, not less than one hundred, nor more than three hundred stripes well laid on."[57] And if any children did not obey their parent's lawful command, such children were to be sent to a "jail or house of correction, there to remain, until he or they shall humble themselves to the said parent's . . . satisfaction."[58] Under those harsh statutes of the Missouri Territory it is not surprising that it was proper to use deadly force in apprehending a felon.

After Missouri became a state, the law was not changed very much. In the Statutes of 1835, section 4 of Article II, relating to offenses, provided that:

> Homicide shall be deemed justifiable, when committed by any person in either of the following cases:
>
> *First*, [self defense in a dwelling house;]
>
> *Second*, [defense of husband, wife, parent or child;]

54. *See* 1 LAWS OF THE TERRITORY OF MISSOURI UP TO 1824, 210-11 (Jefferson City, W. Lusk & Son, 1842) (emphasis added).

55. *Id.* at 210, § 2.

56. *Id.* at 211-12, § 11.

57. *Id.* at 216, § 31.

58. *Id.* at 217, § 32.

> *Third*, When necessarily committed in attempting, by lawful ways and means, to apprehend any person *for any* felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace. [59]

It is to be noted that the Territorial laws were expanded to cover deadly force in the case of a riot or to preserve the peace—a misdemeanor.

This 1835 statute remained unchanged until the adoption of the Criminal Code of 1979.[60] The 1969 statute used the same language of the third category of the 1835 statute.[61]

Section 544.190 was first adopted in 1909 and that section provided "[i]f, 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." [62]

The City of Kansas City, Missouri has special statutes based upon the Uniform Arrest Act espoused some years ago by Sam Bass Warner. Section 84.440, R.S.Mo. provides:

> In case any police official shall have reason to believe that any person has committed, or is about to commit, within the city or on public property of said city beyond the corporate limits thereof any breach of peace or violation of law and order, or that any person found within the city or on public property of said city beyond the corporate limits thereof is charged with the commission of crime in the state of Missouri, against whom criminal proceedings shall have been issued, or when any person may have committed an offense within view of a member of such police force, said police official may cause such person to be arrested by any member of the police force. In cases where officers make arrest for crime committed within their view, the offenders shall at once be conveyed before some police judge or some judge in the city and the proper complaint against him shall be filed by said officer.[63]

And section 84.710, states:

> 1. The members of the police force appointed in pursuance hereof are hereby declared to be officers of the state of Missouri and of the city for which such commissioners are appointed.

59. MO. REV. STAT. § 8 (1835) (last emphasis added). Section 7, the Code also provided that abortion was manslaughter. MO. REV. STAT. § 7 (1835). Also, any "Negro" who commits rape shall be castrated. MO. REV. STAT. § 28 (1835).

60. 1977 Mo. Laws, S.B. 60, at 662, eff. Jan 1, 1979.

61. MO. REV. STAT. § 559.040 (1969); MO. REV. STAT. § 4370 (1939); MO. REV. STAT. § 3985 (1929); MO. REV. STAT. § 3233 (1919); MO. REV. STAT. § 4451 (1909); MO. REV. STAT. § 1818 (1899); MO. REV. STAT. § 3462 (1889); MO. LAWS §1 at 139 (1885); MO. REV. STAT. § 1235 (1879); MO. REV. STAT. § 5 at 232 (1825).

62. MO. REV. STAT. § 544.190 (1969).

63. MO. REV. STAT. § 84.440 (2001).

> 2. They shall have power within the city or on public property of the city beyond the corporate limits thereof to arrest, *on view*, any person they see violating or whom they have reason to suspect of having violated any law of the state or ordinance of the city. They shall have power to arrest and hold, without warrant, for a period of time not exceeding twenty-four hours, persons found within the city or on public property of the city beyond the corporate limits thereof charged with having committed felonies in other states, and who are reported to be fugitives from justice. *They shall also have the power to stop any person abroad whenever there is reasonable ground to suspect that he is committing, has committed or is about to commit a crime and demand of him his name, address, business abroad and whither he is going*. When stopping or detaining a suspect, they may search him for a dangerous weapon whenever they have reasonable ground to believe they are in danger from the possession of such dangerous weapon by the suspect. No unreasonable force shall be used in detaining or arresting any person, but such force as may be necessary may be used when there is no other apparent means of making an arrest or preventing an escape and only after the peace officer has made every reasonable effort to advise the person that he is the peace officer engaged in making arrest.
>
> 3. Any person who has been arrested without a warrant may be released, without being taken before a judge, by the officer in charge of the police station whenever the officer is satisfied that there is no ground for making complaint against him, or when the person was arrested for a misdemeanor and will sign a satisfactory agreement to appear in court at the time designated.[64]

64. MO. REV. STAT. § 84.710 (2001). For a discussion of the Kansas City statute see also State v. Rankin, 477 S.W.2d 72 (Mo. 1972); State v. Bennett, 468 S.W.2d 23 (Mo. 1971); Palcher v. J.C. Nichols Co., 783 S.W.2d 166 (Mo. Ct. App. 1990); Kansas City v. Butters, 507 S.W.2d 49 (Mo. Ct. App. 1974).

In *Rankin*, defendant was convicted of second degree murder. The issue on appeal was whether the trial court erred in admitting a pistol in evidence. Officers cruised a high crime area during the night, saw a car parked in a lot; the lights were off and two men were in the car. The car proceeded from the lot "rather fast" when the police car approached; one of the men bent forward. The officers stopped the car. Rankin was driving. They asked for identification. A weapon was seen lying on the floor. They picked up a .25 caliber pistol. The gun had been used in a previous killing. The men were arrested. At the time no criminal activity had been reported; no crime was in progress. Appellant argued that the search was not made incident to a lawful arrest. The court said there was no arrest but a momentary detention, based on the Kansas City statute: "where officers entertain a reasonable suspicion not amounting to probable cause . . . they may stop . . . ." 477 S.W.2d 72, 75 (Mo. 1972).

The same general common law principles were applicable to private watchmen or security guards. In *Manson v. Wabash, R.R. Co.*,[65] Manson sued the Wabash Railroad, its private watchman, Claude I. Gabbert, and its chief special agent for false arrest, assault and malicious prosecution. The trial court entered a directed verdict for the defendants. Gabbert had died before the case was tried and its chief also died during appeal. Wabash moved to abate the action. On May 30, 1951, Manson, a sixteen-year old high school boy, and his fourteen-year old friend, went to Forest Park to get a job as golf caddies. The Wabash had a footbridge over the track. Gabbert saw the boys sitting on the rail, throwing rocks and swinging on a cable. Gabbert showed them his badge and arrested them for trespassing and destruction of property. Gabbert called

In *Bennett*, this section was used to permit an arrest for assault. 468 S.W.2d 23 (Mo. 1971).

In *Palcher*, plaintiff sued for false arrest and malicious prosecution. When plaintiff and friends parked in a garage at County Club plaza in Kansas City, a security officer saw him and another peering into a vehicle parked nearby and urinating. The officer frisked plaintiff. Kansas City officers came. At trial plaintiff was acquitted. Defendant fashioned an instruction based on R.S. Mo. § 84.710. The Supreme Court held that this section does not empower arrest on less than probable cause. Terry v. Ohio, 392 U.S. 1 (1968). "In the absence of a *reason to believe* that a person committed or was in the commission of a violation of the law, *Mathis*, *Butters*, *and Fulton* explain, a Kansas City police officer has no power to arrest under § 84.710 . . . . The construction a court gives to statutory language becomes a part of the text of the statute as if it had been so amended by the legislature." *Palcher*, 783 S.W.2d at 169 (citing Kansas City v. Mathis, 409 S.W.2d 280, 286 (Mo. Ct. App. 1966); *Butters*, 507 S.W.2d at 49; Kansas City v. Fulton, 533 S.W.2d 677, 679 (Mo. Ct. App.1976)).

In *Butters*, defendant was convicted of possession of marijuana in violation of an ordinance. Defendant argued that the marijuana should be suppressed because of an illegal arrest. In 1972 a Kansas City officer stopped a vehicle because one of the lights was out, and smelled the odor of marijuana. The defendant was a passenger. The occupants got out of the car and frisked defendant. Marijuana was found. Section 84.710 authorizes an officer to effect an arrest if he has reasonable grounds to believe that defendant committed an offense. But here the officer, although he smelled marijuana he did not arrest defendant until he searched him and discovered same. Furthermore the search could not be justified under *Terry* because there was nothing to believe the defendant was carrying a weapon. Terry v. Ohio, 392 U.S. 1 (1968). The case was reversed. It is difficult to reconcile *Butters* with *Rankin*.

In view of these cases, although § 84.710 seems to give broad power to Kansas City police officers, the standard appears to be the *Terry* standard. The court in *Palcher* reversed and remanded judgment for defendant. 783 S.W.2d at 169.

Under the Kansas City statute, it is not sufficient to arrest upon reasonable grounds to "suspect" but only on reasonable grounds to believe that the person committed an offense. *See Mathis*, 409 S.W.2d 280; *Butters*, 507 S.W.2d 49; *Fulton*, 533 S.W.2d 677. In the absence of a reasonable grounds to believe, a Kansas City officer has no power to arrest under § 84.710. See Palcher v. J.C. Nichols Co., 783 S.W.2d 166 (Mo. Ct. App. 1990), where judgment for defendant on the false arrest claim was reversed.

65. Manson v. Wabash R.R. Co., 338 S.W.2d 54 (Mo. 1960) (en banc).

the police, but after waiting a while they began walking to the station. They were turned over to the police at 3:45 p.m. and released at 5:00 p.m.

One of the points raised was that Gabbert had no power to arrest, and that the Police Board had no authority to license such a private watchman. The court relied on *Frank v. Wabash R.R. Co.*[66] Frank threw some sticks and rocks at a passenger train—"A policeman is the legal equivalent of the 'watchman' at common law who possessed the power of arrest not vested in what we refer to peace officers."[67] The court held the evidence insufficient to sustain a verdict in plaintiff's favor and affirmed the judgment.

IV. THE CASE LAW OF MISSOURI IN THE NINETEENTH CENTURY

The view of the common law and the view of the Missouri cases relating to the use of deadly force in effecting an arrest can be summed up, I believe, in the language of Judge Sherwood of the Missouri Supreme Court. In *State v. McNally*,[68] Judge Sherwood, quoted Foster,[69] a great common law authority, that ministers of justice, while in the execution of their offices are under the peculiar protection of the law.

> This special protection is founded in great wisdom and equity, and in every principle of political justice. For without it the public tranquility cannot possibly be maintained, or private property secured. . . . Homicide in advancement of justice may likewise be considered as founded in necessity; for the ends of government will be totally defeated, unless persons can, in due course of law, be made amenable to justice . . . . and . . . . where persons having authority to arrest . . . are resisted . . . and . . . *killed* [that] homicide is justifiable.[70] Law enforcement officers are under a "*special protection of the law.*"[71]

Judge John Gibson probably captured the common law view as embodied in the nineteenth and early twentieth century Missouri decisions in his dissent in *Mattis v. Scharr*.[72] He first states that the matter is a legislative one which relies on centuries of the common law and states that the Missouri law, section 544.190, only permits such force as may be reasonably necessary to apprehend a fleeing felon when (1) the officer gives the suspect notice of his intentions to arrest, (2) the suspect must either flee or *forcibly* resist, (3) the force used must be necessary, and (4) there must be probable cause to arrest.

66. 295 S.W.2d 16 (Mo. 1956); *see Manson*, 338 S.W.2d at 60.
67. *Manson*, 338 S.W.2d at 60.
68. 87 Mo. 644 (1885).
69. FOSTER, *supra* note 54.
70. *Id.* at 654.
71. *Id.* at 656.
72. Mattis v. Schnarr, 547 F.2d 1007, 1021 (8th Cir. 1976)

This view of the early Missouri cases implies that the law enforcement officer is the first line of defense against crime, in maintaining an orderly and peaceful society and the officer is entitled to a special protection over and above the ordinary law of self defense. The law enforcement officer must make split-second decisions in an emotionally-charged situation, he is not endowed with all the vision of foresight; he must react quickly to meet the exigencies of an emergency situation. As Justice O'Connor stated in dissent *Tennessee v. Garner*,[73] any other rule would simply invite second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances.

The first case in Missouri dealing with the issue of deadly force is *Roberts v. State*.[74] Roberts was indicted, with another, for the murder of Ephraim Hibler, a St. Louis police officer. He was arrested for vagrancy, pigeon-dropping, and stealing. He was confined to the "calaboose" for several days but later released under agreement to leave the City. He did not, and Roberts was arrested again because he was "dangerous." Hibler and his partner attempted to arrest him at a coffee-house; Roberts attempted to escape; the door was locked; Roberts resisted, a scuffle ensued; Hibler shouted, "By God, I'll shoot!" and Roberts said, "I would rather die than go to the workhouse." Roberts shot—killing Officer Hibler. Judge Napton wrote the decision for the supreme court. The court recognized the common law rule that where persons have authority to arrest and the person resists and kills the officer, the offense is murder. The defense requested an instruction that a police officer has no legal right to arrest a citizen without a warrant. It was refused. However, the supreme court reversed and remanded to determine the legality of the arrest because of Roberts' breach of promise to leave the City. "If the jury should be of opinion that the arrest was made solely because the defendant had committed a breach of promise with the city officers by remaining in the city," the arrest was illegal.[75]

In 1881, in *State v. Underwood*,[76] the supreme court again reversed a case where defendant killed a police officer, J.D. McElwrath. In June, 1881, the officers went to arrest horse thieves. They arrested two men and learned that Underwood was also implicated and attempted to arrest him in a saloon. Defendant drew a pistol. The Court stated that a constable has authority to

73. Tennessee v. Garner, 471 U.S. 1 (1984).

74. 14 Mo. 138 (1851).

75. In the course of the opinion, the court cited 32 Geo. III, 17 (Eng. 1796), which authorized constables to apprehend "evil disposed persons, suspected persons and reputed thieves." The court cited Ordinance No. 2364 which contained provisions similar to the English statute. 14 Mo. at 145.

76. State v. Underwood, 75 Mo. 230 (1881); (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *292).

arrest without warrant if he has reasonable cause to suspect that a felony has been committed by the defendant.[77] The court reversed and remanded on the ground that an instruction should have been given as to the defendant's knowledge of the official character of the officer.

In *State v. Obershaw*,[78] the defendant was convicted of wounding one Frank Dimitry. The evidence showed that defendant was a constable and arrested a man for larceny. The man escaped and the defendant, officer, pursued. In the darkness of night, they found the man fled and defendant ordered him to halt several times. The defendant officer fired wounding the man. But the man shot was not the one who was sought. The Court of Appeals reversed and remanded because of a faulty instruction. The instruction given was that if an officer shoots at one not the fugitive, the law does not justify the mistake. This instruction was erroneous.

In *State v. Johnson*,[79] the defendant shot and killed the Marshal of Cameron, Henry C. Culver. He was shot in attempting to arrest the defendant. The prosecution introduced evidence that Johnson had shot his pistol two or three times earlier in the day of the arrest and that he had shot a dog. The defendant had stated that if the marshal "fooled with him, he would fix the s— of a b——." Under these circumstances, where the defendant knew the officer was the marshal and when, in attempting to arrest the felon, caught his horse by the bridle, and rode off, he was guilty of murder.

The main dispute in the nineteenth century cases seems to revolve around whether an officer may use deadly force to effect an arrest for a misdemeanor. As discussed above, *State v. McNally*[80] held that deadly force cannot be used—following the general rule throughout the United States, despite a strong dissent by Judge Sherwood. Sherwood's view prevailed in *State v. Dierberger*,[81] but decisions returned to the *McNally* doctrine, until *State v. Ford*[82] in 1939.

In *Ford*, Officer Herman Ford, town marshal of Rosco was convicted of murder in the second degree for killing Braxtol Gray. The officer was executing a warrant for the arrest of Gray based upon a misdemeanor charge when Gray attempted to seize the officer's pistol. The marshal shot Gray and he later died. Instructions defining the right of an officer to use force were refused. The state contended that the officer's right to use deadly force was

77. 75 Mo. 230, 237 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 536; 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 639 (1866)).

78. 11 Mo. App. 85 (1881).

79. 76 Mo. 121 (1882).

