Use of Force by Law Enforcement Officers in Effecting Seizures of Persons, The

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THE USE OF FORCE BY LAW ENFORCEMENT OFFICERS IN EFFECTING SEIZURES OF PERSONS

This Comment focuses on the law governing the use of force by police in conducting arrests and investigative stops. The examination includes review and comparison of the existing deterrents to and remedies for the use of excessive force in effecting these fourth amendment related seizures. Consideration is given to the recent Tennessee v. Garner, in which the Supreme Court narrowed the use of deadly force in certain arrest situations by application of the fourth amendment. This Comment finds that a need exists for further clarity, conformity, and modernization both in the law and in the remedies. To help meet that need, this Comment proposes a model statute. The proposed statute is designed both to clarify the meaning of reasonable force and to provide more effective responses to the use of undue force.

INTRODUCTION

On July 18, 1984, police responded to a situation at a fast-food restaurant in San Ysidro, California. By the time the so-called "McDonald's Massacre" had ended, twenty-one people were dead, including the gunman, James O. Huberty, who had been felled by a SWAT team sharpshooter.\(^1\) The police use of force in killing Huberty was not only legitimate, but inarguably necessary, given the particular circumstances of the attack.\(^2\) However, few cases in which the police use force against citizens are as clear-cut as in the San Ysidro tragedy.

An essential function of the police as the paramilitary unit of the criminal justice system is to enforce the law by detecting and apprehending violators.\(^3\) To accomplish this task, the police are empowered to detain and take violators into custody, and most importantly,

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1. A twenty-second person died the following day, and nineteen others were wounded. San Diego Union, July 20, 1984, § A, at 1, col. 6.
2. Huberty was armed with three weapons: a pistol, an Uzi rifle, and a pump-action shotgun. When police arrived at the scene, Huberty directed his fire at responding police cars. The amount of fire coming from the restaurant initially led police to believe that there was more than one gunman. L.A. Times, Aug. 3, 1984, § II, at 1, col. 4.
to use force in so doing. The legitimate use of force becomes an issue in two types of police-citizen encounters: arrests, and investigative stops. Both of these are seizures within the meaning of the fourth amendment. While standards have been set which outline acceptable police behavior in initiating an arrest or an investigative stop, rules concerning the permissible degree of force to effect such seizures are not clear. Consequently, an important issue is whether the rules which do exist sufficiently guide officers in the performance of their duties while protecting citizens from the dangers of undue force.

There are several sources of law which could provide stricter standards for the permissible degree of force which can be used to effect a seizure. They include the Constitution, statutes, case law, and administrative rules. These standards often conflict with each other and are, at times, nebulous.

The Supreme Court has recently provided a Constitutional limitation to the use of deadly force in Tennessee

4. ABA Project on Standards for Criminal Justice: The Urban Police Function 10 (1978) [hereinafter cited as ABA Project].
5. An arrest is "the taking of another into custody for the actual or proposed purpose of bringing the other before a court, body or official or of otherwise securing the administration of the law." Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 201 (1940).
6. An investigative stop is a "brief detention of a person for investigation. A stop occurs when an officer uses his authority to compel a person to halt, or to remain in a certain place, or perform some act." Arizona State University and Police Found., Model Rules for Law Enforcement: Stop and Frisk Rule 4 (1975).
7. See Terry v. Ohio, 392 U.S. 1, 16 (1968) ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").
8. The amendment provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
   U.S. Const. amend XIV.
   Probable cause exists where "the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." Henry v. United States, 361 U.S. 98, 102 (1959).
10. The predicate to a lawful stop is reasonable suspicion. The officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968).
11. See Guardians, supra note 3, at 43-44. This report called for "clear and restrictive state laws, local ordinances, and departmental rules on the use of force." Id.
12. A research project by the International Association of Chiefs of Police defines "deadly force" as "that force which is intended to cause death or great injury which creates some specified degree of risk that a reasonable and prudent person would consider likely to cause death or great injury." K. Matulia, A Balance of Forces: A Study of Justifiable Homicide by the Police, Executive Summary 32 (1982).
v. Garner. In light of Garner, numerous statutes now apparently are unconstitutional; others differ greatly among states. Administrative rules, which must conform to state law, vary widely among departments. Regarding the use of non-deadly force to arrest or stop, the line between reasonable and unreasonable force is obscure. Civil and criminal proceedings seek to define reasonable force after a seizure, when the degree of permissible force used by the officer is questioned. The case law in this area, however, is often less clear in its determination of reasonable force than are statutory standards.

This Comment examines the current state of rules regulating the use of force to effect an arrest or an investigative stop. Concurrently, it assesses the adequacy of existing deterrents and remedies available when excessive force is used. The Comment suggests that more restrictive legal rules, which reflect a progressive view of law enforcement, are essential. To this end, a model statute is proposed, designed both to limit the use of force and make compensation more available.

THE USE OF FORCE TO EFFECT AN ARREST

The privilege to use force is concomitant with the power to arrest. No right to use force exists if the arrestee submits to the officer's authority. The use of substantial force arises in two principal arrest situations: when the arrestee resists, or when the arrestee flees. The primary distinctions between the various approaches to the use of force concern their restrictions on deadly force. Therefore, the discussions of deadly and non-deadly force will be treated separately to clarify the differences and similarities between the rules.

13. 53 U.S.L.W. 4410 (U.S. Mar. 27, 1985). In Garner, the Court held that the Tennessee statute which authorized the use of deadly force to arrest an apparently non-violent burglary suspect was unconstitutional. For further discussion of Garner, see infra notes 19-23 and accompanying text.
15. Non-deadly force is force not likely to cause death or serious bodily harm. Perkins, supra note 5, at 289.
17. Agee v. Hickman, 490 F.2d 210, 212 (8th Cir.) cert. denied, 417 U.S. 972 (1974) (force can only be used to overcome physical resistance or threatened force); Moats v. Village of Schaumber, 562 F. Supp. 624, 629 (N.D. Ill. 1983) (no force may be used if arrestee submits to arrest).
18. Perkins, supra note 5, at 268.
Deadly Force

In *Tennessee v. Garner*, the Supreme Court held that the use of deadly force to effect the arrest of an unarmed, nondangerous felony suspect is unconstitutional as an unreasonable seizure under the fourth amendment. The Court found that Tennessee's statute, based on common law, was unconstitutional in that it overly broadly authorized the use of deadly force to arrest all felony suspects. The Court thus abrogated the common law rule, discussed infra. The Court held that deadly force may be used only where the suspect poses a threat of physical harm to the officer or others. Thus, under *Garner*, deadly force is permissible "if the suspect threatens the officer with a weapon or where there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm."

*Tennessee v. Garner* represents the first time that the Supreme Court has addressed the constitutionality of a statute authorizing the police use of deadly force. The impact of *Garner* will be illustrated by a discussion of the statutory law as it existed when that case was decided. The Supreme Court's longstanding silence on this issue contributed to great variations among standards on the use of deadly force. Ignoring departmental rules for the moment, limitations on the permissible degree of force to effect an arrest can be attributed to three sources: (1) common law; (2) modified common law; and (3) Model Penal Code. Each one of these approaches authorizes an officer to use deadly force other than in defense of life. Only the first approach, the common law felony-misdemeanor rule, was struck down by *Garner*.

Common Law Felony - Misdemeanor Rule

The common law felony-misdemeanor rule aligns the boundaries of permissible force with the suspected class of crime. An officer may use any force, short of deadly force to arrest for a

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19. 53 U.S.L.W. 4410 (U.S. Mar. 27, 1985). *Garner*, a 15 year-old eighth grader was killed by police as he fled from the scene of a burglary. The officer who shot the boy did not believe that the boy was armed or dangerous. Id. at 4410, n.2.
20. *Id.* at 4412.
21. *Id.*
22. *Id.*
23. *Id.*
   1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
   2) Any other offense is a misdemeanor.
   3) Any misdemeanor, the penalty for which does not exceed imprisonment of six months or a fine of not more than $500, or both, is a petty offense.
misdemeanor. In the case of a felony, deadly force may be used if reasonably necessary to effect an arrest. Until Garner, deadly force was legally justified provided that the crime for which the officer had probable cause to arrest was defined as a felony. Under this approach, the use of deadly force was permissible for such crimes as murder, auto theft, and even income tax fraud. The common law rule evolved when all felonies were dangerous and punishable by death. Deadly force was then justified because the arrestee had, in effect, forfeited his life by committing a felony. In contrast, few felonies today are punishable by death, which resulted in an erosion of the historic rationale for this rule. Despite widespread criticism by scholarly authorities, nearly half the states followed the common law rule when Garner was decided.

Modified Common Law

As a reaction to the statutory creation of numerous non-violent felonies and the decline in the use of capital punishment, some states


26. Id.


29. Many jurisdictions classify income tax fraud as a felony. Id. at 138. For example, see Cal. Rev. & Tax. Code § 19405 (West 1983).


The common law felonies, as listed in State v. Sundberg, 611 P.2d 44, 47 (Alaska 1980), were rape, murder, manslaughter, robbery, sodomy, mayhem, burglary, arson, and prison break. This list comprises the felonies that were recognized in England in 1500.

31. Moreland, supra note 25, at 409.

32. For example, in Tennessee v. Garner, 53 U.S.L.W. 4410, 4413 (U.S. Mar. 27, 1985), the Court noted that many crimes classified at common law as misdemeanors are now felonies. Furthermore, many crimes formerly punishable by death, such as rape, no longer are. The Court found that "[t]hese changes undermine the concept, which was questionable to begin with, that the use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life." Id. at 4413.


34. These states are Alabama, Arkansas, Connecticut, Florida, Idaho, Kansas, Mississippi, Michigan, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Washington, Wisconsin, Maryland, Virginia, and West Virginia. See Tennessee v. Garner, 53 U.S.L.W. 4410, 4414, no. 14(U.S. Mar. 27, 1985). The Supreme Court in Garner acknowledged that there was not an "overwhelming trend" away from the common law rule, but instead, a "longterm movement." Id. at 4414.
have modified the common law rule. Under the modified rule, the use of deadly force is either restricted to “dangerous felonies” or only permitted for specific felonies. Consequently, under this rule, the use of deadly force is usually limited to cases of murder, rape, arson, burglary, robbery, kidnap, mayhem, and aggravated assault. Except for the case of burglary, this approach is acceptable under Garner because these “dangerous felonies” involve either past or present elements of physical harm. However, many of the criticisms applicable to the common law rule may also apply to this standard. For example, not all of these felonies are punishable by death. Even for those crimes that are, imposition of the death sentence must be preceded by the constitutional safeguards of trial. Furthermore, a classification of felonies for which deadly force is permissible does not necessarily address whether the arrestee is dangerous at the time apprehension is attempted. Therefore, this rule is potentially as problematic as the common law rule in that it also fails to equate the use of deadly force with the dangerousness of an arrest situation and with the severity of subsequent punishment.

Model Penal Code

A more restrictive approach regulating the use of deadly force to arrest is the Model Penal Code (the Code). The Code allows the officer to use deadly force only when the crime for which the arrest is made involved the use of deadly force, or if the officer believes the arrestee will cause death or serious bodily harm if arrest is delayed.


36. K. Matulia, supra note 12, at 10. For example, in Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 372, 132 Cal. Rptr. 348, 353 (1976), a police officers' association challenged the constitutionality of administrative rules that were more restrictive than state law. The court upheld the regulations and found that “in view of the great expansion of crimes which have been made felonies . . . deadly force may be used only against felony suspects if the felony is a ‘forcible and atrocious one’ . . . .”

37. K. Matulia, supra note 12, at 10.

38. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (“mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting imposition of punishment” and cannot be applied consistently with eighth and fourteenth amendments); Gregg v. Georgia, 428 U.S. 153, 195 (1976) (death penalty may not be imposed in arbitrary or capricious manner); Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (one has the right to be presumed innocent and have guilt determined beyond a reasonable doubt).


40. Id. The relevant section of the Code provides that the use of deadly force is not justifiable unless:
(i) the arrest is for a felony; and
(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
The Code forbids the use of deadly force to arrest for crimes against property, so long as no life is or has been threatened. A few states follow this approach, which clearly fits within the standard articulated in *Garner*. Though the Model Penal Code abandons the outdated felony-misdemeanor distinction, it has been criticized because it requires an officer to make a split-second decision about whether the crime involved deadly force. In addition, critics note that the Code, like the common law and modified common law, still allows an officer to inflict greater punishment than a court. As a practical matter, any rule regarding justifiable deadly force requires an officer to make quick decisions. Furthermore, even when an officer kills an arrestee in self-defense, the "punishment" is in theory greater than that likely to be prescribed by a court where a trial by judge or jury must necessarily precede the imposition of the death penalty.

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

(iv) the actor believes that:

(1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

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


42. These states are Colorado, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Nebraska, North Carolina, and Texas. See Wukitsch, *supra* note 35, at 14.


In Tennessee v. Garner, 53 U.S.L.W. 4410, 4415 (U.S. Mar. 27, 1985), the Court addressed the problem of split-second decisions in relation to the rule which prohibits an officer from using deadly force against non-violent fleeing felons. The Court noted that many situations, such as investigative stops, require an officer to make snap judgments. The Court, however, reasoned that it is equally, if not more, difficult for an officer to make a felony-misdemeanor distinction which the common law rule required as a predicate to the deadly force. Furthermore, the Court noted that in those states which have restricted the use of deadly force to dangerous suspects, little litigation has occurred involving the second-guessing of officers' decisions.


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Administrative Regulations

Further restrictions on the use of force permissible to effect an arrest are found in administrative policies of police departments. Because state statutes are often written in very broad terms, departmental policies may vary in degrees of restrictiveness. The International Association of Chiefs of Police (IACP) recommends limiting the use of deadly force to situations where the officer reasonably believes that deadly force is necessary to protect himself or another from death or serious bodily harm. The IACP’s 1982 study of the nation’s fifty-seven largest municipal police departments found that most departments restricted the use of deadly force to a greater degree than state law. The majority of departments surveyed permitted the use of deadly force to arrest for a crime which involved deadly force. In contrast, a small percentage authorized the use of deadly force to arrest for any felony. In the past decade, other studies have illustrated the possibility of variation among departmental policies. Administrative rules may range from a duplication of

45. K. Matulia, supra note 12, at 34. The International Association of Chiefs of Police (IACP) suggests that “[a]n officer may use deadly force to protect himself or others from what he reasonably believes to be an immediate threat of death (or near death) critical to bodily harm.” Regarding fleeing arrestees, the IACP states in even clearer language that “[a]n officer may use deadly force to effect, capture, or prevent the escape of a suspect whose freedom is reasonably believed to represent an imminent threat of grave bodily harm to the officer or other person(s).” Id. at 35. (emphasis in original)

46. Id. at 11.

In Tennessee v. Garner, 53 U.S.L.W. 4410 (U.S. Mar. 27, 1985), the Court found police department policies a compelling reason to abandon the common law rule. First, the Court noted that restrictive administrative rules cast a “dubious indicium of constitutionality” on a statute based on the common law. Id. at 4414. Second, because so many police departments have restricted their policies on the use of deadly force without any increase in crime, there is no indication that restrictive rules hamper police in the performance of their duties. Id. at 4415.

47. The IACP found that 81.1% of the departments authorized the use of deadly force to arrest a felon who used deadly force. Similarly, 84.9% permitted the use of deadly force to arrest a felon threatening deadly force. In contrast to the use of force to effect an arrest, 17% of the departments permitted the use of deadly force to arrest any felon. Id. at 28-29.

48. Only 7.5% of the departments permitted the use of deadly force to arrest any felon. Id.

49. See C. Milton, J. Halleck, J. Lardner & G. Albrecht, Police Use of Deadly Force 38-59 (1977). This study examined the police use of deadly force in seven American cities. The authors found that all of the departments surveyed had a provision concerning the use of deadly force. However, the regulations varied in terms of restrictiveness and specificity. For example, some departments permitted the use of deadly force to arrest only for specific felonies; others permitted its use for the apprehension of any felon. Id. at 49. See also Uelmen, Varieties of Public Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County, 6 Loy. L.A.L. Rev. 1 (1973). Uelmen surveyed fifty police departments in the Los Angeles area by way of interviews with police officers and administrators, review of written policy, and analysis of firearms discharges. Uelmen concludes his study with a suggestion that a policy review board be established to determine statewide policy on the use of deadly force. Id. at 63.
state law to authorizing its use only in self-defense.50

Federal Policy

The policies of federal law enforcement agencies are noteworthy for their limitations on the use of deadly force. For example, Federal Bureau of Investigation (FBI) policy prohibits an officer from shooting anyone except in defense of his own life or the life of another.51 The Federal Bureau of Narcotics and Dangerous Drugs and the Secret Service also operate under defense-of-life restrictions.52 This standard is, by far, the most restrictive, chiefly because it eliminates the use of deadly force to effect the arrest of a fleeing felon, even one who used deadly force in the commission of his crime. Because an officer may kill only in protection of life, his individual authority to decide which arrest situations justify the use of deadly force is restricted.

Non-deadly Force

Unlike the distinctions in the above-mentioned rules regarding justifiable use of deadly force by law enforcement personnel, boundaries restricting the use of non-deadly force are virtually unlimited. Hence, any force, other than deadly force, which is reasonably necessary to effect an arrest may be used.53 This standard cloaks an officer with broad discretion to determine the degree and type of force required in each situation. Therefore, the question of reasonableness is measured by the arresting officer’s subjective interpretation of facts.54 Because each case is considered so wholly on its own

50. Id. at 10-11.
51. FBI policy states:
Agents are authorized to use that amount of force reasonable and necessary to impose custody and overcome resistance and to ensure the safety of the arresting officers, the arrestee, and others in the vicinity of the arrest . . . . Agents are not to shoot any person except as necessary in self-defense or defense of another, when they have reason to believe they or another are in danger of death or grievous bodily harm.
53. Perkins, supra note 5, at 361.
54. See Amato v. United States, 549 F. Supp. 863, 869 (D.C.N.J. 1982) (“determination of whether or not force was excessive . . . is to be made on the basis of facts as they reasonably appear to the officer”); Samuel v. Busnuck, 423 F. Supp. 99, 101 (D.C. Md. 1976) (“the reasonableness or excessiveness of force is to be determined in light of the circumstances as they appeared to the officer at the time of the arrest”); Dauffenbach v. City of Witchita, 8 Kan. App. 2d 303, 310, 657 P.2d 582, 587 (1983) (“the officer has
facts, clear standards for the use of non-deadly force have failed to develop. Instead, at issue is not whether the force used was merely unnecessary, but whether it was grossly excessive. This standard gives the officer considerable latitude in his discretion to use force. Unless flagrantly excessive, the force used to arrest is assumed to be the proper response to the situation.

The determination of reasonable force may be further complicated when resistance by the arrestee creates a right of self-defense in the officer. An officer may not use more force than is necessary in self-defense, but his or her discretion as to what constitutes self-defense may be given great deference. For example, in Agee v. Hickman, the resistance offered by the arrestee consisted of doubling his fists and "squaring off." The court acknowledged that the arrestee did not touch the officers, yet ruled that punching and slapping the arrestee was reasonable responsive conduct. Further complicating the matter, the defense of self-defense may also be invoked by a passive arrestee who claims he was arrested with excessive force. Though no citizen has the right to resist an arrest made with probable cause, the submissive arrestee does have a right to defend himself should the officer use excessive force. Hence, an arrestee charged with
resisting arrest or obstructing justice may respond by asserting self-defense.\textsuperscript{63}

The right to defend oneself from unwarranted physical peril is beyond question for law enforcement officers and private citizens. However, the right may be abused on either side. One scholar found in a 1966 study that many officers routinely followed their own use of force with a fabricated charge of resisting arrest against the arrestee.\textsuperscript{64} Citizens, as well as police, are known to resort to lying to justify their own use of undue force.\textsuperscript{65} While these accounts should not be unduly emphasized, they illustrate the additional difficulties of determining whether excessive force was used when an officer or citizen commits perjury to justify unreasonable conduct.

\textbf{Rules Reflect Balancing of Societal Interests}

The rules restricting the use of force to effect an arrest ostensibly are an attempt to reflect that society is interested in achieving peace and order through vigorous law enforcement.\textsuperscript{66} In some instances, immediate apprehension of the arrestee may be given priority over protecting the arrestee's life or physical well-being. In other cases, the interest in aggressive law enforcement may become secondary to the physical safety of persons other than the arrestee. For example,


\textsuperscript{64} Reiss, \textit{Police Brutality — Answers to Key Questions}, in A. NEIDERHOFFER \& A. BLUMBERG, \textit{THE AMBIVALENT FORCE} 321, 323 (1970). In a seven-week study of three police departments, Reiss and 36 observers accompanied police in patrol cars and monitored booking procedures. The observers found that "some policemen even carry pistols and knives they have confiscated while searching citizens; they carry them so that they may be placed at a scene should it be necessary to establish a case of self-defense." \textit{Id.}

\textsuperscript{65} H. GOLDSTEIN, \textit{POLICING A FREE SOCIETY} 161 (1977). Goldstein observed that the most difficult cases to resolve are those involving excessive police use of force or verbal abuse. According to Goldstein, "[t]hat otherwise honorable citizens resort to lying is well established. It is also clear that some police officers lie to justify an action. The task is further complicated because many of the people with whom the police have contact are unscrupulous individuals." \textit{Id.}

\textsuperscript{66} In Jones v. Marshall, 528 F.2d 132, 142 (2d Cir. 1975), now overruled by \textit{Garner}, the court upheld the common law felony-misdemeanor rule and concluded that "some room must be left to the individual states to place a higher value on the interest . . . in peace and order, and vigorous law enforcement, than on the rights of individuals reasonably suspected to have engaged in the commission of a serious crime." The language here is unfortunately misleading because mere reasonable suspicion would not justify any arrest, much less one made with deadly force.