80. 87 Mo. 644 (1885).

81. 10 S.W. 168 (1888).

82. 130 S.W.2d 635 (1939).

controlled by the justifiable homicide statute[83] which provided that "homicide is justifiable when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony . . . or in lawfully keeping or preserving the peace." The court discussed *McNally* and *Dierberger* and East.[84] The *Dierberger* Court summed up the law:

> These authors, ancient and modern, lay down their law in substantially the same terms. They show that the protection which an officer is entitled to receive is a different thing from self-defense. The officer, when making an arrest, may, of course, defend himself, as may any other person who is assaulted; but the law does not stop here. The officer must of necessity be the aggressor; his mission is not accomplished when he wards off the assault. He must press forward and accomplish his object; he is not bound to put off the arrest until a more favorable time. Because of these duties developed upon him the law throws around him a special protection. As we said in the recent case of State v. Fuller, [9 S.W. 583 (Mo. 1888)], . . . his duty is to overcome all resistance, and bring the party to be arrested under physical restraint, and the means he may use must be co-extensive with the duty.[85]

However, the court stated it need not determine what kind or amount of force an officer may use to effect an arrest when a misdemeanant flees, because this record deals only with a situation where the prisoner forcibly resisted arrest. "[W]e think the doctrine of the *Dierberger* case is right and that of the *McGehee*,[86] *Salts*,[87] and *Roth*[88] is wrong."[89] The language of the statute is broad enough "to use all force reasonably necessary to effect and maintain against resistance . . . ."[90]

V. THE TWENTIETH CENTURY UNTIL THE NEW CRIMINAL CODE

In the first decade of the Twentieth Century only five decisions were handed down. In *State v. Lane*,[91] Samuel Lane, a marshal in Malden, was charged with the murder of James McGregor. He was convicted of manslaughter. In 1895, the deceased became drunk and disorderly and carried

83. MO. REV. STAT. § 3985 (1929). This statute was later revised. The current law is MO. REV. STAT. § 563.046 (1999).

84. 1 EDWARD HYDE EAST, TREATISE OF THE PLEAS OF THE CROWN 302 (London, A. Strahan 1803). "As to arrests for misdemeanors and breach of the peace, it is not lawful to kill if he fly from the arrest;" this was the general common law rule. *Id.*

85. State v. Ford, 130 S.W.2d 635, 638 (Mo. 1939) (quoting State v. Dierberger, 10 S.W. 168, 171 (Mo. 1888)).

86. State v. McGehee, 274 S.W. 70 (Mo. 1925).

87. State v. Salts, 56 S.W.2d 21 (Mo. 1932).

88. State *ex rel.* Kaercher v. Roth, 49 S.W.2d 109 (Mo. 1931).

89. 130 S.W.2d at 639.

90. *Id.*

91. 59 S.W. 965 (Mo. 1900).

a pistol. He was in a saloon. The defendant went into the saloon, saw the deceased behaving in a disorderly manner, asked for the revolver and arrested him. Deceased refused. Lane threw him on the floor and took the revolver. The officer took him to jail, but he refused to go. They scuffled, Lane pulled out his gun and hit him with the pistol on the side of the head. Later he died. The jury was instructed that it was the right and duty to arrest anyone violating the law in the officer's presence and to take him to a proper officer and in doing this he was authorized to use such force as was necessary, to overcome all resistance, even to the taking of life, but if the blow was struck under such circumstances that the jury does not find it was necessary, then the jury cannot acquit. This was deemed to be a correct instruction and the case was affirmed.

In *State v. Evans*,[92] Evans was charged with and convicted of murder for killing William L. Henniche, a police officer in Boonville. A number of cigar stores had been burglarized. The owner of a cigar store caught defendant in an act of burglary and shot at him. The officer later attempted to arrest the defendant. They "tussled." The defendant kept fighting, the officer attempting to hold his wrists to "keep his hand out of his pocket." Evans struck the officer and defendant's gun went off twice. Defendant denied being in the cigar store, and claimed that the officer was beating him when he fired. The supreme court affirmed the conviction of murder in the first degree. The court relied upon the common law—the statutes do not impinge upon the authority to make arrest.[93] Under the circumstances, the "killing of Hennicke was nothing less than murder."[94]

State v. Coleman[95] was a sad case involving the selling of fish on the public sidewalk without a permit in Dalton, Missouri. The deceased, Rufus Cox, attempted to sell fish on the sidewalk of the town, and the defendant, a marshal, advised Cox that he was in violation of a city ordinance, and requested him to move his fish to some other place. After several attempts to remove the fish when the deceased declined to do so, defendant sought to place Cox under arrest. Cox had his hand in his pocket; the defendant fired a shot. The man was killed. The case was reversed and remanded because of the

92. 61 S.W. 590 (Mo. 1901).

93. The court cites Bishop. If a person is walking the streets at night, and the indications are that he has committed a felony, watchmen and beadles have authority at common law to arrest and detain him in person . . . though the proof of an actual felony committed may be wanting. BISHOP, *supra* note 85. The court cites Lawrence v. Hedger, 3 Taunt. 14 (Eng. Polo) (a man carrying a bundle in his hand was properly arrested). The court quoted 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 86 (London, E. Rider, Little-Britain 1800). If the defendant "resist or fly" and "upon necessity" the night walker is slain, it is no felony. *Id.*

94. 61 S.W. 590, 594 (Mo. 1901). This case contains an excellent statement of the principles of the common law relating to arrests of "night walkers." *Id.*

95. 84 S.W. 978 (Mo. 1905).

instruction. Killing to effect an arrest for violation of a city ordinance is not justified. The case discusses *McNally* and *Dierberger*. The implication is that killing a person who violates an ordinance is not justifiable homicide.

In 1910, Officer Hiram Montgomery, an officer in Springfield, Missouri, and was tried and convicted of manslaughter.[96] The Supreme Court of Missouri affirmed. The charge was that the defendant-policeman killed the victim, George Mitchell, in August, 1908. Montgomery had arrested one Denton. On the street, certain persons congregated including Allen, a court stenographer. Allen asked if the officer had a warrant, but he did not, and Allen suggested he get one to be on the safe side. Montgomery seemed to be angered at Allen's interference and defendant drew and cocked his revolver and told Allen he would take him too. Mitchell came up and seized the revolver, but Montgomery turned the revolver toward Mitchell and fired two shots, inflicting a mortal wound. Mitchell was unarmed, and Mitchell's interference was of such a character as to show an entire absence of peril or danger to the defendant which would justify the taking of life.

In the last case of the decade, the marshal of Cardwell, Missouri was charged and convicted of the murder of J.A. Leftwich. Leftwich was an old man. He arrived by train somewhat intoxicated and boisterous. He obtained lodging at a local hotel owned by Mr. and Mrs. Brewer. That evening, a disturbance was heard and it was found the old man was holding her husband and swearing. Their daughter called the marshal. The marshal eventually came and had a pistol in his hand. The officer shot through the door a couple of times to intimidate the old man. Leftwich was not armed. The court submitted the case to the jury for manslaughter. The court held that was not the slightest evidence of resistance. All of the testimony tended to show that the officer at no time indicated to the deceased that he had come to arrest him. The only thing that the officer said to the deceased was "halt," when the old man went to shut the door. Taking the most favorable view of the defendant's own testimony, it is too plain for doubt that he did not shoot and kill the deceased in an effort to arrest him, but merely to intimidate and frighten him. Such action was not necessary to effect an arrest. The conduct of the officer was reckless and not justifiable.

Thus, it can be seen that killing for a violation of an ordinance subjects an officer to being tried and convicted of homicide.

In the 1920's, only five cases concerning the issue were decided by our appellate court—*State v. Gartland*,[97] *State v. Jordan*,[98] (where defendant killed

96. State v. Montgomery, 132 S.W. 232 (Mo. 1910).

97. 263 S.W. 165 (Mo. 1924) (discussed *supra* with *McNally* and *Dierberger* relating to killing to effect an arrest for a misdemeanor - holding that an officer has no right to kill to effect an arrest for a misdemeanor). *But see* State v. Ford, 130 S.W.2d 635 (Mo. 1939).

Officer Finn of the St. Louis Police Department when officers saw defendant and others walking in St. Louis frisked defendant, a scuffle ensued and Finn was killed. In such circumstances, defendant was entitled to an instruction on second degree murder), *McKeon v. National Casualty Co.*,[99] and *State v. Lamb*,[100] *State v. Young*.[101]

In *McKeon v. National Casualty Co.*, a civil action was brought on an accidental death benefit insurance policy. The deceased, who was a known gangster in St. Louis was seen driving his car, and four policeman, members of the Night and Day Riders' squad, attempted to pull him over. Instead the deceased sped up, a chase ensued, the officers shot in the air, the deceased shot back, so did the officers, and the deceased Mr. McKeon was killed. There was no probable cause to arrest, although McKeon had a bad reputation. A judgment for the defendant insurance company was reversed and remanded. The Court stated:

> We are not unmindful of the trying position of police officers and the perils to which they submit, but they are officers of the law, charged with its enforcement, and are conclusively presumed to know their duties. They are charged with knowledge of what constitutes probable cause, and that they may only arrest or attempt to arrest, without warrant, upon probable cause. Here we have the situation of police officers pursuing insured, without probable cause, firing into the air, according to their statement, and probably causing him to believe they were shooting at him. It is evident that the police officers, in attempting the arrest without probable cause, that is, committed by insured, were aggressors from the beginning and continued so to the end, which tended to show an accidental result within the meaning of the policy. Personal liberty is one of the absolute and fundamental guaranteed rights, and may not unlawfully be interfered with. . .[102]

In *State v. Young*, Phillip P. Young was a section-hand on a railroad and the city marshal of Martinsburg, Missouri. He was married and had a young high school aged daughter, Lena. She became pregnant by Joe Kumbera, who was in the garage business. Defendant went to Kumbera's home, and during a conversation, shot and killed Kumbera. Young surrendered to the sheriff, and was charged with murder. On appeal, defendant argued that he should have been entitled to a manslaughter instruction. The Supreme Court held he was not so entitled. His voluntary statement to the police was that he killed

98. 268 S.W. 64 (Mo. 1924).

99. 270 S.W. 707 (Mo. Ct. App. 1925).

100. 278 S.W. 1009, 1010 (Mo. 1925). The defendants were found guilty of assaulting the officer.

101. 286 S.W. 29 (Mo. 1926).

102. 270 S.W. 707, 712 (Mo. Ct. App. 1925).

Kumbera because he "ruined' his daughter. He was not acting as an officer but was attempting to punish the deceased. The conviction was affirmed.

The decade of the thirties was very quiet. Only *State v. Ford*,[103] is of significance. *Ford* was the last case to discuss the use of force to effect the arrest of a misdemeanant, and sustained the doctrine of *Dierberger*, to the extent that the police are authorized to use deadly force when the misdemeanant *forcibly resists*. However, the court, did not determine what amount of force an officer may use to effect an arrest when a misdemeanant flees.

The most important case in the 1940's was *State v. Nolan.*[104] This case summarized the law of Missouri and is often cited. The defendant, Neil Nolan, was found guilty for the killing of Alva N. Mead, a St. Joseph policeman. On March 18, 1944, Officer Mead and others were cruising in their squad car at night. That night a tavern was burglarized. The burglary was broadcast over the police radio. The night man in a restaurant gave a description of a "dirty little boy coming" in to get some change. The officers located the boy—the defendant—a seventeen year old who had committed the burglary. During questioning, Nolan later stated that "two cops drove up and started to search me. I had two guns so I made a break for it."[105] The officers chased and ordered Nolan to stop. The officer fired, but hit a building. Nolan fired back. Mead fired and hit Nolan in the leg; his leg buckled. An officer found Mead on his knees and face—he was dead with bullet wounds in his arm and chest. It was not questioned that Nolan had a deadly weapon and he shot Mead. The issue was whether there was a lawful attempted arrest without a warrant.

The *Nolan* court quoted from Blackstone, and made a distinction between the power of an officer to arrest and that of a private person making an arrest. An officer may arrest for a felony for probable cause even though no felony has actually been committed. The manslaughter conviction was affirmed. The Court stated:

> Our statutes explicitly authorize officers to use all necessary force to effect an arrest if a person flee or resist after notice of an intention to arrest him. (Sec. 3960, R.S. 1939). They may command assistance to retake him, . . . and felons are to be forthwith pursued by officers and all others thereto required and may be arrested without warrant . . . . Officers failing or refusing to pursue and arrest felons themselves commit a misdemeanor and are subject to punishment . . . . [The law] provides that a homicide is justifiable when committed: ". . . or, third, when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed . . . ."

103. 130 S.W.2d 635 (Mo. 1939).
104. 192 S.W.2d 1016 (Mo. 1946).
105. *Id.* at 1017.

> Among reasons advanced for protecting officers in the discharge of their lawful duties are: In a republic like ours, the citizens are sovereign. At common law and by statute sheriffs, constables, and other like officers are required to discharge their official duties–protect the sovereign–under penalties. The execution of legal processes and the discharge of legal obligations give life to the law; and resistance thereto is in opposition to the law, unlawful and needs no inquiry as to malice. . . . The security of the people as well as the deputy of the law requires officers, in making arrests, to overcome flight or resistance and place the person under physical restraint, especially felons. This duty is accomplished by pressing forward. It is not discharged by defensive action. Officers are the aggressors. They "would be of all men and the most miserable" if while effecting lawful arrests they be placed on the same level as ordinary individuals having a private quarrel and be denied that protection commensurate with the public duty exacted. Having imposed the duty to arrest in all lawful instances . . . the sovereign does not needlessly expose its protectors as targets for felons to shoot down on the least provocation. The sovereign affords them with special protection. . . . If one has the right to arrest another, that other has no right to resist. It is illogical and irreconcilable to say these rights coexist. Officers need not engage felons on equal terms. They are entitled to overcome flight or resistance with superior force, to the extent of killing the felon if necessary.
>
> The mental state of the accused at the time of the arrest is a material subject of inquiry. A citizen who has committed no felony is conscious of no guilt and an arrest on a false pretense can readily arouse indignation and anger and righteous passion. How can that honest sense of outrage which springs into the mind of the innocent arise in the breast of a felon? Neither reason nor law reaches such a result. A felon knows of his violations of law, his crimes. *An enemy of the sovereign and the security of society, he knows he has* forfeited his right to liberty and that the discharge of duties imposed upon the protectors of the security of the sovereign demands his apprehension to answer at the bar of justice. Fear of and a desire to escape punishment motivates his resistance to a lawful arrest. *Resistance thus becomes a crime and passion becomes wickedness. Consequently, the law that imposes the duty upon officers to arrest felons exacts, as a necessary corollary, that felons submit to lawful arrest*.[106]

106. *Id.* at 1020-21 (citations omitted) (emphasis added). The *Nolan* case has often been cited. *See* State v. Thomas, 625 S.W.2d 115, 122 (Mo. 1981); State v. Jasper, 486 S.W.2d 268, 271 (Mo. 1972); State v. Brothers, 445 S.W.2d 308, 310 (Mo. 1969); State v. Murray, 445 S.W.2d 296, 298 (Mo. 1969); State v. Overby, 432 S.W.2d 277, 279 (Mo. 1968); State v. Brookshire, 353 S.W.2d 681, 689 (Mo. 1962); State v. Stehlin, 312 S.W.2d 838, 842 (Mo. 1958); State v. Cantrell, 310 S.W.2d 866, 868 (Mo. 1958); State v. Brown, 291 S.W.2d 615, 618 (Mo. 1956); State v. Campbell, 262 S.W.2d 5, 9 (Mo. 1953); State v. Johnson, 245 S.W.2d 43, 48 (Mo. 1951); State v. Ussery, 208 S.W.2d 245, 246 (Mo. 1948); State v. Browers, 205 S.W.2d 721, 725

In the 1940's, several cases were handed down relating to the subject. In *State v. Havens*,[107] police officer Glen Havens, deputy marshal of Bolivar, Missouri, was convicted of manslaughter. The Supreme Court affirmed. He was on duty early in the morning when three boys in a car told him there was a drunk at a local café. He went to the restaurant, waited outside until the man came out, and stopped him. Havens told him he was too drunk to drive and placed him under arrest. The deceased, Charley Widener, struck the officer and fought him. During the scuffle, the officer fired two shots to scare him, one which killed Charley. Charley was unarmed. Although the court recognized the principle that an officer may be the aggressor and use a greater degree of force than he could justify use in self-defense, the homicide, to be justifiable, must have been necessarily committed in lawful ways and means. There is a limitation on the officer's right to kill in making an arrest—he may not use more force than was reasonably necessary. The officer is not the judge as to what is necessary to kill—the exigencies of the situation must have been such that there was a necessity for the killing and whether such a necessity existed, as a matter of fact is a question for the jury. The judgment of manslaughter was affirmed.