In Tennessee v. \textit{Garner}, 53, U.S.L.W. 4410, 4412 (U.S. Mar. 27, 1985), the Court also weighed the state's interest in law enforcement. The Court, however, was not "convinced that the use of deadly force is a sufficiently productive means of accomplishing [this interest] to justify killing nonviolent suspects." \textit{Id.}
the use of warning shots and firing from vehicles has been discouraged largely because of potential risk to innocent persons. Officers are also held to a duty of extraordinary care if bystanders are threatened in a situation that would otherwise compel the use of firearms. Furthermore, one scholar has noted that in situations where hostages are involved, conscious decisions are often made to avoid even the appearance of force by police.

These examples indicate that the protection of life is also a fundamental interest of society which is reflected in law enforcement. In many situations, police refrain from the use of unnecessary and arbitrary force to protect innocent persons. However, when probable cause to arrest exists, legal standards on the use of force are inadequate. The Court in Garner indeed narrowed an officer's authority to use deadly force. However, its holding still permits an officer to use deadly force when he has probable cause to believe a given suspect had in the past committed a crime involving force. This is true even if the suspect is not currently dangerous. Furthermore, virtually no restrictions adequately guide an officer as to what constitutes reasonable non-deadly force. The lack of refinement of these standards makes any person who is arrested vulnerable to the danger and indignity of undue force.

**THE USE OF FORCE TO EFFECT AN INVESTIGATIVE STOP**

The use of reasonable force is likewise privileged when a police officer makes an investigative stop. While probable cause is necessary to justify an arrest, a lesser criterion of reasonable suspicion is sufficient for a lawful stop. Accordingly, restrictions on the use of force are more stringent in the area of investigative stops. Though the "[f]ourth amendment does not require a policeman who lacks . . . probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape," the use of deadly force to effect a

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67. The IACP espouses this policy. The IACP also found that 67.9% of the 57 departments surveyed did not permit warning shots. K. Matulia, *supra* note 12, at 36-37.


70. *See* United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977) ("A police officer attempting to make an investigatory stop may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop."). *See also* United States v. Streifel, 665 F.2d 414, 422 (2d Cir. 1981); United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977) (both holding that a police officer may use reasonable force to effect a stop).


seizure based upon reasonable suspicion is prohibited.\(^\text{74}\) Because an investigative stop is an exception to the fourth amendment's requirement of probable cause to seize,\(^\text{75}\) courts more closely scrutinize the manner by which this seizure is made.

In sharp contrast to an arrest made with excessive force, an investigative stop made with excessive force takes on substantial evidentiary consequences. A major difference between an arrest and a stop is that, in the latter, the analyses of reasonable suspicion and reasonable force are made concurrently in a suppression hearing.\(^\text{76}\) The question considered is whether the degree of force transformed what would otherwise be deemed an investigative stop into an arrest for which probable cause is required.\(^\text{77}\) Hence, excessive force to stop may invalidate the seizure as an arrest without probable cause despite the existence of facts sufficient to constitute reasonable suspicion. The sanction of the exclusionary rule results.\(^\text{78}\)

Distinguishing a stop from an arrest by the degree of force employed may pose a close question because in both situations force is used to restrict a person's freedom. However, the purpose of a stop is not to take a person into custody but to detain him briefly to allow the officer to investigate suspicious facts.\(^\text{79}\) The officer's conduct must be concordant with the nature of a stop as a non-custodial seizure.\(^\text{80}\) Because some stops involve more force than some arrests,

\(^{74}\) See Model Code of Pre-Arraignment Procedure § 110.2(3) (Proposal Official Draft 1972). Because deadly force is not allowed in any jurisdiction in misdemeanor arrests based upon probable cause, the prohibition of the use of deadly force when only reasonable suspicion exists is consistent with the law of arrest.

\(^{75}\) See, e.g., Dunaway v. New York, 442 U.S. 200, 210 (1979); United States v. Vasquez-Santiago, 602 F.2d 1069, 1072 (investigative stops involve an exception to the general rule requiring probable cause).

\(^{76}\) A suppression hearing is an evidentiary hearing, held before a judge sitting without a jury, to determine whether the incriminating evidence was lawfully obtained. J. Creamer, The Law of Arrest, Search and Seizure 263 (1968).

\(^{77}\) United States v. Merritt, 695 F.2d 1263, 1267 (10th Cir. 1982); United States v. Ceballos, 654 F.2d 177, 178 (2d Cir. 1981); United States v. Harrington, 636 F.2d 1182, 1186 (9th Cir. 1980).

\(^{78}\) The exclusionary rule requires that evidence obtained by way of a fourth amendment violation be suppressed. Mapp v. Ohio, 367 U.S. 643 (1961).

\(^{79}\) See Adams v. Williams, 407 U.S. 143 (1972), wherein the Court stated that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Id. at 146.

\(^{80}\) See United States v. White, 648 F.2d 29, 33 (D.C. Cir. 1981) (distinguishing a stop from an arrest depends on objective facts and the subjective impression they create); United States v. Patterson, 648 F.2d 625, 632 (9th Cir. 1981) (in determining whether an arrest or stop has occurred, the question is whether a reasonable person would conclude he was under arrest).
the use of force alone is not always determinative of the legality of the seizure.81 Nevertheless, courts closely evaluate stop situations in which the type of force used is of a kind normally associated with an arrest.82

Types of Force Used to Effect a Stop

Use of Guns

Some courts have found that the use of guns is not reasonable force to effect an investigative stop because guns are a type of force objectively associated with an arrest.83 For example, in United States v. Strickler,84 the court found that the police officers’ armed approach to the defendant’s surrounded vehicle was conduct irreconcilable with an investigative stop.85 The court held that the seizure was an illegal arrest because the officers lacked probable cause.86 Likewise, in United States v. Ceballos,87 the court found that an arrest without probable cause occurred when the officers conducted the stop by blocking the defendant’s car and approaching with guns drawn.88 The court also implied that, had the officers had more reasonable justification to use guns, the stop may not have been deemed an illegal arrest.89 The Ceballos court reasoned that the possible danger of the suspected offense cannot alone justify so coercive a stop.90

In contrast, other courts have upheld the use of guns to effect a

81. United States v. Gomez, 633 F.2d 999, 1006 (2d Cir. 1980) (officer may display some force when making a stop); United States v. Thompson, 558 F.2d 522, 525 (9th Cir. 1977), cert. denied, 435 U.S. 914 (1978) (some display of force does not transform a proper stop into an arrest).
82. See, e.g., United States v. Merritt, 695 F.2d 1263 (10th Cir. 1982); United States v. Ceballos, 654 F.2d 177 (2d Cir. 1981) (defendants asserted that guns were used during stops).
83. See United States v. Ceballos, 654 F.2d 177, 184 (2d Cir. 1981) (guns are one of the trappings of a traditional arrest).
84. 490 F.2d 378 (9th Cir. 1974).
85. “[W]e simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with [a stop].” Id. at 380.
86. Id.
87. 654 F.2d 177 (2d Cir. 1981).
88. Id. at 184.
89. “[T]he officers articulated no facts which they viewed as creating a need for the use of force and a degree of intrusion beyond that generally employed in investigative stops.” Id. at 183-84.
90. Id. Other cases wherein the court found the use of guns to be irreconcilable with investigative stops include: United States v. Johnson, 626 F.2d 753, 755 (9th Cir. 1980) (arrest occurred when officers faced defendant with guns pointed); United States v. Larkin, 510 F.2d 13, 14 (9th Cir. 1974) (drawn weapon constitutes an arrest, not a stop); United States v. Lampkin, 464 F.2d 1093, 1095 (3d Cir. 1972) (gunpoint approach constituted an arrest).
In assessing the reasonableness of detention with a gun, these courts consider, *inter alia*, the nature of the crime under investigation, the location and time of the stop, and the reaction of the suspect. In other words, the degree of force must be justified by the particular facts known to the officer who initiates the stop. If these facts lead an officer to believe reasonably that a gun is necessary for his protection, the use of a gun is upheld by these courts. An analogy may be drawn to the protective frisk upheld in *Terry v. Ohio*, in which the frisk is justified solely as a means to protect the officer.

**Use of Handcuffs**

The use of handcuffs, like the use of guns, is a type of force normally associated with an arrest. Consequently, there are also conflicting standards regarding handcuffs as reasonable force while making an investigative stop. In *People v. Campbell*, the court held

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91. *See United States v. Merritt*, 695 F.2d 1263, 1274 (10th Cir. 1982) (question is not whether the force used was so great as to render the stop an arrest, but whether it was reasonable); *United States v. Maslanka*, 501 F.2d 208, 213 (5th Cir. 1974), *cert. denided*, 421 U.S. 912 (1976) (police officers' armed approach did not transform stop into an arrest); *United States v. Balsamo*, 468 F. Supp. 1363, 1384-85 (D.C. Me. 1979) (officers' armed approach did not constitute an arrest).

92. United States v. Aldridge, 719 F.2d 368, 372 (11th Cir. 1983) (drawn gun was reasonable where officer was alone at three o'clock in the morning); *United States v. Harley*, 682 F.2d 398, 402 (2d Cir. 1982) (the totality of circumstances bear on the issue of reasonableness); *United States v. White*, 648 F.2d 29, 33 (D.C. Cir. 1981) (case would be easier if it involved a dark spot or one lone officer).

93. According to *Terry v. Ohio*, 392 U.S. 1 (1968), the standard for determining the reasonableness of a search and seizure is "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20.

94. *See United States v. Aldridge*, 719 F.2d 368, 369 (11th Cir. 1983) (use of a gun to effect a stop is permissible if the officer fears for his safety); *United States v. Jacobs*, 715 F.2d 1343, 1345 (9th Cir. 1983) (the use of force while making a stop is justified when officer fears for his safety); *United States v. Merritt*, 695 F.2d 1263, 1274 (10th Cir. 1982) (intrusion upon a person's physical security is outweighed by increased protection to the officer); *United States v. Beck*, 598 F.2d 497, 301 (9th Cir. 1979) (force is justified when officer fears for his safety).

95. 392 U.S. 1 (1968).

96. [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they lack probable cause to arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous ... it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon ....