In *State v. Hicks*,[108] Hicks, a constable, was convicted of the murder of Hobart Barker. Barker's automobile had a flat tire in Douglas County. A Mrs. Douglas was with him. They stopped on the shoulder. Two different versions were given. Barker sought help with the flat tire by hailing several cars. Eventually Hicks and his son came up to the car, told Mrs. Douglas to turn on the lights and as Barker was getting out of the car he was shot several times. Hicks' version was that his son told him that a man came out of the car with a gun, and the defendant thought they were hijackers. Hicks went to the scene and said he was an officer and to put up their hands. They did not, and Charley Hicks and his son fired. Barker went down. Under the circumstances and proper instructions, the conviction of the officer was affirmed.

The chicken stealing case in 1947, *State v. Parker*,[109] raised some interesting facts and legal questions. Parker's son told him that a friend, Jimmie Jordan, age nineteen suggested stealing some chickens from Elva Carty's place in the Ozarks. The defendant Parker and Carty went to the sheriff and it was arranged to have the son "go ahead" with the plan of catching the thief. Defendant was to show the sheriff where all this would take place. The sheriff, his deputy, the defendant and Carty waited near the barn.

(Mo. 1947); State v. Shilkett, 204 S.W.2d 920, 926 (Mo. 1947); State v. Parker, 199 S.W.2d 338, 340 (Mo. 1947).

107. 177 S.W.2d 625 (Mo. 1944).

108. 167 S.W.2d 69 (Mo. 1942).

109. 199 S.W.2d 338 (Mo. 1947).

All were armed; the defendant with a twelve-gauge shotgun. After two or three hours Jordan appeared and came out of the barn with chickens, and ran away in the darkness. Later, Jordan went to another place where again they concealed themselves in wait. The sheriff said, "don't shoot unless you have to, but if you [deputy] do, shoot low."[110] Jordan appeared. Defendant called to Jordan to stop. When Jordan neared the barn, defendant fired—stating "he was getting away . . . I didn't aim to kill him, I was drawing to the right of him."[111] The defense was that defendant was acting as a member of a *posse comitatus* and whether defendant used more force than necessary. The Supreme Court affirmed a conviction of murder in the second degree.[112] While, in a proper case the sheriff can summon to his act a posse comitatus,[113] an officer can only use reasonable force.

In the 1960's and 70's, prior to the adoption of the new criminal code effective January 1, 1979, few decisions came down from the Missouri courts––generally holding to the various principles of the common law. In *State v. Brothers*,[114] the defendant was charged with striking and beating Officer Lonnie Mason in Dexter, and received a sentence of five years. During the afternoon of June 21, 1968, defendant was drinking heavily in a tavern in Dexter. The owner asked him to leave, he got in a fight with a customer, the police were called, and an officer arrested him and placed him in the police car, but he jumped out and ran. The officer called for help and officer Mason responded. They placed him in the police car, he jumped out, got in a friend's car again, and Mason followed. Mason caught the car, and tried to place handcuffs on defendant, but defendant hit Mason in the face with his fists. Mason tried to subdue him by firing his gun but shot himself in his foot. Later defendant was caught and sent to jail. Defendant contended that the evidence did not establish that Mason was in the performance of his duties—by arresting for a misdemeanor without a warrant. The court held the arrest lawful; defendant was disturbing the peace and Mason's actions were authorized pursuant to section 544.190, R.S.Mo. The court affirmed the judgment.[115]

110. *Id.* at 339.

111. *Id.*

112. The court cited State v. Havens, 8 S.W. 219 (Mo. 1888).

113. The court relied on FOSTER, *supra* note 54, at 309, and 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 85 (London, E. Rider, Little-Britain 1800).

114. 445 S.W.2d 308 (Mo. 1969).

115. In the course of the opinion the court discusses the right to resist arrest. This common law right to resist is waning. *See* United States v. Heliczer, 373 F.2d 241 (2d Cir. 1967); MODEL PENAL CODE, § 304(2)(a)(i); Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330 (1942); Max Hochanadel & Harry W. Stege, Note, *The Right to Resist Arrest, An Outmoded Concept*, 3 TULSA L.J. 40; Max Hochanadel & Harry W. Stege, Note, *The Right to Resist Arrest, An Outmoded Concept*, 3 TULSA L.J. 40; *see also* State v. Koonce, 214 A.2d 428 (N.J. Super. Ct. App. Div. 1965) (a private citizen may not use force to resist an arrest by one he has good reason

One of the more important cases during this era was *Walsh v. Oehlert*.[116] The parents of Timothy Walsh, a sixteen-year-old juvenile, sued Rudolph Oehlert, a St. Louis police officer and others for the wrongful death of their son. In October 1966, Timothy was arrested at his place of work by three officers, one of whom was Oehlert. Oehlert brought Walsh to the district station. While there, Walsh bolted and dove through a window. Oehlert and another officer pursued, warning him to halt. He ran. The other officer fired, aiming at his legs, but he shot Walsh in the back, killing him. The Court of Appeals held that under the common law and Missouri, a police officer may use deadly force to apprehend an accused fleeing felon, citing section 544.190, R.S.Mo. "From these authorities, we hold that an officer, where he has probable cause to make an arrest for felony may use a reasonable amount of force in the discharge of his duties to present the arrestee from escaping."[117] Furthermore, the fact that Oehlert failed to inform the officer who shot the fleeing Walsh that Walsh was a juvenile did not make Oehlert liable. The jury verdict against Oehlert was reversed with directions to enter judgment in favor of the police officer, Oehlert.

In *Davis v. Moore*,[118] the parents of Tyrone Davis sued in 1977, for the wrongful death of their twenty-year-old son. They sued Moore and Simpson, police officers of the City of Kinloch. The jury found in favor of the police and the parents appealed, contending that the instruction did not define "all necessary means." The court held the instruction valid, but reversed and remanded because the trial became one of trying the father, hence plaintiffs were prejudiced. A concurring opinion agreed that the case should be reversed, but noted that the case did not deal with the constitutionality of section 544.190, R.S.Mo., nor does the opinion deal with the "complex problem" of the use of deadly force in effecting an arrest.

On remand, the jury again found in favor of the police officer and the parents again appealed. At the time of the arrest of Tyrone, for several offenses and warrants, he had his hand in his pocket and "wheeled around" and ran. Officer Moore fired a warning shot in the air and ordered Tyrone to halt. He continued to flee. The policeman fired several shots, which struck Tyrone, resulting in his death. The court again held the "necessary means" instruction valid. An instruction that the presumption is that peace officers are in the lawful discharge of their duties, was also held valid. The judgment was affirmed.

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to believe is a police officer engaged in his duties). The common law rule is no longer in force in New Jersey.

116. 508 S.W.2d 222 (Mo. Ct. App. 1974).

117. *Id.* at 224-25. The court relied on State v. Nolan, 192 S.W.2d 1016 (Mo. 1946); BLACKSTONE, *supra* note 84, at 204; HALE, *supra* note 39, at 494.

118. 553 S.W.2d 559 (Mo. Ct. App. 1977).

VI. SUMMARY OF DECISIONS

From this long history of Missouri decisions, certain principles can be summarized:

1. An officer is authorized to effect an arrest for a felony with or without a warrant when there is probable cause to arrest and may use all necessary means to effect the arrest either when the felon flees or when he resists arrest.
2. Unlike the common law, and as in many states, an officer, in Missouri, is authorized to effect an arrest for a misdemeanor with a warrant or a misdemeanor committed in his presence without a warrant and may use all necessary means to effect the arrest including deadly force when the misdemeanant *resists*, but not when he *flees*.
3. In Missouri, an officer is not authorized to use deadly force to effect an arrest for a violation of a city ordinance.
4. An officer is not justified in using deadly force to effect any arrest in order to intimidate or frighten a citizen.
5. An officer is not justified in using deadly force in order to punish a citizen.
6. An officer is not authorized to arrest or use deadly force to effect an arrest without probable cause to believe an offense has been committed merely because the citizen has a bad reputation or is a gang member.
7. If the officer is not permitted to effect an arrest for a felony even to the extent of using deadly force, the officer would be most miserable, violate his duty, and injure the fabric of society.
8. Citizens are not lightly to be deprived of their liberty, but the mischief and inconvenience occasioned the innocent is considered insignificant when compared with the consequences to law enforcement and the public of permitting felons to escape.
9. It is the duty of the citizen not to flee or resist arrest—the street is not the place to determine issues—the only place is the quiet of the courtroom.
10. While all "reasonable" force to effect an arrest for any felony or when the arrestee resists the line is drawn when the officer uses unreasonable or excessive force—a fact question for the jury.[119]

119. *See* Annotation, *Burden of Proof in a Civil Action for Using Unreasonable Force in Making Arrest*, 82 A.L.R. 4th 598 (1990); John F. Wagner, Jr., Annotation, *Standard for*

VII. THE TIMES THEY ARE A-CHANGIN'[120]

Beginning in the late 1960's and early 1970's, many changes were in the offing, not only in society in general, but with regard to the strict principles of the common law as to when a law enforcement officer is authorized to use deadly force. This was only one aspect of the changes suggested as to the substantive criminal law, police practices, management, training of officers, and a whole host of other practices.

The President's Commission issued its report in the late 1960's on "The Challenge of Crime in a Free Society." The President's Commission on "Law Enforcement and Administration of Justice" issued a report, the "National Commission on Reform of Federal Criminal Law." The Model Penal Code adopted new rules; the American Bar Association issued its "Standards For Criminal Justice"; and the Restatement issued new rules in 1965. These suggestions, of course, were not new—in 1926, the Missouri Crime Survey also made many suggestions for reform.[121]

These reform suggestions were not new. As early as 1856 a New York Times editorial questioned a shooting by a police officer, and the Restatement of Torts, section 131, in the late 1930's, first proposed a limit on shooting, but abandoned that policy.[122]

Determination of Reasonableness of Criminal Defendant's Belief that Physical Force is Necessary - Modern Cases, 73 A.L.R. 4th 993 (1989).

120. Song made famous by Bob Dylan in 1964. Bob Dylan, *The Times They Are A-Changin' on* THE TIMES THEY ARE A-CHANGIN' (Columbia 1964), *available at* http://www.bobdylan.com/songs/times.html.

> Come senators, congressmen
> Please heed the call
> Don't stand in the doorway
> Don't block up the hall
> For he that gets hurt
> Will be he who has stalled
> There's a battle outside
> And it is ragin'.
> It'll soon shake your windows
> And rattle your walls
> For the times they are a-changin'.

121. *See generally* GUY A. THOMPSON ET AL., THE MISSOURI CRIME SURVEY 373 (Patterson Smith Publ'g Corp. 1968).

122. See Robert Berkley Harper, *Accountability of Law Enforcement Officers in the Use of Deadly Force*, 26 HOW. L.J. 127 (1983), an excellent article, discussing the issue and listing the statutes of various states. Professor Harper suggests that the law should be that deadly force

The Model Penal Code adopted by the American Law Institute passed section 3.07—Use of Force in Law Enforcement. That provision placed several limitations on when deadly force by a law enforcement officer was justified. Section 3.07 authorizes a law enforcement officer to use deadly force only when the officer believed such force was "immediately necessary to effect an arrest" and (1) the actor makes known the purpose of the arrest or believes it is known, (2) when the arrest is made under a warrant or believed to be valid, (3) the arrest is for a felony, (4) the officer is authorized to arrest, (5) the officer believes that the force employed creates no substantial risk of injury to innocent persons, (6) the officer believes that the crime involved conduct, included the use or threatened use of deadly force, and (7) there is substantial risk that the arrestee will cause death or serious bodily harm.[123] In section 3.11(2), deadly force is defined as that force which the actor uses with the purpose of causing, or which he knows to create, a substantial risk to cause death or serious bodily harm.[124]

The American Bar Association's Standards for Criminal Justice, Standard 1-2.1(b) provide that deadly force should be used when life is endangered by the threat of force, and Standard 1-4.5 states in the comments that particular care should be exercised by courts in passing on policies dealing with the use of deadly force.

The Restatement 2d, Torts (Chapter 5, Topic 1, section 131) authorizes the use of deadly force if:

(a) the arrest is made under a warrant which charges treason or felony, or without a warrant for treason or felony which has been committed, and

(b) the other person is named in the warrant, or the actor [police officer] believes the offense was committed by the other, and

(c) the actor reasonably believes that the arrest cannot otherwise be effected.

The comment notes that the use of deadly force for a felony is not privileged unless the actor reasonably believes that it is impossible to effect the arrest by any other or less dangerous means.

Section 132, of the Restatement provides that the use of deadly force is not privileged if the means employed are in excess of those which the actor

should not be used except in cases of self-defense or in defense of another from an immediate threat of physical violence.

123. MODEL PENAL CODE, § 307.

124. *See also* Finch, Jr., *supra* note 5.

reasonably believes to be necessary. Factors to be considered are the known character of the arrestee, the nature of the offense, and the chance of escape or rescue.[125]

The common law rule that deadly force could be used by law enforcement officers, if necessary, to effect the arrest of a felon has been severely criticized by legal scholars.[126] The President's Commission on Law Enforcement and Administration of Justice and the National Commission on Reform of Federal Criminal Laws (section 6.07) generally support a rule which would limit the use of deadly force where the use of such force is essential for the protection of human life or where force was used in committing the felony.[127]

Even Judge Learned Hand at the American Law Institute Proceedings in 1958 challenged the common law rules.[128]

All these suggestions, rules and suggested policies establish that the historical basis for permitting the use of deadly force by law enforcement officers against non-violent fleeing felons has been eroded when human life is threatened because deadly force does not contribute to public safety and tends to create hostility toward the police.

In the light of these reforms, two decisions had a profound effect on the changing legal principles in Missouri, *Mattis v. Schnarr*,[129] and later, *Tennessee v. Garner*.[130]

In *Mattis*, the sole issue was whether the Missouri statutes, section 544.190 (flight statute) and section 559.040 (justifiable homicide) were constitutional in the light of modern criminal law. The Eighth Circuit Court of Appeals held the statutes unconstitutional in a four-to-three decision "as applied to arrests in

125. RESTATEMENT (SECOND) OF TORTS § 132 cmt. c (1965).

126. United States v. Clark, 31 F. 710, 713 (E.D. Mich. 1887) (Judge Brown was later appointed to the Supreme Court of the United States); Herbert D. Greenstone, *Liability of Police Officers for Misuse of Their Weapons*, 16 CLEVE.-MARSHALL L. REV. 397 (1967); I.B. Hudson, Jr., Note, *Criminal Law Use of Deadly Force in Preventing Escape of Fleeing Minor Felon*, 34 N.C. L. Rev. 122 (1955); Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582 (1929).

127. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE, 189-90 (1967).

128. *A.L.I. Deliberations on Deadly Force and Arrest, in* JOSEPH GOLDSTEIN, CRIMINAL LAW: THEORY AND PROCESS 334-37 (1974).

129. 547 F.2d 1007 (8th Cir. 1976) (en banc). See also Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975), and the three judge panel decision in Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974). See discussion of the *Mattis* case before the en banc panel in Finch, Jr., *supra* note 5; Edward J. Littlejohn, *Deadly Force and Its Effects on Police-Community Relations*, 27 HOW. L.J. 1131 (1984), discussing the situation in Detroit, the *Garner v. Memphis* case, suggesting the modern approach be that an officer is privileged to use deadly force for an arrest for treason or a felony which normally causes death or serious bodily harm and the officer reasonably believes the arrest cannot otherwise be effected. There is also a list of the statutes of the fifty states at 1180.

130. Tennessee v. Garner, 471 U.S. 1 (1985).

which an officer uses deadly force against a fleeing felon who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer or others if not immediately apprehended."[131]

Michael Mattis, the eighteen-year-old son of Dr. Mattis was killed by officer Robert Marek. Michael and his friend were discovered in the office of a golf driving range in early morning by police officer Richard Schnarr. The boys went out a window and Schnarr shouted: "Halt, or I'll shoot." The boys failed to stop. Officer Marek arrived, collided with Mattis and both fell. Mattis broke away. Marek fired one shot in the direction of Mattis and killed him. Dr. Robert Dean Mattis filed suit against the Olivette police officers under 42 U.S.C. §§ 1983 and 1998, and the Missouri Wrongful Death Act. The United States Court of Appeals noted that the issue was not that the statutes were unconstitutional insofar as they permit police officers to use deadly force where reasonably necessary to effect the arrest of a fleeing felon who has used or threatened to use deadly force in the commission of a felony *or* insofar as they permit such force to be used to apprehend a fleeing felon whom the officers reasonably believe will use deadly force if not immediately apprehended. The issue was very narrow whether the statutes were unconstitutional as applied to a fleeing felon suspected of a nonviolent felony whom the officers did not reasonably believe would use deadly force against the officers or others.

In this view of the narrow issue the divided court held the Missouri statutes unconstitutional. The common law rules, as embodied by the judicial decisions for decades in Missouri, were eroded and, having cited all the suggested reforms discussed above, the "historical basis for permitting the use of deadly force by law enforcement officers against nonviolent fleeing felons has been substantially eroded."[132]

Judge Gibson wrote a strong dissent. He contended that the majority recognized that the Missouri statutes were a codification of the common law and at least twenty-four states have similar statutes. "Thus, after a background of five centuries of the common law and two centuries of this country's existence, lo and behold the majority, *ipse dixit* has held that the common law principles embodied in these Missouri statutes are violative of the Due Process clause . . . ."[133] The issue, he believed, was a matter for the legislature.[134]

131. *Mattis*, 547 F.2d at 1009.

132. *Id.* at 1016.

133. *Id.* at 1021

134. The *Mattis* case was eventually taken to the Supreme Court of the United States by the Attorney General. The Court vacated and remanded the case with instructions to dismiss the case as moot. 547 F.2d 1007 (8th Cir. 1976).

The *Mattis* case has been cited in some eighty cases.[135] Although *Mattis* found the Missouri statutes unconstitutional, the Missouri courts refused to be bound by the *Mattis* holding. In *State v. Nunes*,[136] the defendant was found guilty of assaulting a police officer engaged in the performance of his duties. Three members of the Columbia, Missouri police department intervened to quell a "brawl" between Nunes and the night manager of a grocery store in the parking lot. Nunes approached the manager and shoved him and used obscenities. The manager had earlier barred him from the store because his female companion had shoplifted. The police arrived, and tried to place him in handcuffs; he resisted. Nunes struck one officer and kicked, hit, and fought two others. The Kansas City Court of Appeals held that the defendant was not entitled to an instruction on self defense and that the evidence did not warrant an instruction on the misdemeanor of resisting arrest. In the course of the opinion, the court stated that a police officer is authorized to use all necessary force to effect the arrest if the arrestee flees or forcibly resists, citing section 544.190, R.S.Mo. The court noted that the Missouri statutes were held unconstitutional in *Mattis*, but "that holding does not bind us here for state courts are controlled by the supreme court of the land as declared by the United States Supreme Court, and not by the general announcements of law made by lower federal courts."[137]

In *Tennessee v. Garner*,[138] Memphis police officers Elton Hymon and Leslie Wright were dispatched to answer a prowler call. When they arrived at the scene, a woman told them someone was breaking in next door. Hymon went behind the house and saw someone run across the backyard. The fleeing suspect was Garner's son. Hymon saw young Garner, and saw no sign of any weapon and was reasonably sure he was unarmed. The officer thought he was seventeen or eighteen-years-old. Hymon called out: "[P]olice, halt." Young

135. Some of the more recent cases are: Vera Cruz v. City of Escondido, 139 F.3d 659 (9th Cir. 1997); Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994); Mitchell v. City of Sapula, 857 F.2d 713 (10th Cir. 1988); Clark v. Link, 855 F.2d 156 (4th Cir. 1988); Carter v. Chattanooga, 850 F.2d 1119 (6th Cir. 1988); Fitzgerald v. Williamson, 787 F.2d 403 (8th Cir. 1986); Pruitt v. City of Montgomery, 771 F.2d 1475 (11th Cir. 1985); Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983) *cert. granted* sub nom., Tennessee v. Garner, 471 U.S. 1 (1985); Putnam v. Gerloff, 639 F.2d 415 (8th Cir. 1981); Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978); Mattis v. Schnarr, No. 75-1849, 1977 U.S. App. Lexis 12606 (July 1, 1977); Rodriguez v. City of Passaic, 730 F. Supp. 1314 (D.N.J. 1990); Brown v. City of Clewiston, 644 F. Supp. 1417 (S.D. Fla. 1986); State v. Sundberg, 611 P.2d 44 (Ala. 1980); Johnson v. Morris, 453 N.W.2d 31 (Minn. 1990); Estate of Stroetker v. Caskey, 934 S.W.2d 35 (Mo. Ct. App. 1996); Simmons v. City of Chicago, 455 N.E.2d 232 (Ill. App. Ct. 1983); State v. Nunes, 546 S.W.2d 759 (Mo. Ct. App. 1977).

136. *Nunes*, 546 S.W.2d at 759.

137. *Id.* at 762 n.2.

138. Tennessee v. Garner, 471 U.S. 1 (1985).

Garner began to climb a fence and the officer, convinced that he would elude arrest, shot. The bullet hit young Garner in the back of the head. He died on the operating table. Money and a purse were found on his body. Garner was, in reality, an eighth-grader and fifteen-years-old. "In using deadly force to prevent escape, the officer acted under the authority of a Tennessee statute," identical to section 544.190, R.S.Mo.

Garner's father brought an action under 42 U.S.C. § 1983 in the U.S. District Court against the officers and the city. The district court entered judgment for all defendants, concluding that Hymon's actions were authorized. The court of appeals reversed and remanded.[139] The State of Tennessee, which had intervened, appealed. The City filed a petition for certiorari. The Supreme Court noted probable jurisdiction and granted the petition.[140]

In a 6-3 decision, the Court used a balancing approach—balancing the interest of the right to life and effective law enforcement. The issue was a narrow one—could deadly force be employed to prevent the escape of an apparently unarmed suspected felon (burglary)? The Court said,

> [t]he 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.[141]

But "[w]here 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.[142]

The Court discussed whether the Fourth Amendment must be construed in light of the common law rules which permitted the use of force to arrest a fleeing felon.[143] While it is true, said the court, that it has often looked to the common law, it has not frozen those practices that existed at the time of the Fourth Amendment's passage. "Because of sweeping change in the legal and technological context, reliance on the common-law rule would be a mistaken literalism."[144] The common-law developed at a time when weapons were

139. Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983). *See also* James W. Wiggin III, *Recent Case*, Garner v. Memphis Police Department, 52 U. CIN. L. REV. 1155 (1983) (discussing the Court of Appeals case and *Mattis v. Schnarr*); Ginny Looney, Comment, *The Unconstitutional Use of Deadly Force Against Nonviolent Fleeing Felons:* Garner v. Memphis Police Department, 18 GA. L. REV. 137 (1983).

140. Tennessee v. Garner, 465 U.S. 1098 (1984).

141. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

142. *Id.*

143. HALE, *supra* note 39; 4 WILLIAM BLACKSTONE, COMMENTARIES 29; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1098-1102 (3d ed. 1982).

144. 471 U.S. at 13.

rudimentary. Handguns were not carried until the latter half of the nineteenth century. Today, states are varied in the use of deadly force; police policies have changed the common-law rule.[145] The Court concluded that the Tennessee statute was invalid insofar as it purported to give the police officer the authority to act as he did.

Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, dissented:

> By disregarding the serious and dangerous nature of residential burglaries and the long standing 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.[146]

Justice O'Connor stated that burglary is a serious crime and poses real risk of harm. Because burglary is such a serious and dangerous crime, the public interest in the prevention and detection of the crime is of compelling importance, and concluded that the Court's opinion sweeps too broadly.[147]

145. *See* CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 45-46 (1977).

146. *Garner*, 471 U.S. at 22.

147. The *Garner* decision has been cited in some fifty decisions in the Eighth Circuit and Missouri, including: Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (the seatbelt violation case); Whren v. United States, 517 U.S. 806 (1996); Graham v. Conner, 490 U.S. 386 (1989); Ribbey v. Cox, 222 F.3d 1040 (8th Cir. 2000); McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999); Mettler v. Whiteledge, 165 F.3d 1197 (8th Cir. 1999); Nelson v. County of Wright, 162 F.3d 986 (8th Cir. 1998); Tauke v. Stine, 120 F.3d 1363 (8th Cir. 1997); Otey v. Marshall, 121 F.3d 1150 (8th Cir. 1997); Gardner v. Buerger, 82 F.3d 248 (8th Cir. 1996); Woolfolk v. Smith, 81 F.3d 741 (8th Cir. 1996); Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995); Jones v. City of St. Louis, 92 F. Supp. 2d 949 (E.D. Mo. 2000); State v. Fernandez, 691 S.W.2d 267 (Mo. 1985); Davis v. City of Kinloch, 752 S.W.2d 420 (Mo. Ct. App. 1998).

There are many law journal articles discussing the *Garner* case. Among them are Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied* Tennessee v. Garner, 7 KAN. J.L. & PUB. POL'Y 100 (1998); Abraham N. Tennenbaum, *The Influence of the Garner Decision*, 85 J. CRIM. L. & CRIMINOLOGY 241 (1994); John Simon, Note, Tennessee v. Garner: *The Fleeing Felon Rule*, 30 ST. LOUIS U. L.J. 1259 (1986).

The Smith article examines how the *Garner* decision has been interpreted in the numerous cases following *Garner*, including *Daniels v. Terrell*, where Missouri Highway Patrol officers attempted to pull over a driver who sped away and shot at the officers. 783 F. Supp. 1211 (E.D. Mo. 1992). The suspect jumped from the car: the trooper shot causing the suspect to fall and permitting the officer to place him under arrest. The District Court held the trooper was justified in using deadly force. The author suggests the use of deadly force only when a person's life is in imminent danger. *See* Smith, *supra*.

In Dr. Tennenbaum's article, he concludes that *Garner* had a clear effect on justifiable homicides reducing the police homicides, and more study should be done. *See* Tennenbaum, *supra*. The Saint Louis University article discusses the common-law rule, the *Garner* decision, and suggests that deadly force would only be permitted when the officer reasonably believes the

VIII. THE REFORM MOVEMENT IN MISSOURI

Because of all these reform movements in the country and recent decisions, in the late 1960's the Missouri Bar established a special committee to investigate the reform of Missouri's substantive and procedural criminal law. The special committee first chaired by this author, was formed consisting of judges, appellate and trial, law professors, and members of the General Assembly. Efforts persisted for years.

In the late 1960's the Missouri Bar Committee drafted a "Proposed Pre-Arraignment Code" which dealt with various aspects of the law of arrest, bail, search and seizure, arraignment, etc.[148]

The Pre-Arraignment Code has never been adopted by the General Assembly. The proposed Pre-Arraignment Code, dealt with the rights of an officer to use deadly force in making arrests:

> *Section 8. [of the Proposed Code] Rights of Officer in Making Arrests and Detentions*
>
> (1) After an officer has notified the person to be arrested of the officer's authority and intention to arrest, he shall use all appropriate means to effect the arrest. No unnecessary or unreasonable force or means of restraint may be used in arresting or detaining any person.
>
> (2) An officer making an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person sought to be arrested; nor shall he be deemed an aggressor or lose his right of self-defense by the use of reasonable force to effect the arrest.
>
> (3) An officer in effecting an arrest is justified in using force likely to cause death or great bodily harm only:
>
> (a) when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or others, or
>
> (b) when he reasonably believes that such force is necessary to prevent an arrest from being thwarted *and* also reasonably believes that the person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon or may otherwise endanger himself or inflict great bodily harm unless arrested without delay.
>
> "Forcible felony" means treason, murder, manslaughter, forcible rape, robbery, mayhem, burglary, arson, kidnapping, assault with intent to kill and

use or threatened use of serious physical harm is involved when an inherent dangerous felony is involved. *See* Simmon, *supra*.

148. *See* John Scurlock & Joseph J. Simeone, *The Proposed Pre-Arraignment Code*, 25 J. MO. BAR 9 (Jan. 1969). The Code was introduced as H.B. 89, 75th Mo. General Assembly.

any other felony which involves the use or threat of physical force or violence against the person of any individual.

(4) An officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

(5) Any officer making a lawful arrest may orally summon as many persons as he deems necessary in making the arrest. Every person when required by an officer shall aid him in making the arrest.

(6) To make an arrest with or without a warrant for a felony the officer may break into a dwelling, house, or other building, or any other enclosure if he has reasonable cause to believe that the person he seeks is located therein and he is refused admittance after notice of his office and purpose. The same authority shall exist in misdemeanor cases when the officer has a warrant.

(7) If any arrested person escapes or is rescued, the officer from whose custody he made his escape or was rescued, may immediately pursue and retake him at any time and within any place in the state, and may command assistance as in making arrests in other cases, and he may use such force as he was justified in using to effect the original arrest or detention.

Section 9. Resisting Arrest or Detention

(1) If a person has reasonable grounds to believe that he is being arrested by a police officer, sheriff, member of the highway patrol or marshal or his deputy, it is his duty to submit to such arrest or detention and refrain from using force or any weapon in resistance at the scene whether the arrest is legal or not.

The comments to these proposals deal with the rights of officers in making arrests stated:

I. Section 8 (1)

Missouri Revised Statutes Section 544.190 (1959) provides: "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." The words of the statute "all necessary means" imply that necessity is the only limitation on the useable force, but it is only *reasonable* force which is permissible. *State ex rel. Donelson v. Deuser*;[149] *State v. Havens*,[150] *State v. Hicks*.[151] Section 8(1) is phrased so as to emphasize the duty of the officer to press forward to effect an arrest or detention while at the same time expressing clearly, which section

149. 134 S.W.2d 132 (Mo. 1939).
150. 177 S.W.2d 625 (Mo. 1944).
151. 167 S.W.2d 69 (Mo. 1942).

544.190 does not, that the actual authority under existing law of an officer to use force in arresting or detaining is limited by the demands of reasonableness.

Section 544.190 relates only to arrest. Section 544.190 requires that the officer announce his intention to arrest but says nothing about an announcement of authority. It is desirable that he should make known his authority as well as his intention before using force to effect an arrest or detention. Section 8(1) so provides.

Section 8(3)

The purpose is to limit the officer's authority to use force likely to cause death or great bodily harm to *two situations*. The first is that in which the arrestee's forcible resistance to arrest presents a danger of death or great bodily injury to the arresting officer, and the second is that in which the person is to be arrested flees or takes some other action which does not threaten the officer but does threaten other persons with serious harm if the person is not immediately arrested. The first situation is that of self defense as to which the ordinary law would apply, qualified by the absence of any duty to retreat. In this context Section 8(3) embodies existing law.

The second situation entails a substantial curtailment of the authority which the existing law gives an officer to use lethal force to effect an arrest. It is settled in Missouri that if it is necessary in order to make a lawful arrest for any felony, or to prevent the escape of such arrestee, the officer may resort to shooting or to the use of means which are capable of producing serious bodily injury or death. There is no need to consider whether the officer or any one else was in danger of serious bodily injury or death. The sole question is: could the arrest have been effected or escape prevented if the officer had not used lethal means? See Scurlock, *Arrest in Missouri*.[152]

The authority of an officer under existing law to use lethal methods to effect the arrest of a misdemeanant is considerably less clear. The Missouri Supreme Court has taken varying positions: (1) that killing is not justifiable either to overcome resistance or to prevent escape; (2) that killing is justifiable when necessary to overcome resistance (flight not considered); (3) that killing is justifiable when necessary to overcome resistance but cannot be resorted to prevent flight; (4) that the offender cannot be shot to prevent escape (resistance not considered); (5) that killing is justifiable, when necessary, both for the overcoming of resistance and prevention of escape.[153] In 1947 in *State v. Browers*,[154] the latest pronouncement, there is dictum that an officer is never justified in shooting at one guilty of a misdemeanor to effectuate his arrest or prevent his escape.