*Id.* at 24.

that while an armed approach by an officer was not excessive force to effect a stop, the act of handcuffing manifested physical restraint beyond that permissible for a stop. In contrast, the court in United States v. Bautista upheld the use of handcuffs in an investigative stop. In Bautista, the court found that, though the act of handcuffing intensifies the intrusiveness of an investigative stop, it may be reasonable as a precautionary measure to ensure the officer's safety. Like the use of guns, then, this physical restraint seems more likely to be condoned when it is used as a means of protecting the officer from potential harm.

Policies on the Use of Force to Effect Stops

As with arrests, limits on the degree of force used to effect a stop are imposed by administrative policy. For example, the Model Code of Pre-Arraignment Procedure (the Pre-Arraignment Code) states the general rule which prohibits only deadly force in the course of making a stop. Commentary accompanying the Pre-Arraignment Code asserts pragmatically that force must be authorized to effect a stop because, should the suspect flee, the officer would then be free to subject the person to a lawful arrest, using force if necessary. Apparently, the Pre-Arraignment Code assumes that reasonable suspicion of a particular offense would be escalated to probable cause when a person flees. In contrast, the Model Rules For Law Enforcement limit the amount of permissible force to the least coercive means necessary to effect a stop and prohibit the use of a weapon or baton.

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98. Id. at 596, 176 Cal. Rptr. at 446.
99. 684 F.2d 1286 (9th Cir. 1982).
100. Id. at 1289.
101. Id.
102. "[P]olice conducting on-the-scene investigations involving potentially dangerous suspects may take precautionary measures if they are reasonably necessary." Id. at 1289.
103. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(3) (Proposed Official Draft 1972). The section provides that “[a] law enforcement officer may use such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer’s presence.”
105. In a book discussing the elements of lawful arrests, “flight” is included in a checklist of facts indicative of probable cause. J. CREAMER, supra note 76, at 19.
106. ARIZONA STATE & POLICE FOUND., MODEL RULES FOR LAW ENFORCEMENT: STOP AND FRISK RULE (1975). These rules were drafted with the guidance of representatives of eleven police agencies from across the country. The rules are intended to aid police administrators in formulating policy. Id. at 1.
107. The Model Rules provide:

A. General Rule: An officer shall use the least coercive means necessary under the circumstances to effect the stop. The least coercive means may be a verbal request, an order, or the use of physical force.
The aforementioned standards for the permissible degree or type of force to effect stop are often unclear. This ambiguity may be attributed to the competing interests in maximizing an officer’s safety and minimizing the intrusiveness of a stop. Even so, the case law and rules indicate that an officer’s use of force to conduct a stop is more regulated prior to its use and more scrutinized afterwards than is the use of force to arrest. Moreover, the possibility that the use of excessive force will transform an otherwise lawful stop into an illegal arrest, thus invoking the exclusionary rule, further underscores the relevance of the use of force to this seizure.

CONSEQUENCES OF EXCESSIVE FORCE

Though the limitations on the use of force to effect arrests and stops are often nebulous, various sanctions and remedies are available following the use of undue force. The traditional responses to police misconduct are the exclusionary rule, federal and state civil actions, criminal prosecution of the offending officer, and internal discipline. The following section of this Comment will examine the impact that these alternatives have on police use of force.

Exclusionary Rule

The exclusionary rule is applied by the courts to deter the use of excessive force in making an investigative stop. However, courts have failed to consider the rule as a deterrent to the use of excessive force in making an arrest. Recently, Alaskan courts have debated the invocation of the exclusionary rule for the use of excessive force in arrest. In State v. Sundberg, the Alaska Supreme Court rejected the application of the rule, finding no legislative mandate for its invocation. In addition, the court noted that existing deterrents to unreasonable police conduct appeared to be sufficiently

B. Use of Physical Force: An officer may use only such force as is necessary to carry out the authority granted by these Rules. The amount of force used to effect a stop shall not, however, be such that it could cause death or serious bodily harm to the person stopped. He may use his hands, legs, arms, feet, or handcuffs. If the officer is attacked, or circumstances exist that create probable cause to arrest, the officer may use the amount of force necessary to defend himself or to effect a full-custody arrest.

Id. at 305.


110. Id. at 50.
Despite its holding, however, the court warned that it would reconsider its decision should cases involving police use of excessive force become abundant, indicating the ineffectiveness of other deterrents.\footnote{112}

The refusal of courts to apply the exclusionary rule when an arrest is made with excessive force is puzzling in light of the traditional application of the rule to a fourth amendment violation.\footnote{113} A court could conclude the rule is appropriate on several grounds. First, the fourth amendment guarantees the "right of the people to be secure in their \textit{persons} . . . against \textit{unreasonable} searches and seizures . . . ."\footnote{114} Because excessive force is by definition unreasonable conduct during a seizure,\footnote{115} excessive force to arrest is clearly an unreasonable seizure despite the existence of probable cause. As to deadly force, the Supreme Court clarified this point in \textit{Garner} by stating that "it is plain that reasonableness depends on not only when the seizure is made, but also how it is carried out."\footnote{116} Second, the previously discussed investigative stop cases indicate that the predicate to the seizure (reasonable suspicion) does not alone make the seizure reasonable under the fourth amendment.\footnote{117} In stops, officers have a continuing duty once the requirement of reasonable suspicion is met to conduct the seizure reasonably.\footnote{118} The manner by which an arrest is made should also bear on the fourth amendment requirement of reasonableness. Third, excessive force used during a search to obtain evidence may result in application of the exclusionary rule,\footnote{119} despite

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\item \footnote{111} "Potential deterrent exists in the possibility of criminal sanctions; police departmental proceedings; civil rights actions; and common law tort suits. . . ." Id. at 51-52.
\item \footnote{112} "[W]e think it appropriate to caution that our holding is not immutable . . . [if other deterrents are found] illusory." Id. at 52.
\item \footnote{113} In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court imposed the exclusionary rule on the states. The Court held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments," and calls for suppression of evidence illegally seized. Id. at 657. In Wong Sun v. United States, 371 U.S. 471 (1963), the Court held that verbal evidence derived from an illegal entry and arrest is a "fruit" of official misconduct and may be suppressed. 371 U.S. at 479.
\item \footnote{114} The amendment provides: The right of the people to be secure in their \textit{persons}, houses, papers, and effects, \textit{against unreasonable searches and seizures}, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized. (Emphasis added).
\item \footnote{117} See supra notes 80-90 and accompanying text.
\item \footnote{118} See supra note 93 for the test for determining the reasonableness of an officer's conduct in conducting a seizure.
\item \footnote{119} See 2 W. LA FAVE, \textsc{Search and Seizure} § 5.1 (1978). Professor La Fave argues that the exclusionary rule could apply to excessive force in the arrest process. He bases his argument on Schmerber v. California, 384 U.S. 757 (1966) and Rochin v.
the existence of probable cause.\(^{120}\) It is logical, then, to conclude that the rule is as applicable to the unreasonable seizure of a person as it is to the unreasonable seizure of an object.

The deterrent effect of the exclusionary rule to excessive force in the arrest context is untested. In some instances, the rule’s effect would be limited or non-existent. For example, if unreasonable force used during an arrest resulted in the death of the arrestee, the application of the rule would be irrelevant.

In other instances, the exclusionary rule would be applicable as a deterrent to the use of excessive force. For example, if unreasonable force used was neither deadly nor egregious enough to warrant a suit for damages,\(^{121}\) evidence obtained incident to the use of undue force could be suppressed.\(^{122}\) However, the exclusionary rule has been criticized as an impotent deterrent\(^{123}\) and has recently been limited by

California, 342 U.S. 165, 172 (1952). In Schmerber, the Court held that the taking of blood samples from the body is reasonable under the fourteenth amendment provided they are taken to avoid “an unjustified element of personal risk and pain.” 384 U.S. at 772. Professor La Fave states:

[It] would seem to follow that the seizure of a person must likewise be reasonable from the use-of-force standpoint. And if, as held in Rochin v. California, the use of a stomach pump to seize evidence from the body violates due process because it is ‘conduct that shocks the conscience,’ then it would likewise appear to follow that due process is violated by a shocking use of force in making a seizure of a person.


Furthermore, La Fave argues that the fact that the purpose of an arrest is to obtain custody rather than acquire evidence is insignificant. Because an “arrest will be unlawful, necessitating suppression of evidence . . . if the arrest is accomplished by an unnecessary breaking into premises for purposes of arrest, the arrest should not be considered otherwise when it is accomplished by an unnecessary use of force against the person.” \(\text{Id.}\)

\(^{120}\) See State v. Williams, 16 Wash. App. 868, 875, 560 P.2d 1160, 1164 (1977) (choking defendant so he could hardly breathe exceeds bounds of reasonableness and evidence should have been suppressed); People v. Parham, 60 Cal. 2d 378, 382 33 Cal. Rptr. 1001, 1004 (1963) (brutal force in obtaining evidence should require suppression despite the existence of probable cause).

\(^{121}\) See ABA PROJECT, supra note 4, at 64. Unless an arrestee has suffered severe injuries, the cost of litigation may dissuade a victim of excessive force from pursuing civil remedies. \(\text{Id.}\)

\(^{122}\) For example, in State v. Sundberg, 611 P.2d 44 (Alaska 1980), the defendant sought to suppress a gun which was found on his person after the officer used excessive force to arrest him.

\(^{123}\) See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 655, 755 (1970). Oaks calls the rule a failure in deterring police because the rule has no “direct effect on the overwhelming majority of police conduct that is not meant to result in prosecution.” \(\text{See also}\) Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C. J. dissenting) (“the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective . . . .”)

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the Supreme Court. It may be that these factors will dissuade courts from considering an expansion of the rule.

Civil Suits

Though the use of excessive force incident to an arrest does not currently result in the invocation of the exclusionary rule, other remedies are available. A primary avenue for redress is a federal or state civil proceeding. Within the last twenty years, extensive litigation over police misconduct has arisen under 42 U.S.C. § 1983 due to several Supreme Court decisions expanding liability under this statute. In *Monroe v. Pape*, a suit against state officers based on an illegal search and seizure, the Court held that the existence of a state remedy does not preclude federal litigation, and that section 1983 should be “read against a background of tort liability that makes a man responsible for his actions.” Therefore, abuse by police acting in their official capacity may establish a constitutional deprivation in addition to a state tort claim. In 1978, the Court expanded section 1983 further. In *Monell v. Department of Social Services*, it held that a municipality could be liable for the unconstitutional conduct of its employees if an official policy or custom causes a plaintiff’s injuries. Two years later, the Court further held that a municipality could not assert a good faith defense to a section 1983 action.