152. Scurlock, *supra* note 5, at 220.

153. *Id.* at 222.

154. 205 S.W.2d 721, 723 (Mo. 1947).

Section 8(3) restricts the authority of the officer to use force likely to cause great bodily harm or death to those situations in which the arrestee poses or appears to pose a threat of serious harm. If the arrestee has committed a forcible felony, he is presumably capable of further violence. The social interest in having him arrested outweighs the social interest in preserving lives. The same balance of interests obtains in the case where the offender has committed a non-forcible felony or a misdemeanor but has indicated in some way that he will endanger human life or inflict great bodily harm unless arrested without delay. "The fact that he is armed with a deadly weapon clearly is such an indication, and the peace officer should be authorized to act even if the offender has not actually used or apparently threatened to use the weapon; the normal inference is that he intends to use it to thwart apprehension. The circumstances may also indicate that he intends to use the weapon against some particular person."[155]

Section 8(3) affords the officer the benefit of a reasonable mistake. He will not act unlawfully in using lethal force because a felony of forcible nature was not committed or attempted or the person sought to be arrested is not the offender, provided his belief in the existence of these facts is reasonable. No distinction is made by Section 8(3) between mistake of fact as to the commission of a felony and mistake of fact as to the identity of the offender.

The principal practical difference which Section 8(3) makes in the authority of officers to use lethal methods appears in the escape and flight cases. Whatever the grade of the offense for which an arrest is being made, if the arrestee has the means and shows a willingness to kill or inflict serious bodily harm to prevent arrest, the officer is justified under present law to resort to lethal force in self defense. He does not need to wait until he is attacked before shooting. Section 8(3) forbids such practices as an officer firing at an escaping shoplifter or firing at the driver of an automobile to prevent flight from arrest for a driving violation or other minor offense.

Section 8(4) gives recognition to the proposition that such as the officer is expected to act upon a warrant of arrest and promptly carry out its command without debating whether it should have been issued, he should be protected against civil or criminal liability arising out of an illegality of the warrant of which he was unaware. This accords with the rule observed in Missouri and elsewhere that an action will not lie against officers executing process when the acts are done in the lawful execution of process issued from a court having jurisdiction to issue the process and when the writ or process is legal in form and there is nothing upon its face to indicate that it was issued without authority.[156] However, the protection extended to the officer by Section 8(4) is greater than that afforded under existing law. Section 8(4) does not qualify the

155. Committee Comments, Smith-Hurd Illinois Annotated Statutes, 38 § 7-5, at 277.

156. *See* Scurlock, *supra* note 5, at 239.

> nature of the invalidity whereas under the existing law invalidity stemming from total lack of jurisdiction to issue the warrant and from defects visible on the face of the warrant automatically void the arrest and make the arrestor liable for force used. In judging whether an officer knows of the invalidity of a warrant, a higher degree of awareness of the conditions for and the ingredients of a lawful warrant can be presumed of an officer than of an ordinary citizen. An officer can be expected to know what courts have authority to issue warrants and to know what visible defects render a warrant void.
>
> Section 8(5)
>
> This subsection is based on A.L.I. Code of Crim. Proc. sec. 27 (1930). There are a number of statutes and decisions in Missouri relating to assisting officers. The general statute is 105.210: "In all cases where, by the common law or a statute of this state, any officer is authorized to execute any process, he may call to his aid all male inhabitants above the age twenty-one years in the county in which the officer is authorized to act."
>
> Section 8(6).
>
> This is essentially present Missouri Law. Section 544.200 (1959).
>
> Section 8(7).
>
> This is essentially Missouri Revised Statutes Section 544.-210 (1959) with an addendum respecting the force which may be used: "and he may use such force as he was justified in using to effect the arrest or detention." This would probably follow as a matter of implication.
>
> Section 9, relating to resisting arrest was deemed important:
>
> This section is drawn from the Uniform Arrest Act, section 5 and subsection 2 of Model Penal Code, sec. 3.04.
>
> In *State v. Koonce*,[157] it is said: "But it seems to us that an appropriate accommodation of society's interests in securing the right of individual liberty, maintenance of law enforcement, and prevention of death or serious injury not only of the participants in an arrest fracas but of innocent third persons, precludes tolerance of any formulation which validates an arrestee's resistance of a police officer with force merely because the arrest is ultimately adjudged to have been illegal.Force begets force, and escalation into bloodshed is a frequent probability." The place to determine the legality of the arrest is in the calm atmosphere of a courtroom.

The Proposed Pre-Arraignment Code also provided for the rights of persons upon arrest. Among those rights were the right, as soon as practicable, to be informed of the crime for which he is arrested, to be treated humanely, to

157. 214 A.2d 428, 435-36 (1965).

be provided with proper rest, food and drink, the right to remain silent, the right to communicate reasonably with counselor or family, *Miranda* warnings, and the right to counsel. There was even a provision that any officer who prevented the exercise of any right would be guilty of a misdemeanor.

After many drafts, the Proposed Criminal Code (not the Pre-Arraignment Code) was finally recommended by the Bar to the General Assembly in 1973 and was eventually adopted. The final draft of the Proposed Criminal Code, among many other things, dealt with the use of deadly force.

> 8.080. (1) A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he reasonably believes to have committed an offense[158] because of resistance or threatened resistance of the arrestee. In addition to the use of physical force authorized under other sections of this chapter, he is, subject to the provisions of Subsections (2) and (3), justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or the prevent the escape from custody.
>
> (2) The use of physical force in making an arrest is not justified under this section unless the arrest is lawful or the law enforcement officer reasonably believes the arrest is lawful.
>
> (3) A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only
>
> (a) when such is authorized under other sections of this Chapter.
>
> (b) 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
>
> (i) has committed or attempted to commit a felony involving the use or threatened use of physical force against a person; or
>
> (ii) is attempting to escape by use of a deadly weapon; or
>
> (iii) may otherwise endanger life or inflict serious physical injury unless arrested without delay.
>
> (4) The defendant shall have the burden of injecting the issue of justification under this Section.

After many attempts to pass the Proposed Criminal Code, eventually S.B. 60 was introduced in the General Assembly by many sponsors, and passed by both houses and signed by the Governor. The Legislation became effective

158. *See* MO. REV. STAT. §§ 556.020, 556.040 (1959).

January 1, 1979. It was a complete overhaul of the substantive and procedural criminal law—both substantive and procedural—which had been of effect for decades—going back to the early days of Missouri—1835. The suggestions by the Bar in the Proposed Code relating to deadly force were not fully adopted by the General Assembly. The final Proposed Code dealing with the use of deadly force by the police, was essentially adopted as section 563.046, R.S.Mo.[159]

Section 563.046, R.S.Mo. now provides:

> 1. A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. In addition to the use of physical force authorized under other sections of this chapter, he is, subject to the provisions of subsections 2 and 3, justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.
>
> 2. The use of any physical force in making an arrest is not justified under this section unless the arrest is lawful or the law enforcement officer reasonably believes the arrest is lawful.
>
> 3. A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only
>
> (1) When such is authorized under other sections of this chapter; or
>
> (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;[160] 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.
>
> 4. The defendant shall have the burden of injecting the issue of justification under this section.

159. Related statutes are MO. REV. STAT. § 563.051 (2000) (private person's use of force in making an arrest), MO. REV. STAT. § 563.056 (2000) (use of force to prevent escape from confinement), and MO. REV. STAT. § 563.061 (2000) (use of force by persons with responsibility for care, discipline or safety of others).

160. Note that the Proposed Code added the words "involving the use or threatened use of physical force against a person." These words were omitted by the General Assembly.

This section, according to the Comments to the Proposed Code, was based on the Model Penal Code, section 3.07, the New York Revised Penal Law Section 35.30, and Illinois Criminal Code, Ch. 38, section 7-5(a)(5).

The Comments note that in *State v. Ford*,[161] the Missouri Supreme Court described the law enforcement officer as the "aggressor" in effecting an arrest. The standard that the officer "reasonably believes necessary" was enunciated in *State v. Nolan*.[162] The standard for the use of force—"reasonably believes to be immediately necessary" is a codification of Missouri case law.[163] The standard immediately makes clear that the use of force is limited to situations where less extreme methods appear to be useless.

Subsection 3 applies in situations where the person is attempting to avoid arrest by fleeing. Where the arrestee is resisting arrest by fighting, the officer is privileged to use force to protect himself under section 563.031. If the officer's life is endangered, he may use deadly force. This section (563.046) provides an additional justification for the use of force to effect the arrest. Subsection 3 sets out these situations where the use of deadly force is justified for the purpose of making an arrest:

> The third provision is important as it permits the use of deadly force when there is a substantial risk that the person sought to be arrested will endanger human life or cause serious physical injury unless arrested without delay. This particular provision is based on Model Penal Code § 3.07(2)(b)(iv). Similar provisions can be found in the Illinois Code, Ch. 38, § 7-5; and the Michigan Proposed Code § 630(2)(b). This clause gives the necessary leeway to the judgment of law enforcement officers as to the type of person with whom they have to deal.[164]

IX. SUMMARY

Therefore, under the present Missouri statute, section 563.046, R.S.Mo., a summary may be made:

1. Deadly force is not authorized to effect an arrest of an unarmed fleeing felon, misdemeanant or violator of an ordinance who poses no threat to the officer or other.

2. Deadly force is justified to effect an arrest of a person whom the officer has reasonable grounds to believe that the person has committed a felony, if the officer reasonably believes that such use of deadly force is *immediately necessary* or the person is attempting to escape by use of a deadly weapon.

161. 130 S.W.2d 635 (1939).

162. State v. Nolan, 192 S.W.2d 1016, 1020-21 (Mo. 1946).

163. *Id.*

164. MO. REV. STAT. § 563.046 cmt. (2000).

3. Although the statute authorizes deadly force to arrest any fleeing felon, *Tennessee v. Garner* has placed limits on this and held the Missouri statute unconstitutional insofar as it permits deadly force in all felony cases.

4. Deadly force may be used when effecting an arrest or in preventing an escape when the officer reasonably believes that such use of deadly force is necessary to effect the arrest and the person (a) has committed a felony, *or* (b) is attempting to escape by use of a deadly weapon, *or* NOT AND (c) may endanger life or inflict serious bodily injury unless arrested without delay.

5. Deadly force is not justified to effect an arrest for a misdemeanor or violation of an ordinance unless the arrestee forcibly resists and serious harm may come to the officer or others.

6. The Missouri statute does not go as far as the suggestions made by other organizations that such deadly force can only be used when there is a risk that the arrestee will cause death or serious bodily harm to the officers or third persons. Deadly force, according to scholars and other organizations suggest that deadly force should only be used to effect an arrest when such force is essential for the protection of human life, whether that of the officers or third parties, or where violence was used in committing a felony.

X. DECISIONS UNDER SECTION 536.046

Very few appellate court cases have interpreted or construed the Missouri deadly force statute.

In *Fitzgerald v. Patrick*,[165] Thomas Fitzgerald appealed a summary judgment on his civil rights claim against several law enforcement officers. In June, 1985, Fitzgerald escaped from a Missouri county jail using a gun. He had been charged with armed robbery and armed criminal action. He alleged he escaped only to find evidence that he was innocent. For a few weeks he hid from the police. In July, members of the sheriff's office went to his trailer to look for him. He was hiding in a ditch when discovered. He pointed a gun at an officer and told the officer to drop his gun. Two police cars pulled up, and Fitzgerald, using an officer as a hostage, made the other officers drop their guns. He had a total of six hostages. A standoff developed. Fitzgerald released some of the hostages, leaving one officer, Denny Boss. Boss ran; Fitzgerald fired; the Highway Patrol Special Emergency Response Team shot back, hitting and injuring him. The District Court granted summary judgment to the defendant officers.

The Court of Appeals for the Eighth Circuit affirmed the holding of the district court granting summary judgment under section 563.046. Law enforcement officers are justified in using deadly force in self-defense or in defense of a third person if a reasonable person in similar circumstances would

165. 927 F.2d 1037 (8th Cir. 1991).

believe that it was necessary. Fitzgerald was armed, he threatened the hostages, and a shot was fired by him. It was reasonable for the officers to assume that he was dangerous and to return cover fire.

Jones v. City of St. Louis,[166] was another § 1983 action against city officials alleging that defendants failed to properly train police officers that subjected plaintiffs to excessive force in violation of their civil rights. The defendants moved for summary judgment. Plaintiffs, Jerome Jones and Anthony Stevenson, were in an alley in 1997. Stevenson had been firing a rifle when police officers came. Plaintiffs fired shots at the officers, the officers returned fire and plaintiffs were shot several times. The defendant's motion for summary judgment was sustained. The court held that the use of deadly force is reasonable where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others.[167]

In *Daniels v. Terrell*,[168] a Missouri state trooper attempted to pull over the driver of a car for running a red light. The automobile stopped and one or both of the occupants opened fire on the trooper's vehicle. The suspects then sped away with the trooper in pursuit. Periodically during the course of the chase, the suspects would fire at the trooper with a revolver and a rifle. Eventually, the suspect vehicle stopped in a housing project and the passenger ran away on foot. The driver, however, jumped from the car and ran directly at the trooper who was still in his vehicle slowing down as he reached the scene. The trooper shot at the now unarmed suspect through the window of his patrol car and then exited his vehicle and fired more shots at the suspect driver as he ran from the scene. These shots caused the driver to fall and allowed the trooper to place him under arrest.

Under these circumstances, the district court had no trouble ruling that the trooper was justified in using deadly force to apprehend the plaintiff driver. Following a bench trial of the driver's § 1983 suit against the trooper, Judge George Gunn wrote that "the credible evidence also supports the conclusion that, at a minimum, plaintiff was seeking to escape and was fired upon only after a warning had been given."[169] Thus, even assuming that the plaintiff was merely seeking to escape when he was shot and was no longer a direct threat to the trooper, the court ruled that the trooper's use of deadly force was appropriate under *Garner*. In entering judgment for the defendant trooper,

166. 92 F. Supp.2d 949 (E.D. Mo. 2000).

167. Krueger v. Fuhr, 991 F.2d 435, 438 (8th Cir. 1993) (quoting Tennessee v. Garner, 471 U.S. 1, 11-12 (1985), *cert. denied*, 510 U.S. 946 (1993)); State v. Abdul-Khaliq, 39 S.W.3d 880 (Mo. Ct. App. 2001) (involving deadly force to defend premises under MO. REV. STAT. § 563.036 in which a conviction for murder was affirmed).

168. 783 F. Supp. 1211 (E.D. Mo. 1992).

169. *Id.* at 1213.

Judge Gunn quoted Justice White's dicta from *Garner* which suggested that deadly force is an appropriate response to apprehend those who use or threaten to use deadly force in the commission of a crime.

XI. MISSOURI APPROVED INSTRUCTIONS

The Missouri Approved Instruction-Criminal (MAI-CR), given in cases of deadly force by a police or law enforcement officer pursuant to section 563.046, is tailored to satisfy the requirements of the *Garner* decision. Volume I, MAI-CR 3d 306.14 (9-1-90), entitled Justification; Use of Force by Law Enforcement Officer states:

> One of the issues (as to Count __) in this case is whether the use of force by the defendant against [*name of victim*] was the lawful use of force by a law enforcement officer in making an arrest. In this state, the use of force (including the use of deadly force) by a law enforcement officer in making an arrest (or in preventing escape after arrest) is lawful in certain situations.
>
> A law enforcement officer can lawfully use force to make an arrest or to prevent escape if he is making a lawful arrest or an arrest which he reasonably believes to be lawful. An arrest is lawful if the officer had reasonable grounds to believe that the person arrested had committed (or was committing) a crime (or was acting under an arrest warrant which he believed to be valid).
>
> In making a lawful arrest or preventing escape after such an arrest, a law enforcement officer is entitled to use such force as reasonably appears necessary to effect the arrest or prevent the escape.
>
> A law enforcement officer in making an arrest need not retreat or desist from his efforts because of resistance or threatened resistance of the person being arrested.
>
> But in making an arrest or preventing escape, a law enforcement officer is not entitled to use deadly force, that is, force which he knows will create a substantial risk of causing death or serious physical injury, unless he reasonably believes that the person being arrested is attempting to escape by use of a deadly weapon or that the person may endanger life or inflict serious physical injury unless arrested without delay.
>
> And, even then, a law enforcement officer may use deadly force only if he reasonably believes the use of such force is immediately necessary to effect the arrest or prevent the escape.
>
> As used in this instruction, the term 'reasonable belief' means a belief based on reasonable grounds, that is, grounds which could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false.