A plaintiff asserting a section 1983 claim must first establish two essential elements: (1) deprivation of a constitutional right, and (2)

124. For example, in *United States v. Leon*, 104 S.Ct. 3405 (1984), the Court held that evidence obtained in objectively reasonable reliance on a search warrant later found to be defective may not be suppressed. However, should the Court expand the good faith exception beyond the fact of *Leon*, the applicability of the exclusionary rule to an arrest made with excessive force would be unaffected. It is unlikely that a determination could be made that an officer acted in good faith when he made an arrest with excessive force.

125. *See When Police Officers Use Deadly Force*, 94 U.S. NEWS & WORLD REP. 58-59 (1983), in which experts estimate that there are currently 20,000 suits against police pending.

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


128. *Id.* at 183.
129. *Id.* at 187.
131. *Id.* at 694.
causation of the deprivation by a person acting under color of law.\textsuperscript{133} Regarding the first requirement, federal courts differ as to which right, if any, is violated by the use of excessive force by police.\textsuperscript{134} Little unanimity exists as to whether the fourth,\textsuperscript{135} eighth,\textsuperscript{136} or fourteenth amendment\textsuperscript{137} is violated by the use of excessive force. Furthermore, at the time Garner was decided, the majority of courts held that no constitutional right was violated by the use of deadly force against non-violent felons.

**Deadly Force Under Section 1983**

Most federal courts upheld the constitutionality of the common law rule allowing law enforcement officers to kill non-violent fleeing felons in arrest situations.\textsuperscript{138} A few courts, however, laid the groundwork for the Supreme Court’s ultimate decision to strike down the rule. The eighth circuit was the first court to hold that the rule was unconstitutional in Mattis v. Schnarr,\textsuperscript{139} later vacated on procedural grounds. Mattis invalidated the rule by due process analysis, holding that the state failed to establish an interest equal to or greater than the individual’s right to life.\textsuperscript{140} The sixth circuit in 1983 followed

\textsuperscript{134} In Dandridge v. Police Dep't of the City of Richmond, 566 F. Supp. 152 (E.D. Va. 1983), the court discussed the great variation among the circuits in determining which constitutional right may be violated by excessive force. The court said in relation to these cases that “[j]udicial analysis of the support in the Constitution or the Supreme Court cases . . . is . . . very limited and far from conclusive.” Id. at 156.
\textsuperscript{135} U.S. CONST. amend IV. For the text of the amendment see supra note 8.
\textsuperscript{136} U.S. CONST. amend. VIII provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”
\textsuperscript{137} The amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

U.S. CONST. amend. XIV.

\textsuperscript{138} See Jones v. Marshall, 528 F.2d 132, 142 (2d Cir. 1975) (common law rule not fundamentally unfair); Cunningham v. Ellington, 323 F. Supp. 1072, 1075 (W.D. Tenn. 1971) (the rule is not punishment within the meaning of the eighth amendment). See also Connors v. McNulty, 697 F.2d 18 (1st Cir. 1983); Wiley v. Memphis Police Dept. 548 F.2d 1247 (6th Cir.), cert. denied, 434 U.S. 822 (1977). The common law rule has also been challenged and upheld in several state courts. See, e.g., Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982); Schumann v. McGuinn, 307 Minn. 446, 240 N.W.2d 525 (1976).

\textsuperscript{139} 547 F.2d 1007 (8th Cir. 1976), vacated as moot sub nom. Ashcroft v. Mattis, 431 U.S. 171 (1977).

140. The court in Mattis found that it was the function of the judiciary to balance “the interests of society in guaranteeing the right to life of an individual against the interest of society in insuring public safety.” 547 F.2d at 1019. In this due process analy-
Mattis in Garner v. Memphis Police Dept.,\textsuperscript{141} and held that the rule was both a violation of due process and of the fourth amendment’s prohibition of unreasonable seizures.\textsuperscript{142} The Supreme Court’s affirmation finally resolves the conflict of opinion as to the constitutionality of the felony-misdemeanor rule.\textsuperscript{143} The Supreme Court relied exclusively on the fourth amendment’s prohibition of unreasonable searches and seizures in Tennessee v. Garner.\textsuperscript{144} The Court began its analysis by stating that apprehension by use of deadly force is a seizure for fourth amendment purposes.\textsuperscript{146} The Court then used a balancing test to determine the reasonableness of the seizure.\textsuperscript{140} The nature of the intrusion on the suspect’s fourth amendment rights and his interest in life were weighed against society’s interest in effective law enforcement.\textsuperscript{147} Under this analysis, the Court found that the use of deadly force as a means to arrest all felony suspects is “constitutionally unreasonable.”\textsuperscript{148} The Court concluded that “[i]t is not better that all felony suspects die than that they escape.”\textsuperscript{149}

One of the most important aspects of Garner is that it firmly establishes that the use of deadly force in effecting an arrest is a constitutional issue. Prior to Garner, courts which upheld the common law felony-misdemeanor rule often deferred to the legislature as the proper forum to modify the rule.\textsuperscript{160} By this approach, the problem of

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\footnotetext[141]{The court relied on Roe v. Wade, 410 U.S. 113, 155 (1976), in which the Supreme Court held that a state may proscribe a woman’s right to abort her pregnancy subsequent to viability only by establishing a compelling state interest. Mattis cited Roe and stated that “[b]ecause we deal with a fundamental right, the Missouri statutes can be sustained only if they protect a compelling state interest ‘narrowly drawn to express only the legitimate state interest at stake.’” 547 F.2d at 1019. In Tennessee v. Garner, 52 U.S.L.W. 4410 (U.S. Mar. 27, 1985), the Supreme Court made no mention of Mattis. The Court did, however, use a balancing test similar to that used in Mattis, in which a person’s interest in his life is weighed against the public’s interest in law enforcement.}
\footnotetext[143]{710 F.2d at 247. The sixth circuit in Garner held, as in Mattis, that the state failed to meet due process requirements because it could not justify the common law rule by establishing a compelling state interest. The sixth circuit, unlike the Supreme Court’s analysis, found little case law supporting its fourth amendment analysis and relied heavily on Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), discussed infra note 145 and accompanying text. For a detailed analysis of the lower court’s disposition of Garner, see Comment, The Unconstitutional Use of Deadly Force Against Non-Violent Fleeing Felons: Garner v. Memphis Police Dep’t, 18 GA. L. REV. 137 (1983).}
\footnotetext[144]{Tennessee v. Garner, 53 U.S.L.W. 4410 (U.S. Mar. 27, 1985).}
\footnotetext[145]{Id. at 4411.}
\footnotetext[146]{Id.}
\footnotetext[147]{Id. at 4412.}
\footnotetext[148]{Id.}
\footnotetext[149]{Id.}
\footnotetext[144]{Id.}
\end{footnotes}
police killings was deemed a public policy issue for legislative consideration rather than a constitutional issue for judicial determination.151 Nevertheless, one scholar has observed that legislatures are reluctant to restrict police procedures because the public's fear of crime makes such legislation politically unpopular.152 This contention seems to be supported by the continued viability of the common law rule up to the time Garner was decided.

Excessive Force Under Section 1983

Despite the conflicts regarding the use of deadly force, most courts agree that the use of excessive force to effect an arrest can, in some circumstances, give rise to a section 1983 claim.153 Even so, substantial conflict exists in the federal courts as to which constitutional right is violated and by what degree of unreasonable force.

Some courts have held that the use of excessive force to effect an arrest is a fourth amendment violation.154 In Jenkins v. Averett,155 a police officer shot a man who had not committed a crime and was not charged with one. The court noted the language of the fourth amendment which specifically protects the security of the person.156 It stated that “this shield covers the individual's integrity,” and held that excessive force is an unreasonable seizure.157 Similarly, the court in Soto v. City of Sacramento,158 found a fourth amendment

151. "It is clearly the perogative of the state legislature to decide whether such restrictions on the use of force are consonant with public policy." Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1253 (6th Cir. 1972), cert. denied, 434 U.S. 822 (1977).

152. See Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 378 (1974). In discussing the unwillingness of legislatures to restrict police procedures, Amsterdam notes that "there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control." Id. at 379.


155. 424 F.2d 1228 (4th Cir. 1970).

156. The court noted that "[i]t should not be forgotten that the Fourth Amendment expressly declares 'the right of the people to be secure in their persons . . . .'" Id. at 1232.

157. Id.

violation in the use of excessive force.\textsuperscript{169} The court maintained that there is a continuing obligation of reasonableness under the fourth amendment even when probable cause is found.\textsuperscript{169}

A fourth amendment analysis of excessive force is appropriate because the amendment clearly addresses seizures of the person. However, not all courts follow a fourth amendment analysis when confronted with claims of excessive force incident to an arrest.\textsuperscript{161} The reluctance of courts to classify the use of excessive force to arrest as an unreasonable seizure may be the result of a singular emphasis on probable cause as determinative of the legality of the arrest.\textsuperscript{162} Hence, the element of probable cause and the manner by which an arrest is made are considered by some courts as separate legal questions.\textsuperscript{163} Garner could provide precedent for future assertions that there is a fourth amendment violation when the use of force is excessive.

Courts have also found fourteenth\textsuperscript{164} and eighth amendment\textsuperscript{165} violations in situations where law enforcement officers use excessive force to arrest. Courts have been receptive to a fourteenth amendment due process analysis, holding that unreasonable force at the hands of police violates liberty interests.\textsuperscript{166} The eighth amendment, on the other hand, is less often applied to section 1983 claims against officers for the use of excessive force.\textsuperscript{167} For example, Soto followed

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\item \textsuperscript{159} Id. at 672.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} See United States v. Reed, 639 F.2d 896 (2d Cir. 1981). In Reed, the court rejected the fourth amendment claim and stated that “[t]he seizure was pursuant to an arrest warrant issued with probable cause and therefore, ‘reasonable’ for the purposes of the Fourth Amendment . . . .” Id. at 901. See also Popow v. City of Margate, 476 F. Supp. 1237 (E.D. Pa. 1979), in which the court said, regarding Jenkins, that “[i]t constitutes a strained construction of the fourth amendment to term a negligent killing a ‘search and seizure.’” Id. at 1242 n.2.
\item \textsuperscript{162} Many courts have stated that an arrest made with excessive force is lawful. See, e.g., Hernandez v. City of Los Angeles, 624 F.2d 935, 937 (9th Cir. 1980) (a technically lawful arrest can be accomplished with excessive force); People v. Curtis, 70 Cal. 2d 347, 350, 450 P.2d 33, 39 74 Cal. Rptr. 713, 720 (1969) (the question of reasonable force is distinct from the legality of the arrest); Houghtaling v. State, 175 N.Y.S.2d 659, 666 (1958) (excessive force does not affect the legality of the arrest). This language is problematic because it implies that excessive force is lawful. Instead, the reasoning should be that an arrest is lawful because it was made with probable cause, even though it was accomplished in an unlawful manner.
\item \textsuperscript{163} This thesis may also explain why courts have not considered the exclusionary rule, discussed supra, in this area.
\item \textsuperscript{164} See supra note 137.
\item \textsuperscript{165} See supra note 136.
\item \textsuperscript{166} Conklin v. Barfield, 334 F. Supp. 475, 479 (N.D. Mo. 1971). See also Courtney v. Reeves, 635 F.2d 326, 329 (5th Cir. 1981) (the right to due process of law includes the right not to be treated with excessive force); Hamilton v. Chaifin, 506 F.2d 904, 909 (5th Cir. 1975) (excessive force violates due process); Melton v. Shivers, 496 F. Supp. 781, 784 (M.D. Ala. 1980) (officers who beat or inflict punishment are not acting in conformance with due process of law).
\item \textsuperscript{167} A few courts have held that the use of excessive force is an eighth amendment
Supreme Court precedent in other settings and held that the fourteenth and not the eighth amendment was the proper vehicle for addressing pre-trial claims of undue punishment.

The degree of unreasonable force required to constitute a section 1983 claim is also ill-defined. Although a section 1983 violation may also constitute a state tort claim, many courts hold that mere tortious conduct alone will not constitute a constitutional deprivation. Some courts determine that a battery becomes a constitutional violation when the force is inflicted as punishment. This determination again illustrates that grossly excessive rather, than mere unreasonable force, is needed to establish a claim against an officer. The standard may also explain why most successful section 1983 actions involve cases of flagrant police misconduct resulting either in death or serious physical injury. A plaintiff with lesser injuries may have


170. Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981) (some state-inflicted injury is so minor as to amount only to a state tort, not a constitutional violation); Moats v. Village of Schaumberg, 562 F. Supp. 624, 629 (N.D. Ill. 1983) (a tort under state law may not be actionable under § 1983); Bur v. Gilbert, 415 F. Supp. 335, 341 (E.D. Wis. 1976) (force used must be more than a technical battery).

171. See, e.g., Melton v. Shivers, 496 F. Supp. 781 (M.D. Ala. 1980), wherein the court stated that "[i]the function of police officers is not to determine guilt and inflict punishment. Therefore, if police officers act beyond their lawful authority and be at or otherwise inflict corporal injury upon suspects by way of punishment ... this action is not in conformity with due process of law." Id. at 787. See also Dandrige v. Police Dep't of City of Richmond, 566 F. Supp. 152, 161 (E.D. Va. 1983) (the question is whether the officer inflicted injury with malice).

A finding of punishment by an officer also serves to negate the good faith defense which is available under § 1983, based on Pierson v. Ray, 386 U.S. 547 (1967). In Pierson, the Court held that "[p]art of the background of tort liability ... is the defense of good faith ..." Id. at 556-57. See Feemster v. Dehnter, 661 F.2d 87, 89 (8th Cir. 1981) (there can be no question of good faith when officers inflict punishment).

173. ABA PROJECT, supra note 4, at 64.
difficulty establishing that a "mere battery" is a constitutional infraction.

State Courts

Establishing a cause of action in state court may be less problematic for an injured arrestee. Because suit may be brought under tort principles of liability, a constitutional violation is not essential. Nevertheless, plaintiffs often prefer federal to state court because a successful plaintiff may recover attorney fees in a section 1983 action. Therefore, the cost of litigation may make state court a viable alternative only for injuries severe enough to promise a substantial judgment.

In state proceedings, there is conflict regarding the standard of care against which an officer's conduct is measured. While some courts hold that police department rules are admissible as a standard, other courts reject administrative regulations and hold that state law controls. Because departmental policy is often more restrictive than state law, it is to a plaintiff's advantage to use departmental policy as a standard of care. Studies suggest that a conflict of interest between city attorneys and police administrators further complicates the problem of restricting the use of force in departmental policy. It is frequently assumed that clear-cut standards on the use of force may result in expanded civil liability should those standards be violated.


175. Id. at 3.

176. ABA Project, supra note 4, at 64.


179. See supra note 46 and accompanying text.

180. See H. Goldstein, supra note 65, at 123-24. Goldstein explains that city attorneys, who defend the city in lawsuits, often become concerned over expanded civil liability when clear policy regarding force is written.

181. Id. See also K. Matulka, supra note 12, at 33. In this report, the International Association of Chiefs of Police cautions police administrators against writing weak policy to avoid potential lawsuits. The report, however, also recommends that a written policy include a disclaimer that the policy "not be construed as a creation of a higher legal standard of safety" in a civil or criminal proceeding. Id.
Impact of Civil Suits

The adequacy of either section 1983 actions or state proceedings as viable remedies for injured plaintiffs has been questioned.\*\*\* In both state and federal courts, plaintiffs face numerous hurdles in winning verdicts. The plaintiff may be a minority, uneducated, and possibly accused of criminal activity.\*\*\* These factors tend to make a plaintiff less credible to a jury than a police-officer defendant.\*\*\* Furthermore, as a practical matter, a civil suit for damages is an unsatisfactory recourse for the victim of excessive force who has suffered little or no injury.

The deterrent effect of civil proceedings is also uncertain. The Presidents Commission on Law Enforcement and the Administration of Justice found that civil litigation seemed an unlikely tool to shape police practices.\*\*\* Additionally, a 1979 study of 149 section 1983 actions against the police found that few policy changes resulted from litigation.\*\*\* The dearth of deterrence was attributed to small and infrequent awards, continued police support from civic leaders, and the inconsequential impact on individual officers who were either insured or indemnified against adverse judgments.\*\*\* However, these actions do have some effect on police procedures. For example, a fifty-million dollar damage suit filed against a Southern California city and police department provoked an official investigation into numerous complaints of police brutality,\*\*\* even though this suit ulti-

\*\*\* See Takagi, Death by Police Intervention, in A COMMUNITY CONCERN: POLICE USE OF DEADLY FORCE 31 (1979). "To prosecute an individual police officer for the wrongful death of a citizen . . . is distributive justice and not social justice." Id. at 39. See also Hinds, Police Use of Excessive Force: Racial Implications, in A COMMUNITY CONCERN: POLICE USE OF DEADLY FORCE 9 (1979) (asserting that civil litigation will not produce systematic changes in the police use of deadly force).

\*\*\* Guardians, supra note 3, at 129.

\*\*\* Id.

\*\*\* President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report: The Police (1967) [hereinafter cited as Task Force Report]. "It seems apparent that civil litigation is an awkward method of stimulating proper law enforcement policy. At most, it can furnish relief for the victim of clearly improper police practices." Id. at 32.


\*\*\* Id. at 813.

\*\*\* This suit was filed by the parents of Ron Settles against the city and police department of Signal Hill, California. Settles was a black college football player who was stopped for a traffic violation and arrested for possession of cocaine by Signal Hill Police. N.Y. Times, Nov. 2, 1981, at 16, col. 3. Police officers admitted beating Settles because he was belligerent during the arrest; three hours later he was found hanging in his jail cell. L.A. Times, Dec. 9, 1981, § II, at 1, col. 5. A coroner's inquest jury ruled that the death was "at the hands of another" and not a suicide, as police claimed. San Diego
mately settled out of court.\textsuperscript{189} Although less sensational cases may go largely unnoticed, some civil suits do result in public, if not municipal, pressure on police practices.

\textit{Criminal Sanctions}

Criminal sanctions are an even more unlikely deterrent to the use of excessive force than civil actions. Numerous factors impede criminal prosecution of police officers. At the state level, vigorous prosecutions are often hindered because local district attorneys are unwilling to charge police with criminal conduct due to the necessary interaction between the two groups.\textsuperscript{190} At both the state and federal levels, the higher burden of proof contributes to the paucity of criminal prosecution.\textsuperscript{191} As in civil actions, juries must often decide whether to believe the police officer's account of an arrest situation or the arrestee's. In these cases, juries are most likely to defer to the judgment of the officer.\textsuperscript{192}

Criminal prosecution at the federal level is also rare.\textsuperscript{193} The two principal federal statutes under which these actions are brought are 18 U.S.C. \textsection 241\textsuperscript{194} (requiring a conspiracy) and 18 U.S.C. \textsection 242.\textsuperscript{195}

\begin{footnotesize}
\begin{enumerate}
\item<sup>189</sup> N.Y. Times, Jan. 14, 1983, at 8, col. 5.
\item<sup>190</sup> GUARDIANS, supra note 3, at 103.
\item<sup>191</sup> See Comment, United States v. City of Philadelphia: \textit{A Continued Quest For an Effective Remedy For Police Misconduct}, 7 BLACK L.J. 180, 197 (1981).
\item<sup>192</sup> GUARDIANS, supra note 3, at 102.
\item<sup>193</sup> The U.S. Department of Justice receives more than 10,000 complaints of police misconduct each year and prosecutes between fifty and one hundred. See GUARDIANS, supra note 3, at 112-13.
\item<sup>194</sup> The section provides as follows:
If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured
They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.
\item<sup>195</sup> The section provides:
Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.
\end{enumerate}
\end{footnotesize}
Section 242 is essentially the criminal counterpart to section 1983 though it also requires proof of specific intent to deprive a person of a constitutional right.\textsuperscript{196} Like section 1983, section 242 also seems to require egregious wrongdoing before a constitutional violation will be found,\textsuperscript{197} further limiting the incidence of criminal prosecution.

In summary, because of their infrequency and limited scope, state and federal prosecutions have little impact on the use of force by law enforcement officers. In addition, criminal prosecution, by its nature, addresses individual misconduct rather than inadequate standards that may make misconduct likely.\textsuperscript{198} For instance, a violence-prone officer may be criminally prosecuted and dismissed from a department. However, this will not prevent the use of excessive force that occurs within the law as a result of overbroad rules.