> (Part B[D]): If the defendant was a law enforcement officer (making) (or) (attempting to make) a lawful arrest (or what he reasonably believed to be a lawful arrest) of [*name of victim*] for the crime of [name of crime] and used only such non-deadly force as reasonably appeared to be necessary to effect such arrest (or to prevent the escape) of [*name of victim*], then his use of force was lawful, or
>
> If the defendant reasonably believed that [*name of victim*] (was attempting to escape by the use of a deadly weapon) (or) (would endanger life or inflict serious physical injury unless arrested without delay), and he reasonably believed that the use of deadly force was immediately necessary to effect the arrest of [*name of victim*], then his use of deadly force was lawful.
>
> The state has the burden of proving beyond a reasonable doubt that the defendant was not entitled to use force as a law enforcement officer. Unless you find beyond a reasonable doubt that the defendant was not entitled to use force as a law enforcement officer against [*name of victim*], you must find the defendant not guilty (under Count ___).
>
> As used in this instruction, the term 'serious physical injury' means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

The notes state that section 563.046 sets out the circumstances in which a law enforcement officer can use deadly force to effect an arrest. Section 563.046.3(2) lists three situations where deadly force can be used. One of them is if the officer reasonably believes that the arrestee has committed or attempted to commit a felony. The basis for the lawful use of deadly force is not included in the instruction because of the principles laid down in *Tennessee v. Garner*. Under that decision, the use of deadly force to effect an arrest cannot be justified by the sole ground that the arrest is for a felony. Deadly force to effect an arrest for any felony is unconstitutional insofar as it authorizes the use of deadly force against unarmed or nondangerous fleeing suspects.

XII. PRESENT POLICIES OF URBAN POLICE FORCES

Many Missouri police departments have written policies regarding the use of deadly force to effect an arrest. Only the urban police departments and the Missouri Highway Patrol will be discussed here: St. Louis City, St. Louis County, Kansas City and the Highway Patrol. Also set forth is the present Department of Justice Policy.

A. St. Louis City

The City of St. Louis probably has the largest police force in the state. It has a policy which was adopted on November 23, 1992—Order No. 92-S-12,[170] entitled, "Use of Force," which outlines the procedures for the use of both deadly and non-deadly force. The policy of the Department states that it has a "reverence for human life" and the policy is to guide officers in the use of deadly force. Officers are directed and ordered to "use the least amount of force reasonably necessary to accomplish their lawful objective while safeguarding their own lives and the lives of others."[171] The Order is addressed to all bureaus, districts and divisions. The definition of deadly force is any use of force that is likely to cause death or serious bodily injury. Deadly force includes any discharge of a firearm at a person. It includes striking with a weapon to sensitive parts of the body.[172]

The policy[173] of the St. Louis Department is that:

> Deadly force may be used in the performance of police duty under the following circumstances:
>
> 1. to protect the officer or others from what is reasonably believed to be an immediate threat of death or serious bodily harm;
>
> 2. when reasonably necessary to prevent the escape of a person when ALL of the following conditions apply:
>
> a. the officer has probable cause to believe that the person committed a felony involving the infliction or attempted infliction of serious physical harm; AND
>
> b. the officer reasonably believes that the person armed with a firearm or other item which can cause death; AND
>
> c. the officer has probable cause to believe that the person poses a significant threat to human life should escape occur.
>
> 3. In addition to the foregoing, an officer may discharge a firearm:
>
> a. to destroy seriously injured or dangerous animals when no other method is practical;
>
> b. at an approved firing range.[174]

170. Metropolitan Police Dep't, City of St. Louis, Office of the Chief of Police, Special Order No. 92-0S-12 (effective Nov. 23, 1992). The author is indebted to Ms. Priscilla F. Gunn, attorney for the St. Louis Police Board for this information. She is the daughter of one of the finest judges to grace the bench, Judge George Gunn, who served on the Missouri Court of Appeals, the Supreme Court of Missouri, and the United States District Court.

171. *Id.* at Section B.

172. *Id.* at Section A.

173. *Id.* at Section B.

In addition to the above, the police in St. Louis are placed under several restrictions:[175]

> 1. An officer will not discharge a firearm, when to do so would endanger a bystander or hostage.
>
> 2. An officer shall not discharge a firearm at or from a moving vehicle, nor at a suspect in a moving vehicle.
>
> 3. Before shooting at a suspect, an officer will identify him [sic]/herself as an officer and state his/her intent to shoot, whenever practicable.
>
> 4. Warning shots are prohibited.

When a shooting has occurred, there are certain post-incident procedures. All officers involved in the use of deadly force are required to report for the post-shooting trauma program. A Performance Evaluation Unit reviews incidents involving firearm discharges, resistance, or the use of force by an officer. An evaluation is made to determine if there is a need for retraining or other professional counseling. The Use of Force Committee, consisting of several high ranking officers, who make periodic reports and provide the Chief with a report of its overall findings and recommendations.[176]

Section IV of Order 92-S-12 provides for a Post-Shooting Trauma Program designed for members involved in the death or serious injury of a citizen. This team is a volunteer group of commissioned officers previously involved in a shooting who help the family. Within twenty-four to forty-eight hours after an incident, the officer is to report for psychiatric evaluation in civilian attire to a psychiatrist at Saint Louis University.

The Department also has a policy on the use of batons/night sticks, which may be used to control a subject, but "deadly force" is not justified.[177] However, deadly strikes are only justified when the officer can demonstrate that he was in danger of "serious physical injury or death," circumstances must be considered including the relative strength and size and skills of the subject.[178] The primary goal of the nightstick is to create a temporary muscle or motor dysfunction in the arms or legs.[179]

B. St. Louis County

174. Order No. 92-S-12, Deadly Force Policy.
175. Order No. 92-S-12, Restrictions.
176. *Id.* at Section D.
177. *Id.* at Section VI.
178. *Id.*
179. *Id.*

The St. Louis County police policy is contained in Departmental General Order 00-29, dated November 8, 2000.[180]

The policy of the county department "recognizes and respects the special integrity of human life." "A careful balancing of human interests is required." The policy states that "while the use of reasonable physical force may be necessary. . .force may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under a particular set of circumstances. . . . Verbal or physical abuse is forbidden.[181]

As to the use of deadly force by the police officers, Section B of the Order provides:

Commissioned employees [police] are authorized to use deadly force in order to:

> 1. Protect themselves or others from what is reasonably believed to be an immediate threat of death or serious physical injury; or
>
> 2. Effect the capture or prevent the escape of a suspect when:
>
> a. The suspect committed or attempted to commit a felony and;
>
> b. the crime involved the use or threatened use of deadly force and;
>
> c. There is a substantial risk that the fleeing suspect will cause death or serious physical injury if apprehension is delayed.

The policy also states that firearms *shall not* be discharged (1) as a warning shot, (2) at or from a moving vehicle, unless the occupant represents a direct and immediate threat to the life or safety of the officer, or (3) into a crowd where it appears likely that an innocent person may be injured.

When an officer has discharged a firearm, or when an officer is shot, the Bureau of Crimes Against Persons must investigate the circumstances.[182] The on-duty supervisor of the Crimes Against Persons evaluates the use of deadly force and determines if it was justified under this General Order, and prepares a Use of Force Memorandum and forwards it through the chain of command to the Chief. The reports are then forwarded to the Bureau of Professional Responsibility for review.

The Department trains its officers in the concept of controlling resistance behavior under its Resistance Control Program.

Whenever an officer uses a weapon wherein the death of a person results, he "shall be placed on administrative detachment" immediately upon

180. St. Louis County Police, Office of the Chief of Police, Departmental General Order 00-29 (approved Nov. 8, 2000). The author is indebted to Ms. Kate Brehe of the County Police Department for furnishing this information.

181. *Id.* at Section II.

182. *Id.* at Section E.

completion of a preliminary report of the incident.[183] But this is not to imply that the officer acted improperly. He is to receive counseling with a psychologist.[184]

C. Kansas City Police Department

The Kansas City, Missouri Police Department's policy on deadly force is contained in Procedural Instruction 01-3, effective March 14, 2001.[185] The policy deals with both lethal and non-lethal force. The policy respects the value and special integrity of human life and sets forth its guidelines for lethal force:

Officers are authorized to use lethal force in order to:

1. Protect themselves or others from what is reasonably believed to be an imminent threat of death or serious bodily harm.

2. To prevent the escape of a person:

   a. From the vicinity of a violent crime or confrontation during which that person is reasonably believed to have caused or attempted to cause death or serious bodily harm to the officer(s) or other persons, or

   b. Who is reasonably believed to be armed and to have committed an offense in which he/she caused or attempted to cause death or serious bodily harm to another person, or

   c. Who may otherwise endanger life or inflict other serious physical injury unless arrested without delay.[186]

These policies of these departments generally follow section 563.046, R.S.Mo., and significantly limit the use of deadly force to effect the arrest of a felon, and not a misdemeanant, unless it is necessary to protect the life of the officer or others. Under Missouri case law it has always been the law of Missouri that deadly force could be used against a resisting misdemeanant.

183. *Id.* at Section X.

184. *Id.*

185. The author is indebted to Chief Richard D. Easley and Dale H. Close, Legal Advisor for this information.

186. Procedural Instruction 01-3, at Section IV, B.

D. The Missouri Highway Patrol

The Missouri State Highway Patrol also has a General Order relating to the Use of Force.[187] The Policy of the Order places the highest value on human life and the safety of the public and patrol employees by using only the amount of force which is reasonable and necessary to accomplish lawful purposes.

While non-lethal force is authorized, the use of deadly force is authorized as follows:

> Officers are authorized to use deadly force against persons, including fleeing felons, only when they reasonably believe such action is in defense of human life (including their own) or in defense of any person in immediate danger of serious physical injury or death.[188]

The Order lists a series of force options escalating to shooting—tire deflation, verbal dialogue, commands, aerosol, physical force which causes no pain, etc.[189] When deadly force is used, the officer is placed on administrative leave pending an administrative review by the command of Field Operations.[190] Under the order, officers are not permitted to discharge firearms toward or from a moving vehicle except when the use of deadly force is justified.[191]

Reports are to be forwarded to the Use of Force Review Board consisting of high ranking officers. The Board is to classify the use of force as justified or unjustified and may recommend disciplinary action.[192]

It is to be noted that there is a great difference between the policy of the Highway Patrol and other departments. The Highway Patrol's policy on the use of deadly force is much more restrictive than the other departments. Under the Patrol's policy, deadly force can be used *only* when the officer reasonably believes "such action is in defense of human life (including their own) or in defense of any person in immediate danger of serious physical injury or death."[193]

E. United States Department of Justice Policy

The United States Department of Justice issued its policy on the use of deadly force in October, 1995. FBI Director Louis J. Freeh issued Resolution 14 concerning the use of deadly force in order to have a uniform policy

187. General Order No. 01-04-0846 (effective May 21, 2001). The author is grateful to Superintendent Roger D. Stottlemyre for a copy of the Order.

188. *Id.* at Section III, C.

189. *Id.* at Section III, F.

190. *Id.* at Section III, H.

191. *Id.* at Section IX, G.

192. *Id.* at Section XIII, K.

193. *Id.* at Section III, C.

throughout the Department. The Policy statement regarding the use of deadly force states:

> I. Permissible Uses. Law enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.
>
> A. Fleeing felons. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.
>
> Deadly force [is defined as] the use of any force that is likely to cause death or serious physical injury. When an officer of the Department uses such force in non-custodial situations, it may only be done consistent with his policy. Force that is not likely to cause death or serious physical injury, but unexpected results in such harm or death, is not governed by this policy. . . . [194]

The Department of Justice recognizes certain general principles regarding the use of deadly force:

> Principles on Use of Deadly Force:
>
> The Department of Justice recognizes and respects the integrity and paramount value of all human life. . . .
>
> The necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail. . . .
>
> Deadly force should never be used upon mere suspicion that a crime, no matter how serious, was committed, or simply upon the officer's determination that probable cause would support the arrest of the person being pursued or arrested for the commission of a crime. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction

194. This policy can be found in 58 THE CRIMINAL LAW REPORTER, No. 4, dated October 25, 1995, BNA. The author is indebted to Peter J. Krusing, Chief Division Counsel, St. Louis Division of the Federal Bureau of Investigation for providing this material.

> of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.[195]

The uniform policy is a reasonable one and conforms to the modern principles laid down by judicial decisions.

XIII. WHAT ARE THE CAUSES OF THIS DEADLY FORCE PANDEMIC

The answers to what has caused this social blot are not easy. It is complex and difficult. There may be no answers short of martial law. But one can speculate! The social problem of police shootings is only one small aspect of the social ills of our country.

When Abraham Lincoln was a very young man he gave a speech to the Lyceum Society in Springfield, Illinois entitled "The Perpetuation of Our Democratic Institutions." In it he said:

> In the great journal of things happening under the sun, we, the American people find our account running under the date of [the 21st century.] We find ourselves in the peaceful possession of the fairest portion of the earth. . . . We find ourselves under the government of a system of political institutions conducive to the ends of civil and religious liberty than any of which the history of former times tell us. . . . We found ourselves the legal inheritors of all these blessings. We did not toil to acquire them, they were bequeathed to us by hardy, brave and patriotic ancestors. . . . It is our task to transmit these liberties .
>
> [No] translantic military giant will step the ocean and crush us . . . all the armies of Europe, Asia and Africa combined.., could not by force take a drink from the Ohio or make a track on the Blue Ridge . . . .
>
> If [danger] comes it cannot come from abroad. If destruction [of our nation] be our lot, we must be its author and finisher. As a nation we must live or die by suicide.

It is not surprising, nor is it hard to logically deduce how we got where we are. It did not begin with Woodstock or the Beatles—it has been a long time coming. But the 1960's revolution has greatly exacerbated the decline, and today, we see the fruits of years and decades of moral corruption.[196] The social context is complex. There are many reasons. Some of the reasons for the present societal problems are:

1. The breakup of the traditional family by divorce, domestic violence and children born out of wedlock have much to do with the present problems in

195. *Id.*

196. *See* Daniel Patrick Moynihan, *Defining Deviancy Down*, THE AMERICAN SCHOLAR 22, 22 (1993).

society. In the immediate post-war era only 11 percent of children born in the 1950s would see their parents separate or divorce. Out-of-wedlock births barely figured as a cause of family disruption. But beginning in the 1960's family disruption suddenly began to rise. Throughout the 1950's and early 1960's the divorce rate held fairly steady at fewer than ten divorces per 1000 marriages. Beginning about 1965 the rate increased sharply. Now half of all marriages end in divorce.

In his essay, *Defining Deviancy Down*, Senator Moynihan, quoting from the New York Times, stated that "[t]hirty years ago, one in every forty white children was born to an unmarried mother; today it is 1 in 5. . . Among blacks, two of three children are born to an unmarried mother; 30 years ago the figure was 1 in 5."[197] Citing Karl Zinsmeister, Moynihan states that:

> [t]here is a mountain of scientific evidence showing that when families disintegrate children often end up with . . . scars that persist for life. . . We talk about the drug crisis, the education crisis, and the problems of teenage pregnancy and juvenile crime. But all these ills trace back predominantly to one source: broken families.[198]

In the words of the former Senator:

> From the wild Irish slums of the 19th century Eastern seaboard to the riot-torn suburbs of Los Angeles, there is one unmistakable lesson in American history: a community that allows a large number of young men to grow up in broken families, dominated by women, never acquiring any stable relationships to male authority, never acquiring any set of rational expectations about the future—that community asks for and gets chaos. Crime, violence, unrest, unrestrained lashing out at the whole social structure - that is not only to be expected; it is very near to inevitable.[199]

All this has a devastating effect on children. The media, Hollywood and Madison Avenue have played an influential role in defending, glamorizing and celebrating unwed motherhood.[200] Today more professional women have children born out of wedlock.