\textit{Injunctions}

Another method of externally controlling police practices is an injunction. Plaintiffs have had only limited success at the federal level in obtaining injunctions against the police.\textsuperscript{199} A recent example is \textit{City of Los Angeles v. Lyons}.\textsuperscript{200} In \textit{Lyons}, the plaintiff sought injunctive relief barring the use of the chokehold by the Los Angeles Police Department. The plaintiff had allegedly been subjected to the restraint procedure after being stopped for a traffic violation and offering no resistance.\textsuperscript{201} The Supreme Court dismissed the claim,

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  \item[196.] The Supreme Court imposed the requirement of specific intent in Screws v. United States, 325 U.S. 91, 101 (1945).
  \item[197.] See, e.g., United States v. Delerme, 457 F.2d 156 (3d Cir. 1972). \textquoteleft It is one thing to be guilty of excessive force, and thus chargeable with violating the law of the state or territory; it is quite another for a policeman to administer physical beating as punishment for allegedly breaking the law.	extquoteright Id. at 161.
  \item[198.] The U.S. Commission on Civil Rights found that a principal obstacle to criminal prosecution against the police is that the criminal law is designed to redress specific incidents of misconduct rather than the activities of an entire department. See \textit{Guardians}, supra note 3, at 101.
  \item[199.] In \textit{Rizzo v. Goode}, 423 U.S. 362 (1976), the Supreme Court reversed the lower court's order which required the Philadelphia Police Department to develop a comprehensive program for addressing civilian complaints of police misconduct. The Court reversed on the grounds that (1) the class action plaintiffs failed to demonstrate that they were threatened by an immediate injury, and (2) federal intrusion into the state's administration of its own laws was inappropriate. \textit{Id.} at 374, 378-79.
  Federal injunctions have been granted in cases establishing patterns of police misconduct. See \textit{Allee v. Medrano}, 416 U.S. 802 (1974) (enjoining a police department from interfering with formation of union organizational activities); \textit{Lankford v. Gelston}, 364 F.2d 197 (4th Cir. 1966) (enjoining a police department from the practice of conducting warrantless searches based on anonymous tips).
  \item[200.] 461 U.S. 95 (1983).
  \item[201.] \textit{Id.} at 98.
\end{itemize}
\end{footnotesize}
holding that the plaintiff lacked standing to sue because he could not prove an immediate threat of again suffering injury as a result of the practice. In doing so, the Court reiterated its position that the balance of powers limits the federal judicial role in police affairs. It directed plaintiffs who seek equitable relief against municipal police to pursue actions in state court.

The unwillingness of plaintiff to pursue equitable relief against local police in state courts seems, at first glance, perplexing because local police are engaged in the administration of the state's criminal laws. One scholar has attributed the reluctance of plaintiffs to pursue actions in state courts to several factors. First, the doctrine of res judicata may prevent subsequent federal litigation. Plaintiffs may be unwilling to sacrifice a possible federal claim. Second, federal judges are presumed to be more supportive of citizens' rights to be free from improper police activities. State judges, who are concerned with re-election, may be reluctant to condemn police practices.

At the state or federal level, injunctive relief seems unlikely to change existing law. Injunctive relief is valuable only when a particular illegal activity is supported by a police department. Assuming that the use of undue physical force is the product of inadequate rules and ineffective deterrents, injunctive relief against a particular department will have little effect on the general use of excessive force.

Non-Judicial Controls Over Police

Another alternative for regulating police use of force is to monitor police practices either within a department or by external review. The effectiveness of these non-judicial controls, however, is contested. Although one report did find that internal procedures were

202. The Court stated the following: That Lyons may have been illegally choked by the police ... does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. Id. at 95.

203. The Court in Lyons recognized "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws." Id. at 112.

204. "The individual states may permit their courts to issue injunctions to oversee the conduct of law enforcement authorities ... [T]his is not the role of the federal court absent far more justification." Id. at 113.

205. Id. at 112.

206. H. Goldstein, supra note 65, at 181.

207. Id. at 186 n.50.

208. Id. at 181.

209. See supra note 199.
the best way to deal with police misconduct, various other sources question the ability of the police to monitor themselves adequately.

Numerous factors can hinder effective internal control. Objective internal investigation is difficult because police officers are often the only witness to police actions other than the arrestee. One scholar found that officers will rarely incriminate each other and will either support a fellow officer’s action or deny knowledge of the incident. A further complication is that departmental policy is often vague concerning standards of conduct in police-citizen encounters. Absent active contributions by police administrators and officers, the effectiveness of internal investigation is limited.

External review board evaluation of complaints is an alternative to internal monitoring. These review boards consist either entirely of citizens or of a combined group of police and citizens. In the past twenty years, citizen review boards have had limited national success. Their overall failure has been attributed to various factors, such as police resistance to and resentment of outside review, and complicated procedures which are designed to insure fairness but produce confusion for those seeking review. The United States Commission on Civil Rights found that the failure of citizen review boards was primarily due to their limited advisory nature and lack of power to decide cases or impose discipline. Even so, some com-

210. TASK FORCE REPORT, supra note 185, at 193.
211. The U.S. Commission on Civil Rights reported that an officer in Philadelphia was disciplined on nine different occasions before being dismissed. See GUARDIANS, supra note 3, at 85. Also, an officer involved in the Signal Hill investigation, discussed supra note 178, had been previously named in nine brutality claims. In six instances, the arrestees said that they were beaten until they became unconscious. L.A. Times, Oct. 11, 1981, at 3, col. 1. See also H. GOLDBERG, supra note 65, at 160-65. Goldstein notes that often a citizen’s complaint will be about police conduct which was actually within the officer’s legal authority. Many departments will, therefore, vindicate the officer’s conduct even though he acted improperly but not illegally.
212. Id. at 165.
213. Id. at 165-66.
214. Id. at 162.
215. GUARDIANS, supra note 3, at 124.
216. See Comment, supra note 191, at 197.
217. See ABA PROJECT, supra note 4, at 66. See also W. GELLIORM, WHEN AMERICANS COMPLAIN (1966), in which the author reports that in 1965, the International Association of Chiefs of Police described civilian review boards as a type of control alien to the democratic process. Id. at 171.
218. Id. at 185-88. Gellhorn describes a complicated New York procedure in 1966 and he concludes that the complainant would begin to wonder “whether the game was worth the effort.”
219. GUARDIANS, supra note 3, at 125.
mentators believe that external citizen review is the best means of curbing excessive force, reasoning that civilian authority can spark public awareness of police officer abuse of discretion.\textsuperscript{220}

In sum, citizen review may be an important vehicle for objective review of complaints if it is made more accessible to the public. However, both internal and external review occur only subsequent to an officer's alleged wrongdoing which provokes a citizen's complaint. Like the criminal law, review assesses, at best, individual misconduct and makes no attempt to change inadequate standards of conduct.

\textit{Empirical Data}

Statutory and case law illustrate some legal limits on the use of force to effect the seizure of the person. The wide varieties of remedies noted above indicate that there is a recognized need for some avenue of redress for injured persons. Statistical data, however, clarifies the need for stricter rules on the use of force. It has been concluded that police homicides and abuses are too frequent\textsuperscript{221} or too arbitrary.\textsuperscript{222} Moreover, available statistics reveal the impact in loss of life that the existing inadequate legal rules have on society.

The IACP estimates that between 1970 and 1979, 3094 persons were killed by police in fifty-seven United States cities.\textsuperscript{223} The IACP also found that jurisdictions with the common law rule on deadly force had a considerably higher "justifiable homicide rate" than either modified common law or Model Penal Code states.\textsuperscript{224} Though the actual number of police homicides is uncertain,\textsuperscript{225} the IACP's estimations indicate that between 1970 and 1979, American police have killed, on the average, nearly one person per day.\textsuperscript{226}

Every available study in the last twenty years recognizes that minorities are the victims in a disproportionate number of police killings.\textsuperscript{227} This imbalance has been attributed to a variety of factors,

\begin{itemize}
  \item 220. Hinds, \textit{supra} note 182, at 7, 9.
  \item 221. Harper, \textit{supra} note 43, at 368.
  \item 222. Sherman, \textit{supra} note 33. Sherman suggests that a reasonable inference can be drawn that police homicides are arbitrary, based on the relative rarity of occurrences per number of arrests. \textit{Id.} at 94.
  \item 223. K. Matulja, \textit{supra} note 12, at 22.
  \item 224. \textit{id.} at 12.
  \item 225. Police department reporting of data regarding justifiable homicides to the FBI is voluntary. The second major source of data, the National Center for Health Statistics, records police killings from death certificates. These tabulations are assumed to be inaccurate due to poor medical diagnosis and mechanical errors. \textit{Id.} at 15.
  \item 227. K. Matulja, \textit{supra} note 12, at 14. The report found that blacks comprised 59.6\% of persons killed by police. \textit{See also} C. Milton, J. Halleck, J. Lardner & G. Albrecht, \textit{Police Use of Deadly Force} 19 (1977), in which blacks were found to comprise 79\% of all shooting victims in a seven-city study. \textit{See generally} \textbf{A Community Concern: Police Use of Deadly Force} (1979) (discussion of empirical data on police
\end{itemize}

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including possible racial bias\textsuperscript{228} and minority over-representation in arrests for violent crimes.\textsuperscript{228} One scholar has concluded that, no matter how one interprets the statistics, the number of blacks killed by police is too disproportionate to be justified.\textsuperscript{230}

Though many studies have focused on police use of firearms, the use of other types of force is more incalculable and often ignored until controversy erupts. The chokehold,\textsuperscript{231} for example, was used more frequently by the Los Angeles Police Department (LAPD) in altercations with citizens than any other control device.\textsuperscript{232} At the time \textit{Lyons} was brought to the Supreme Court, the device was not considered "deadly force" by the LAPD, though sixteen persons had died following its use.\textsuperscript{233} Reiss, a scholar who has done extensive research on the police, found in a 1966 study that police use of excessive force in metropolitan areas was not uncommon, the most likely targets being police suspects.\textsuperscript{234} Though this study is nearly twenty years old, its conclusion regarding the probable victims of excessive force seems unlikely to be outdated. It is logical to assume that those most vulnerable to the use of unreasonable force are those with whom the police are likely to have confrontational encounters.

Other studies indicate that police are provoked to use force for reasons other than the duty to arrest or stop. For example, citizen disrespect for police has been found to be a major inducement.\textsuperscript{235} An officer's fear or panic in a situation may also contribute to the decision to use force.\textsuperscript{236} Another study found that younger and more

\begin{itemize}
  \item \textsuperscript{228} See Hinds, \textit{supra} note 182, at 7, 8.
  \item \textsuperscript{229} K. Matulka, \textit{supra} note 12, at 23.
  \item \textsuperscript{230} Takagi, \textit{supra} note 182, at 31, 33.
  \item \textsuperscript{231} The chokehold is a control device. To use, the officer uses his forearm to apply pressure to a suspect's neck, reducing the flow of oxygen and thereby rendering the person unconscious. City of Los Angeles v. Lyons, 461 U.S. 95, 97 n.1 (1983).
  \item \textsuperscript{232} \textit{Id.} at 116.
  \item \textsuperscript{233} \textit{Id.}
  \item \textsuperscript{234} Reiss, \textit{supra} note 64, at 321. In a seven-week study, Reiss found police used excessive force in 37 out of 3826 encounters. Reiss determined that force was excessive when it was applied in one of the following ways: (1) if a policeman physically assaulted a citizen and then did not make an arrest; (2) if the citizen being arrested did not resist; (3) if the policeman could have easily restrained the citizen without force; (4) if many police officers were present and could have assisted in subduing the citizen; (5) if an arrestee was handcuffed and offered no resistance; and (6) if the citizen resisted, but the use of force continued after the citizen was restrained. \textit{Id.} at 323-24. Reiss cautioned that his figures were deceptively low because the rate consisted of all encounters between police and citizens rather than the population most vulnerable to abuse, police suspects (arrestees or persons stopped). \textit{Id.} at 327.
  \item \textsuperscript{235} W. Westley, \textit{Violence and the Police} 122 (1970).
  \item \textsuperscript{236} See Binder, \textit{The Violent Police-Citizen Encounter}, 452 \textit{Annals} 114, 118.
\end{itemize}
inexperienced officers are more likely to resort to the use of firearms than their older counterparts.\textsuperscript{237} These and other factors illustrate the complicated variable that may determine whether force will be used in an arrest situation.

Another factor that affects the decision to use force is the training that an officer receives in the use of force.\textsuperscript{238} The United States Commission on Civil Rights reported in 1981 that training in the use of deadly force was insufficient and subject to the ambiguities of state law and administrative policy.\textsuperscript{239} The Commission’s report found that new recruits and even experienced officers have difficulty determining when deadly force may be used according to a vague statute.\textsuperscript{240} Another study found that great disparity existed among individual officers in their perception of policy within a single department.\textsuperscript{241} The training that officers receive in both state law and departmental rules on the use of force may produce confusion. For example, in San Diego, California, police recruits study from training manuals comprised mostly of state law for a seventeen week course. Thereafter, seven days are spent learning departmental rules before field work with a senior officer begins.\textsuperscript{242} Ignoring other aspects of training, vague state law offers little or no guidance to a police recruit who is learning about his legal authority to use force.

The variety of factors that influence the use of force by law enforcement officers are too numerous for one Comment to address. It is clear, however, the legal rules provide the minimum standard to which administrative policies and individual officers must conform. Legal rules must be flexible enough to allow an officer to perform his duties in diverse situations. Currently, these legal standards are so flexible that the limits of permissible force are ambiguous to citizens and police.

**SUMMARY AND PROPOSAL**

The law governing the use of force by law enforcement officers has not adequately developed to define the boundaries of permissible force. Statutes, case law, and empirical studies reveal the need for more restrictive and specific rules rather than for more remedies. *Tennessee v. Garner* is an important development, but it is only the first step toward specificity and modernization of the law. In its

\textsuperscript{237} Uelmen, *supra* note 49, at 10-11.
\textsuperscript{238} The President's Commission on Law Enforcement and Administration of Justice found in 1967 that departments nation-wide needed to upgrade their training criteria. *See Task Force Report, supra* note 185, at 142-43.
\textsuperscript{239} Guardian, *supra* note 3, at 29-30.
\textsuperscript{240} Id.
\textsuperscript{241} Uelmen, *supra* note 49, at 50.
\textsuperscript{242} Telephone interview with Adolfo Gonzales, Academy Advisor of San Diego Regional Law Enforcement Training Center (June 5, 1984).
narrowest sense, Garner means that an officer may not use deadly force to arrest a suspect when the officer has probable cause to believe that suspect is non-dangerous. Despite this decision, many statutes are comprised of broad and archaic terms, subject only to judicial restriction. Furthermore, much of current law demands that an officer make a probable cause judgment of the nature of a crime committed as a predicate to the use of deadly force. Regarding the use of non-deadly force, the case law is ambiguous and arbitrary in its determination of what is reasonable or unreasonable force. Administrative rules, which are the most progressive in terms of limiting force, are of varying clarity and may be useless to an injured arrestee. Instead, the law often shields that officer from any question of his judgment. Furthermore, the failure of rulemaking bodies to agree that excessive force to arrest is an unreasonable seizure under the fourth amendment makes unclear and equivocal an arrestee’s constitutional protection from unreasonable force.

To limit effectively the use of force, legislative, judicial, and administrative bodies must develop standards that both safeguard the physical security of arrestees and protect law enforcement officers in the fulfillment of their duties. To date, statutory language on the use of force is non-specific and unclear. For example, California’s statute, based on the common law rule, permits an officer to use “reasonable force” to arrest.\(^\text{243}\) An officer may use deadly force “in arresting persons charged with a felony, and who are fleeing from justice or resisting such arrest.”\(^\text{244}\) New York’s modified common law statute permits an officer to use physical force “when and to the extent he reasonably believes such to be necessary,” and permits deadly force for specific felonies.\(^\text{245}\) Even the Model Penal Code,
which more carefully limits the use of deadly force, only restricts an officer to use of such non-deadly force as is “immediately necessary” to effect an arrest. All three of these statutory approaches are permissible under Garner, yet each one is flawed by vagueness.

Restrictive statutory language need not deprive an arresting officer of the necessary authority to use force nor hamper him in the performance of his duties. For example, a narrower but more comprehensive statute could provide as follows:

Use of Physical Force in Law Enforcement:
(1) Use of Force to Effect an Arrest: A law enforcement officer, in the course of making or attempting to make an arrest based upon probable cause, may use:
   (a) a reasonable degree of physical force, short of deadly force, when the officer reasonably believes such to be necessary to take custody of another.
   (b) deadly force only when he reasonably believes that such force is necessary to protect himself or another from imminent death or serious bodily harm.
(2) Use of Force to Effect an Investigations Stop:
   A law enforcement officer, in the course of making or attempting to make an investigative stop based upon reasonable suspicion, may use a reasonable degree of physical force, short of deadly force, when the officer believes that such force is necessary to make the stop or protect himself from potential physical harm.
(3) A Violation of Any Part of this Statute Shall Result in One or More of the Following:
   (a) Criminal Prosecution: Unless death results, a law enforcement officer who violates this statute shall be fined not more than $10,000, imprisoned not more than three years, or both. If death results, the law of homicide shall govern.
   (b) Exclusion of Evidence: A court shall suppress any evidence found incident to a violation of this statute provided that the motion to suppress is brought by an accused who was himself the direct subject of such violation;
   (c) Existing and future civil remedies against a law enforcement officer and/or his superiors are not affected by this statute.

The limitation of force by statute cannot address particular police practices in the use of force. However, this proposed statute would conform to the principles of Garner and would lay the groundwork for further developments. In the area of deadly force, statutory language would clarify what many police administrators, legal scholars, and members of society agree is fundamental: that the sanctity of life supercedes the benefit of aggressive law enforcement. Because federal and other police agencies already use this standard, though no statute has codified it, the rule has been tested as a workable and

custody, or to defend himself or a third person from what he reasonably believes to be the use of imminent use of physical force.

Deadly force is allowed in self-defense, defense of another, if the felony involved the use of physical force against a person, and for kidnapping, arson, escape in the first degree, burglary in the first degree, or any attempt to commit such a crime. Id. 246. MODEL PENAL CODE § 3.07(1) (Proposed Official Draft 1962). “[T]he use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.” Id.
realistic standard. Importantly, this standard recognizes that there are instances, such as the attack discussed in the introduction of this Comment, where the police must be vested with the legal authority to kill rather than arrest. Furthermore, the standard relieves an officer from the burden of making a probable cause determination of the dangerousness of a crime previously committed.

The stricter standard on non-deadly force attempts to minimize the use of physical force in situations where the arrestee physically resists the officer’s authority or otherwise threatens the officer or another person. Because it is likely that some arrestees will not acquiesce to the officer’s orders, an officer must be authorized to use physical force to effect custody. However, the use of force must be legally justified only in these situations. Once the officer has restrained the person or when the arrestee complies, the officer’s authority to use force ends.

Another advantage to a narrower rule on the use of deadly and non-deadly force is that it may obviate the need for an injured arrestee to establish that the officer used grossly excessive rather than unreasonable force in civil actions. While juries may still favor a police officer-defendant to a plaintiff who was possibly involved in criminal activity, the plaintiff’s burden of proof would not be so heavy. Presently, the plaintiff’s burden of proof against the officer is akin to the higher burden of proof required for a criminal prosecution. In effect, a narrower rule on the use of force would make unjustified injuries more compensable.

The inclusion of sanctions as part of the statute is intended to clarify and summarize the penalties for the use of excessive force. Officers, judges, and citizens should clearly recognize the criminal, evidentiary, and civil consequences of illegal force. Furthermore, the extension of the exclusionary rule by statute gives a legislative mandate to invoke the rule when illegal force benefits the prosecution yet corrupts the criminal justice system.

The judiciary, like the legislature, should uniformly recognize that excessive force to effect an arrest is a violation of the fourth amendment’s prohibition of unreasonable seizures. Because arrests and stops are both fourth amendment seizures, the existing determinations that excessive force to effect a stop and deadly force to effect certain arrests are unreasonable seizures support this thesis. Regarding criminal prosecutions, an extension of the exclusionary rule to arrests made with excessive force would be given further support. In civil actions under section 1983, an injured plaintiff would be able to
enter a claim on firm constitutional grounds.

The proposed statute also authorizes law enforcement officers to use reasonable force in making investigative stops. The statute permits the use of reasonable force when an officer meets resistance or fears for his safety; it does not attempt to specify the type of force appropriate to the situation. A defendant's primary purpose in contesting the use of force in a stop is to obtain a judgment that the seizure itself was illegal. The case law in this area, however, often draws fine distinctions between reasonable and unreasonable force. Therefore, the role of police administrators is to articulate specific policy on the type of force permitted to make investigative stops. Force associated with arrests — guns and handcuffs — should be permitted only in extenuating circumstances where specific facts dictate physical force as necessary to protect the officer and ensure compliance with his order to stop.

To summarize, the rules on the use of force to effect arrests and stops should reflect a balance between three criteria: compliance with the seizure, minimum invasion on the physical security of the person stopped or arrested, and protection of the police officer and the public. Some of the current judicial analyses of excessive force to stop may come nearer to meeting these criteria. Because the degree of force used to effect a stop may be as integral to the legality of the seizure as the element of reasonable suspicion, the manner by which the seizure is made is more likely to conform to the fourth amendment requirements of reasonableness. The use of both deadly and non-deadly force to arrest should be subject to this type of scrutiny. Whether Garner's reasonableness requirement will extend to arrests made with excessive non-deadly force is unclear.

More restrictive rules on the use of force could have the effect of initially increasing liability of officers and their departments. For example, a uniform rule on the use of deadly force limited to defense-of-life situations could produce civil or criminal liability in instances where currently only internal discipline may result. However, stricter legal rules could also decrease departmental liability by making individual officers' responses to situations more uniform. Hence, more restrictive rules on the use of force would benefit not only citizens who are subjected to force but also law enforcement officers.

**CONCLUSION**

Society's interest in the safe and effective containment of violent behavior must be reflected in the laws and procedure of those charged with the duty of law enforcement. However, the abuse of force arouses society's fear of the very agencies empowered to protect it. Trust and cooperation between citizens and police cannot exist in an atmosphere of fear. Through the restriction and redefinition
of the permissible use of force, society and the police will be free from the burden of fear to work together toward the mutually desired end of peace and order.

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