2. By the time the average American child leaves elementary school, he or she will witness some 8,000 murders and more than 100,000 acts of violence on television alone. The media plays a large part in "desensitizing" children to violence. At one time in our society, and not that long ago, the courts put brakes on such violence and glamorizing sexual and immoral conduct. In

197. *Id.* at 17.

198. *Id.* at 22.

199. *Id.* at 26.

200. *See* Barbara Dafoe Whitehead, *Dan Quayle Was Right*, THE ATLANTIC MONTHLY, Apr. 1993, at 47. The Alan Guttachacher Institute reports that each year almost one million teenage women, ten percent of all women age fifteen to nineteen, become pregnant.

Illinois, one court stated that the purpose of putting brakes on such "artistic" conduct, stated that the "welfare of society demands that every effort to afford protection [to the young] should be sustained." The purpose of such limitations "[are] to secure decency and morality in the moving picture business and that purpose falls within the police power.[201]

In fact, Congress and President Clinton ordered a government investigation into whether and how the entertainment business markets violence to children. "The time has come to show some restraint." To date nothing has been done.

A great deal of rap music by "artists" is not only disgusting to a civilized society, it is obscene within the legal definition. Read the lyrics of the "artists" The Dogg Pound (which no newspaper or other media dare report). Such "entertainment" cannot be within the legal boundaries of "free speech." People cry, "Don't violate my First Amendment rights." But the Founding Fathers never intended the present-day media "art" in films, songs, and television to come within the confines of the First Amendment.

There are some restrictions, but not much. One court has held recently that a high school student cannot be permitted to wear clothing such as a "Marilyn Manson T-shirt." The First Amendment, it was held, does not apply.[202]

3. Lack of respect for authority is one of the principal causes of the present breakdown. Today people do not have traditional heroes. The heroes of today are the convicted felons, drug addicts and porn-stars. Today, we have become the me-first society. The cry is: "Don't tell me what to do." And worse, no one is allowed to tell another what is right and what is wrong. Today there are no objective moral standards. But in every society a citizen does have the duty to respect authority and recognize it as a good for the benefit of society. It is the duty of a citizen, according to the courts, to submit to an arrest, and determine the legality of it in a courtroom, not on the streets. Leaders, black and white, have said that "in the long run, dedication to the laws of the land is better than any form of lawlessness or any acts of civil disobedience.[203]

4. More important than any of these or other causes for decline, is the lack of objective standards of conduct or a recognition of a higher power establishing standards of conduct. Today morality consists only of subjective (my) standards. When standards of conduct are related to man and mankind, then there are no limits on what is "right" conduct. The bottom line in contemporary society now seems to be that "I am entitled to my freedom— to do what I want, where I want, when I want, and with whom I want, live my life the way I want and society has no right or duty to interfere." "If it feels good,

201. *See* Block v. City of Chicago, 87 N.E. 1011, 1013 (1909).

202. *See* Boroff v. Van Wert City Board of Education, 220 F.3d 465 (6th Cir. 2000).

203. Rev. Dr. J.H. Jackson, *Some Tough Talk to Negroes From a Top Negro Minister*, U.S. NEWS & WORLD REPORT, Sept. 23, 1968, at 54.

do it," is the modern motto of the "Me first society." The modern theme is that no one—not government, not society, not authority—can tell me what to do, or how to live or regulate my conduct. There are no rules, no principles, no morals; each person can make up his or her own morality, and each person has the right to determine what that morality is.

These concepts of absolute personal freedom unrestrained by society or any objective morality are not new but it is only in this generation that unrestrained freedom has gone beyond any bounds of restriction or civility. The modern concepts of individualized morality have never, in the history of civilization, been recognized or permitted. One cannot do whatever he or she wants anywhere, anytime. No civilization has permitted a person to consent to murder, an assault, or any other illegal conduct. One cannot commit euthanasia, or suicide, or engage in dueling, or engage in incest.

The point is that there is a general, reasonable concept of *moral* law upon which all *civil* law is based. Without relying on religious concepts or without discussing religion or "sin", there is, in every society, not only a political structure, but a moral one. There is such a thing as "public morality." What makes a society great, especially the American society, is a community of ideas, goals and visions. Without shared culture, without shared ideas, and without shared concepts of the fabric which holds society together (morality and ethics) no civilized society can continue to exist.

Does society, therefore, have the right to pass judgment on individual conduct, even when committed in private? The answer has to be yes, if a civilized society is to continue.[204] No civilized society can long endure without common goals and standards in both the political and moral realms. The American society is surely a tolerant one, but it cannot balkanize itself politically or morally without disintegration and political and moral bankruptcy. Americans cannot be so tolerant of others so as to destroy the political and moral fabric which unites it.

To achieve these ends, society has the right to protect itself from dangers, whether from within or without. No one would argue that society has a right to protect itself from outside, external forces. So an established common morality is just as necessary as a political one. In the history of the world it has been demonstrated that societies disintegrate from within much more frequently than from without. "The loosening of moral bonds is the first stage of disintegration."

Many societies, ours included, have relied on traditional rules and standards. An excellent address by commentator Ted Koppel, says that "the sheer brilliance of the Ten Commandments is that they codify in a handful of

204. *See generally* SIR PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (Oxford University Press 1965).

words acceptable human behavior. Not just for then, or now, but for all time. There is majesty in the concept of an unseen power. . . . There is harmony and inner peace to be found in following a moral compass . . . regardless of fashion or trend."

An excellent address was made by Dean John Sibler of the Boston University School of Education entitled "The Problem of Character Education." He states that the character of a nation depends on the character of its people, and the character of the people depends on the character of its children. Children must be taught moral education, and to speak of moral education is not to speak of *subjective* preference, but of objective judgment of right and wrong. "To build character we must offer our young children examples of persons and stories that illustrate the moral principles. Such stories are found in the teachings of our great religious and moral sages."[205]

5. In June 1998, Ted Koppel, again, gave a commencement address at Stanford. The title of his address was: "Aspire to Decency; Practice Civility." In it he says:

> [w]hat we have done in America today is to turn ethics into a commodity. Virtue may still be its own reward, but we lose touch with its meaning when we allow it to be defined by the standards of the market place or the political arena. . . . When people . . . consistently reward bad behavior, then, inevitably, we perpetrate that sort of behavior. . . . I believe that . . . questions of what's right or wrong require the individual to measure himself against absolute standards of ethics and responsibility."[206]

Present day American society is tracking the record of other lost societies. In view of what has been going on in the last several decades, what can we expect? There are many changes that could be made.[207] They would be drastic.[208] And if society does not change soon, then in the words of Al Jolson, "Folks, you ain't seen nothin' yet."

XIV. WHAT CAN BE DONE

Over the years there have been many suggestions and proposals for reform as to the use of deadly force by law enforcement officers.[209] Attached hereto is

205. John Silber, *The Problem of Character Education*, BOSTON UNIVERSITY SCHOOL OF EDUCATION NEWSLETTER, Spring 1996, at 1 (on file with author).

206. *Id.*

207. But that is the subject of another day.

208. *See Skinner's Utopia: Panacea, or Path to Hell?*, TIME, Sept. 20, 1971, at 47 (stating that the message of B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971) is "we can no longer afford freedom, and so it must be replaced with control over man, his conduct and his culture").

209. *See e.g.*, James J. Fyfe, *Observations on Police Deadly Force*, CRIME & DELINQUENCY, July 1981, at 376 (suggesting that departments issue clear guidelines, shootings should not be done in non-violent situations, incidents must be reviewed and made public, etc.). This article

an appendix summarizing the many suggested reforms, as gleaned from the literature. Many reforms have been adopted by police departments, courts, and legislatures.

One way of attempting to alleviate the problem of police misconduct is not through the courts, but by administrative regulations, *e.g.*, revocation of an officer's certificate or license.[210] Yet, there is a wide gulf between the police and certain segments of the community.[211] Whether this gulf can even be bridged is a matter of conjecture. Only the future will tell—but it will be a long time. Perhaps the ultimate solution is to invoke the emergency powers of a mayor or the Governor and declare the present social blot an emergency and call out the Guard to curtail the killing.[212] It is hoped that in our free democracy this will never come to pass. Perhaps another way is to invoke the doctrine of "community caretaking function,"[213] whereby greater leeway is given to the police to perform their duty. It is sad to see some police departments engaging in "selective disengagement" whereby officers do not enforce the law.

But there are less drastic remedies for both the police and the citizen. While many suggestions for reform have been made throughout the years, beginning with the Missouri Crime Survey in 1926 to the present, both in Missouri and elsewhere,[214] the General Assembly would do well to adopt the principles in the Proposed Pre-Arraignment Code, or the standards laid down

also contains a list of articles and books on reform on page 387. CATHERINE H. MILTON ET AL, POLICE USE OF DEADLY FORCE 127 (1997).

210. Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy For Police Misconduct,* 45 ST. LOUIS U. L.J. 541 (2001); MO. ANN. STAT. §§ 590.105 through 590.501 (2000).

211. Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killing*, 9 HARV. BLACKLETTER L.J. 1, 11 (1992).

212. MO. ANN. STAT. § 41.480 (2000); MO. ANN. STAT. § 84.540 (2000); *Municipal Corporations, Counties, and Other Political Subdivisions*, 13B AM. JUR. LEGAL FORMS § 180.56 (2d ed.1996).

213. Cady v. Dombrowski, 413 U.S. 433, 441 (1973); Winters v. Adams, 254 F.3d 758, 766 (8th Cir. 2001); United States v. Smith, 162 F.3d 1126, 1126 (8th Cir. 1998).

214. *See* Julia Campbell & Tom Foreman, *Deadly Force: Police Shootings Raise Questions on Level of Training and Tactics*, ABC NEWS.COM (SEPT. 28, 2000), *at* http://abcnews.go.com/sections/us/dailynews/shootings000927.html. Many argue that police in small communities do not receive proper training in firearms and tactics; in a twenty-five page report in Detroit, community members blamed "inadequate training of officers, lack of material resources, lack of accountability and a shortage of personnel;" the chief of the Detroit NAACP said: "We have now come to a fork in the road to either take the path that leads to healing, or the path that leads to further deterioration of an effective department"; the Kansas City Policy Department has recently revised its policy on vehicle pursuits – and officer may pursue when based on reasonable suspicion that the suspect has committed or attempted to commit a serious violent felony and the suspect presents clear and immediate threat to the safety of others.

by the Missouri Highway Patrol—that deadly force may be used against persons, including fleeing felons, only "when they [officers] reasonably believe such action is in defense of human life (including their own) or in defense of any person in immediate danger of serious physical injury or death."[215] Such a principle would go a long way to help solve the situation.

On the part of the citizen, he or she should not resist arrest at the scene of the incident. The *street* is not the place to determine the lawfulness of the arrest—only the quiet of the courtroom is the proper place to determine the issue.[216]

Perhaps there should be appointed a high level civilian review board consisting of citizens of the community to determine whether the force was justifiable or not. Community leaders have called for such a Board. While under Missouri law, the St. Louis Board of Police Commissioners is a *civilian* review board appointed by the Governor. Perhaps the community would feel more secure if an independent civilian review board would be appointed. This may be a vehicle to avoid and smooth tension.

Also, it would be helpful to decrease the rhetoric. Avoid massive street demonstrations, seek relief from the responsible officials—not TV and the media. Demonstrations accomplish little but to inflame passions among all groups. If the citizen knew that there was a basic Bill of Rights of Arrested Persons as proposed by the Pre-Arraignment Code, perhaps that could help ease tensions.

XV. SUMMARY AND CONCLUSIONS

The purpose of this article is to give a survey of the Missouri law and policy relating to police use of deadly force. It examined the early law of Missouri, the common law as rendered in judicial decisions, the repealed and present statutes of the state, the policies as laid down in the orders of the various police departments, the causes of the phenomenon, suggestions for change and a summary of the present law.

A. Summary of Present Law

The present law, as this writer understands it is:

1. The police have the duty to enforce the law, to arrest suspected criminals in order to protect the public; otherwise there is anarchy and chaos;

215. This is the recommendation of the International Association of Policy Chiefs in the Model Statutes Projects followed by several states: ME. REV. STAT. ANN. 17-A, § 107 (2000); OR. REV. STAT. § 161.239 (1999); TENN. CODE ANN. § 39-11-620 (2000); UTAH CODE. ANN. § 76-2-404 (1953).

216. *See State v. Koonce*, 214 A.2d 428 (N.J. Super. Ct. App. Div. 1965).

2. It is the duty of the police officer to effect an arrest when there is probable cause, otherwise as Judge Sherwood stated long ago—he would "be of all men the most miserable" if he has the duty to arrest and the "law did not give him adequate powers for the accomplishment of the end commanded."[217]

3. If arrestee offers no resistance, only minimum force may be used—e.g., handcuffing.

4. Although the officer must act quickly in a difficult situation, he is not the sole judge of the reasonableness. The force used to arrest must be reasonably necessary to effect the arrest. But the officer is entitled to the benefit of the usual assumption that he is acting in good faith.

5. In making an arrest, the officer must be the aggressor.

6. Unnecessary beatings or other forms of brutality are not permitted, and under such circumstances officers have been charged.[218]

7. Deadly force may lawfully be used to effect the arrest of a felon who flees and is armed or committed a crime involving the infliction of serious physical harm, but not where the felon is obviously unarmed, or such force may be used when a felon resists, and reasonable means are used to effect the arrest including lethal force.

8. Deadly force may not be used to effect the arrest of a fleeing misdemeanant or ordinance violator, unless the person poses an immediate danger of serious physical harm to the officer of others—deadly force cannot be used to pursue a traffic violator.

9. Shots are not to be fired from a police vehicle involved in a police chase unless there is serious immediate danger of harm to the officer or others.

10. Warning shots are not permissible.

11. Deadly force is authorized to effect the arrest of a felon when the felon resists and such force is immediately necessary to prevent serious physical harm or death to the officer or others.

B. Summary of Recommendations

Summarizing the recommendations above, the following suggestions are made:

1. The General Assembly should adopt a new statute on police use of deadly force—one which is simple, easy to understand and which would help to release tensions—deadly force is not authorized unless the officer reasonably believes such force is in immediate defense of his life or in defense of any person in immediate danger of serious physical harm or death, or in the

217. State v. McNally, 87 Mo. 644, 653 (1885). At common law, the lawbreaker was looked upon as at war with the community; he was outside the law, hence it was the right and duty to "hunt him down and slay him as a wolf." Wilgus, *supra* note 5, at 545.

218. State *ex rel*. Donelon v. Deuser, 134 S.W.2d 132, 133 (Mo. 1939).

alternative a standard based on the Proposed Pre-Arraignment Code or of the Highway Patrol, should be adopted.

2. Educate citizens not to resist arrest at the scene of an arrest; that is not the place to play out the incident—only the quiet of the court room is.

3. Make final police reports on deadly force incidents public.

4. Appoint a committee, possibly a civilian review board (although it should not be called that) consisting of well-respected men and women of the community, black and white, to review the whole incident and situation and issue a final report to the community. This was begun some years ago in St. Louis but was abandoned.

5. Establish an "Arrestee Bill of Rights."

6. Adopt a statue which would handle police shootings at the administrative level, rather than through the courts, as suggested by Professors Goldman and Puro.[219]

7. The new Missouri "Racial Profiling Statute[220] should help ease the tension in the community.

8. All police agencies should have a uniform policy, preferably based on the policy of the Missouri Highway Patrol.

219. Goldman & Puro, *supra* note 225.

220. MO. ANN. STAT. § 590.650 (2001)

APPENDIX

Suggestions for Reform from the Literature

Police Training

Since police training in the use of deadly force is usually "insufficient and subject to the ambiguities found in statutes and departmental policies," officers must be trained to deal with ambiguous situations through role-playing exercises that simulate "actual conditions that might call for the use of force." Training must also focus on "safeguarding the lives of officers, bystanders, and suspects."
UNITED STATES COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES 155 (1981). See also *id.* at 29-32, for an in-depth discussion.

"Officers should be required to train with their issued weapons and to requalify with that weapon periodically."
Id. at 156.

Officers must be certified with their weapons on a quarterly basis. Failure to become certified can eventually lead to suspension and retirement.
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 42 (1982).

Police departments must have a "high standard of specialized training" in the use of deadly force. Training should address the moral and legal implications that arise from using deadly force, not just firearms training.
COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 21 (1993).

Training for officers puts them into situations that, in real life, begin much earlier. "In the field, patrol officers typically become aware of potentially violent situations at a distance, as when their radio dispatchers advise them of conditions requiring their presence or when they decide to stop suspicious pedestrians. In these circumstances, officers have opportunities to structure a confrontation in ways that diminish the likelihood that it will escalate into violence." Training should begin where real life situations begin.
James J. Fyfe, *Training to Reduce Police-Civilian Violence*, POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 165, 170-71 (William A. Geller et al. eds., 1996).

Officers should be skilled in conflict resolution, and where conflict cannot be avoided, officers should use less-than-lethal techniques.
COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 11 (1993).

Dealing with emotionally and mentally disturbed people: departments should create policy dealing specifically with this special situation and train officers accordingly. This has been successful in preventing use of deadly force in hostage situations and can also apply to "encounters with emotionally disturbed persons, apprehensions at the end of vehicle pursuits, responses to robberies and other violent crimes, and off-duty interventions into suspected crimes."
James J. Fyfe, *Training to Reduce Police-Civilian Violence*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 165, 168-69 (William A. Geller et al. eds., 1996).

Officer required cultural training. Also, officers hired should match the diversity of the community they patrol.
Id. at 173.

Training must be continuous to assure that officers will remember how to handle dangerous but rarely encountered situations and to remind officers of the danger they may confront while on patrol.
Id. at 176.

1. Officer survival training.
2. Range training including nighttime, bad weather, etc.
3. Weapons training including specification of regulation departmental firearms.
4. Cultural awareness training.
5. Strong and effective supervision during training and while in service.
6. Less-than-lethal weapons and soft body armor.

William A. Geller, *15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers*, *in* COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 87-90 (1993).

Training should include realistic police-citizen encounters and include alternatives to shooting. Training should focus on problem-solving skills and field exercises.

CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 137 (1997).

Training must be continuous with feedback on performance.
CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 125 (1995).

Officers must be trained in multicultural sensitivity. Diversity "must be part of every lecture, every presentation, every discussion."
Id.

Cultural training is necessary to prevent unnecessary violence between police and the community.
WILLIAM A. GELLER & KEVIN J. KARALES, SPLIT-SECOND DECISIONS: SHOOTINGS OF & BY CHICAGO POLICE 196-97 (1981).

Training should include alternatives to deadly force and should be taught through role-playing in real-life conditions such as nighttime and outdoor situations.
Id. at 198-99.

To reduce police shootings of minorities, Jenkins suggests additional police training—including realistic firearms training, conflict resolution techniques and training on how to deal with off-duty confrontation.
Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities*, 9 HARV. BLACKLETTER L.J. 1, 11 (1992).

Departmental Policy Should Clarify State Guidelines,
Or Use of Deadly Force Must Be Well Enforced

Policies, rules, and laws must be unambiguous and clearly state, "what conduct is expected and what will not be condoned." For example:

(1) Police department regulations should restrict officer use of deadly force to defense of life in those circumstances where it is reasonably believed to be the only available means for protecting the officer's life or the life of another person.
(2) Officers should be issued a single regulation sidearm, and the carrying of additional sidearms should be prohibited.
(3) Officers should be required to train with their issued weapons and to requalify with that weapon periodically.
(4) Every discharge of a firearm by an officer should be reported and thoroughly investigated within 24 hours of the discharge.

UNITED STATES COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES 156 (1981). See also *id.* at 43-50, for an in-depth discussion.

Police departments should have a clear deadly force policy that clearly states the guidelines for: "(1) when to shoot, (2) the investigative procedure following a shooting, (3) a Board of Review, (4) firearm equipment requirements, and (5) firearms training."
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 31 (1982).

Each department should define the phrase "deadly force." Suggested definition: "that force which is intended to cause death or grave injury or which creates some specified degree of risk that a reasonable and prudent person would consider likely to cause death or grave injury."
Id. at 32.

Written policies must be clear and easily understood.
COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 21 (1993).

Police departments need clearly written firearms policies that are well enforced.
Edward J. Littlejohn, *Deadly Force and its Effects on Police-Community Relations*, 27 HOW. L.J. 1131, 1178 (1984).

A department's deadly force policy should be "relatively brief and written in clear, straightforward language so that it can be easily understood."
CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 136 (1997).

Rules of police conduct must be in writing, detailed, easy to understand and misconduct must have consequences.
CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 113-14 (1995).

Departmental Policy Creation & Review

Departmental policy should be created by a task force comprised of representatives from all levels of the police department. The policy should be reviewed periodically to determine whether it is producing positive results.

CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 128-29 (1997).

Department Reporting Policy for Discharge of a Firearm

"Every discharge of a firearm by an officer should be reported and thoroughly investigated within 24 hours of the discharge."
UNITED STATES COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES 156 (1981).

Police departments should require reports on all firearm discharges compete with a departmental investigation.
Robert Berkley Harper, *Accountability of Law Enforcement Officers in the Use of Deadly Force*, 26 HOW. L.J. 119, 148 (1983).

1. Debriefing of officers after discharge of their weapon. Include a departmental "shooting review panel."
2. Formal research on patterns of shootings to identify causes and control those situations.

William A. Geller, *15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers*, *in* COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 87-90 (1993).

Officers should report any firearm discharge immediately, followed by an investigation. A review board, comprised of various department representatives, should recommend a penalty for such discharge if found inappropriate.
CATHERINE H. MILTON, ET AL., POLICE USE OF DEADLY FORCE 139 (1997).

The department should have a "shooting review panel" to review all shots fired by police. The panel would debrief the officers and collect data on police shootings in order to identify areas in need of improvement.
WILLIAM A. GELLER & KEVIN J. KARALES, SPLIT-SECOND DECISIONS: SHOOTINGS OF & BY CHICAGO POLICE 190 (1981).

Policies Regarding Secondary Firearms

"Officers should be issued a single regulation sidearm, and the carrying of additional sidearms should be prohibited."
UNITED STATES COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES 156 (1981).

Back-up secondary weapons should only be allowed when it meets particular department standards.
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 38, 40-41 (1982).

Departmental Policies Should Include Disclaimer

Each department should include a disclaimer in its deadly force policy to preclude use of the department policy as a higher legal standard for officers when third party claims are brought against them. It should clearly state that violations of the department policy "will only form the basis for departmental administrative sanctions."
Id. at 33.

Departmental Policies Should Stress Importance of Human Life

Department policies should stress the importance of human life.
Id. at 33.

Warning Shots

Department policy should prohibit warning shots.
Id. at 37.

Warning shots should not be allowed.
CATHERINE H. MILTON, ET AL., POLICE USE OF DEADLY FORCE 134 (1997).

Officers should not fire at, or from, a moving vehicle unless "as the ultimate measure of self-defense or defense of another when the suspect is using deadly force by means other than the vehicle."
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 36 (1982).

Policy should not allow the discharge of a firearm, at or from, a moving vehicle unless the suspects in the other vehicle are using deadly force (other than the vehicle) against the officer.
CATHERINE H. MILTON, ET AL., POLICE USE OF DEADLY FORCE 134 (1997).

National Uniform Deadly Force Policy Needed

Finch urges a federal decision holding "the use of deadly force to arrest non-violent felony suspects unconstitutional" in lieu of different states allowing

force in different situations. The decision would require departments to "issue and enforce a constitutional weapons policy" as well as constitutional criterion for assessing deadly force."
Floyd R. Finch, Jr., *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV. 361, 389 , 398 n.130 (1976).

Model Penal Code approach should be adopted by legislatures. It would have the effect of eliminating the problems caused by different police departments adopting different deadly force regulations.
Edward J. Littlejohn, *Deadly Force and Its Effects on Police-Community Relations*, 27 HOW. L.J. 1131, 1174 (1984).

Defense of Life/Innocent Bystanders

Department policies should include a provision for the use of deadly force in the defense of the life of the officer and others.
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 34 (1982).

Police departments need written policies that clearly define defense-of-life as the deadly force standard and such policies must be rigidly enforced.
Robert Berkley Harper, *Accountability of Law Enforcement Officers in the Use of Deadly Force*, 26 HOW. L.J. 119, 147 (1983).

Policies should be rewritten to only allow deadly force in self-defense or defense of others since the only felony punishable by death in the modern era is murder. Also this policy is "both constitutional and highly practical."
Id. at 138-40.

Policy should permit officers to fire when necessary to protect life, but not in any other situation. Also, officer cannot carry gun when intending to drink alcohol.
William A. Geller, *15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers*, *in* COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 87-90 (1993).

Deadly force policy should be based on level of danger the suspect presents. Deadly force should only be used in self-defense and defense of others, and should not be used when there are innocent bystanders.
CATHERINE H. MILTON, ET AL., POLICE USE OF DEADLY FORCE 131 (1997).

Officers must not use their gun when "it appears likely that an innocent person may be injured."
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 36 (1982).

Officers should only use deadly force in self-defense or defense of others.
WILLIAM A. GELLER & KEVIN J. KARALES, SPLIT-SECOND DECISIONS: SHOOTINGS OF & BY CHICAGO POLICE 183 (1981).

Distinguishing Between Adults and Juveniles

Department policies should not distinguish between adults and juveniles regarding the use of deadly force. Only self-defense and imminent threat should be used.
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 35 (1982).

The policy should not distinguish between adults and juveniles.
CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 133 (1997).

Alternative Rules

Simon suggests an alternative to the fleeing felon rule put forth in *Tennessee v. Garner*: a list of inherently dangerous felonies for which deadly force can be used to clear up any uncertainty the officer may have if he or she is uncertain whether the suspect is armed and dangerous. He suggests that deadly force should only be permitted when the officer "reasonably believes the use or threatened use of serious physical harm is involved."
John Simon, Tennessee v. Garner: *The Fleeing Felon Rule*, 30 ST. LOUIS U. L.J. 1259, 1276-77 (1986).

Recommended fleeing felon rule: "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)."
KENNETH J. MATULIA, A BALANCE OF FORCES: EXECUTIVE SUMMARY 35 (1982) (emphasis in original).

Two interests must be weighed in the decision to use deadly force: 1. The need to "apprehend[] suspected criminals, deter[] escape attempts, and maintain[] effective arrest power of the police;" and 2. Preservation of human life and

"the adjudication of the guilt or innocence of the felony suspect according to constitutional and other rights."
Robert Berkley Harper, *Accountability of Law Enforcement Officers in the Use of Deadly Force*, 26 HOW. L.J. 119, 134 (1983).

Smith proposes a two-prong reasonableness test in deadly force situations to replace the Graham reasonableness standard:

1. Would a reasonable officer have believed that lives were in immediate danger? If the officer is easily frightened or "seems too ready to use deadly force without sufficient justification, then the officer may be liable for using excessive force."
2. Did the officer use force with the amount of skill and judgment that a reasonable officer would use under the circumstances? For example, an officer firing shots into a crowd would not have acted reasonably. "The harm created by the officer's conduct in that hypothetical would outweigh the benefits."

Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied* Tennessee v. Garner, 7 KAN. J.L. & PUB. POL'Y 100, 114-15 (1998).

Citizen Review Panel

Fair, expeditious, influence-free administrative review panel.
William A. Geller, *15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers*, *in* COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 87-90 (1993).

An independent review board is necessary to represent the community's sentiment when dealing with police misconduct. It should have independent regulatory power, be composed of a majority of non-law enforcement personnel, and its hearings should be open to the public.
CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 131-32 (1995).

To reduce police shootings of minorities, Jenkins suggests: Civilian review boards.
Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities*, 9 HARV. BLACKLETTER L.J. 1, 22 (1992).

Prescreen Officers for Violent Tendencies

Departments should prescreen a candidate's propensity for violence through psychological testing and interviews. In this way, unsuitable candidates can be eliminated before misconduct occurs.
CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 136 (1997).

"Tendencies toward bias, uncontrolled temper, and violence may have to become *per se* grounds for disqualification [from police force]."
CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 114 (1995).

Pre-selection screening of recruits should be utilized to minimize officers with violent tendencies. Also, those who are hired as police officers should be monitored to identify patterns of violent conduct.
WILLIAM A. GELLER & KEVIN J. KARALES, SPLIT-SECOND DECISIONS: SHOOTINGS OF & BY CHICAGO POLICE 195 (1981).

To reduce police shootings of minorities, Jenkins suggests: More effective screening and monitoring procedures—screen out those with a predisposition for violent behavior.
Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities*, 9 HARV. BLACKLETTER L.J. 1, 23 (1992).

Collect & Analyze Use of Force Data

Police departments should collect and analyze data on the use of force to "make judgments about off-duty regulations and to develop relevant training programs." There should also be a national collection of this data so "states, cities, and police departments can review and objectively evaluate their laws, policies, and procedures affecting police use of deadly force."
CATHERINE H. MILTON ET AL., POLICE USE OF DEADLY FORCE 141 (1997).

Community Policing

Ogletree recommends a community policing approach to reduce tension between the police and the communities that they serve. He also urges that police come from within the community itself (i.e. residency requirements) so they will be familiar with the community.
CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 107-09 (1995). *See also id* at 127-30.

To reduce police shootings of minorities, Jenkins suggests:

1. Restrictive shooting policies—taking community sentiment concerning shooting into account when writing the policy.
2. Increasing minority representation on the police force.
3. Utilizing civil penalties to reduce the use of deadly force by police—allow civil suits against police departments, which will then force the department to change their deadly force policy.
4. More effective and stringent internal discipline.

Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities*, 9 HARV. BLACKLETTER L.J. 1, 19-22, 24 (1992).

Performance Evaluations

Officers should have periodic performance evaluations to ensure they are meeting the department's standards. If an officer has a history of complaints against him or her or has used unnecessary force, the officer should receive a negative evaluation. Those officers who use alternatives to force should be commended and receive positive evaluations.

CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 116-17 (1995).

Miscellaneous Suggestions

1. Interagency networks to provide accurate criminal history information.
2. Cost-benefit analysis should be used before deploying officers.
3. Field investigations and inspection unit.
4. Counseling for officers.
5. Departmental reward systems to honor courage and ingenuity in using restraint or properly using deadly force.

William A. Geller, *15 Shooting Reduction Techniques: Controlling the Use of Deadly Force By and Against Police Officers*, *in* COMMUNITY RELATIONS SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 87-90 (1993).

Other recommendations from the literature:

1. Police departments should institute clear policy guidelines to limit the use of deadly force.
2. Policy guidelines should be related to the dangerousness of suspects, and should prohibit use of deadly force to apprehend nonviolent suspects.

3. Police departments should investigate thoroughly all incidents in which police weapons are discharged, whether or not anybody or anything is actually struck by bullets.
4. Reports of the investigations should minimize uncertainty about what has happened by making as complete use of witnesses and forensic techniques as possible.
5. All police shootings should be reviewed and adjudicated by police departments, with contributions from as many perspectives and levels of the police organization as possible. These adjudications should consider both the circumstances of the instant shooting and the record of the officer involved.
6. The findings of investigations and adjudicatory bodies should be made available to the public, and police departments should react to questioning and criticism openly and responsibly rather than defensively.
7. Police agencies should attempt to improve and use state of the art psychological devices and techniques to screen and monitor personnel in order to identify those likely to use violence without proper justification.
8. Police supervisors and field commanders should be held accountable for monitoring and acting on the unjustifiable use of force or violence by personnel reporting to them.
9. Police training programs should be based upon social science principles to increase officers' skills in daily interaction and crisis intervention in the community, and to reduce the possibility that police actions will cause the escalation of violence.
10. Police firearms training programs should consider legal, administrative, and moral questions concerning the use of the gun, and should encourage the use of less drastic alternatives where possible.
11. Police deployment policies and practices should be formulated in such a manner that the potential for police-citizen violence is reduced.
12. Police internal reward systems should be structured in such a manner that quantitative measures of police work (e.g., numbers of arrests) and involvement in violent activities are not the predominant or exclusive means of obtaining recognition for outstanding performance.
13. Police agencies should encourage citizens to make complaints about officers' use of abuse or unnecessary force, and should thoroughly investigate all such allegations, and should advise complainants of findings and the action taken. [quote]

James J. Fyfe, *Observations on Police Deadly Force*, 27 CRIME & DELINQUENCY 376, 387-88 (1981).