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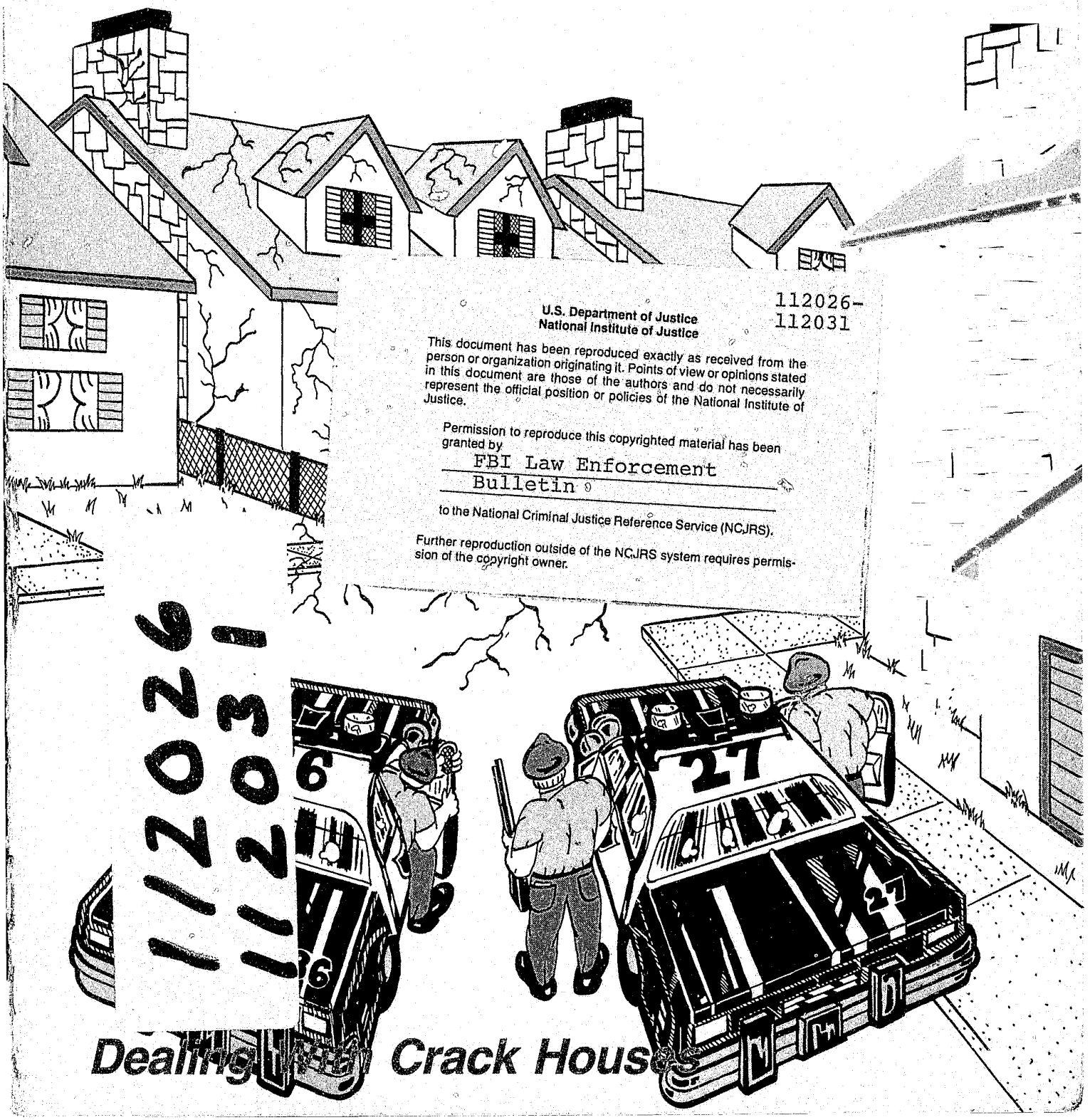

Dealing With Crack Houses

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Police Use of Deadly Force to Arrest

A Constitutional Standard

(Part I)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Consider the following statement:

"If effective law enforcement is to be maintained, the race must not be to the swift. The fleeing criminal, regardless of his offense, must be considered the author of his own misfortune." [1]

On the other hand:

"Without in any way disparaging the importance of these goals [i.e., effective law enforcement], we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. . . . [The parties] have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life." [2]

But:

"Without questioning the importance of a person's interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary. . . . [T]o avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt." [3]

These seemingly irreconcilable statements describe a conflict that has raged within our society and the courts for many years. They reflect the concerns of intelligent and well-meaning people who struggle to strike a proper balance between the sometimes competing interests of the individual (in his own life) and society (in effective enforcement of its laws). State legislative bodies, police policymakers, and more recently, the courts have confronted this dilemma and sought to resolve it. The result is that today, the law enforcement officer's decision to use deadly force implicates a number of different — and sometimes differing — guidelines by which the correctness of his decision may be assessed.

Historically, State law has been the primary means of defining police authority to use deadly force. However, in recent years, police administrators —

". . . today, the law enforcement officer's decision to use deadly force in a given set of circumstances implicates a number of different—and sometimes differing—guidelines . . . ."

been generally characterized as the "fleeing felon" rule.

Statutory and Policy Changes

Following the establishment of American independence, most States adopted the "fleeing felon" rule by statute or court decision. After all, felonies were by definition serious offenses, frequently punishable by death. Furthermore, in the days when communications were only as fast as the legs of man or horse and organized police forces were nonexistent, the likelihood of an escaping — and perhaps unidentified — suspect's later capture was remote, to say the least.

The passage of time brought dramatic technological and organizational changes to American law enforcement, and with those changes, came pressures to modify the "fleeing felon" rule. Partly as a response to these changes and pressures, some States adopted modifications of, or alternatives to, the "fleeing felon" rule, which generally tended to limit the use of deadly force by police to those circumstances where it was necessary to prevent the escape of a "dangerous" felony suspect. Typically, that meant that either the suspected felony must be one defined by law as "dangerous" or "forcible," or there must exist some other reason to believe that immediate apprehension was necessary to avoid risk to the officer or others.

Apart from these statutory developments, many law enforcement agencies adopted policies which were stricter than the "fleeing felon" rule of their respective States. The reasons for such policies are varied, but undoubtedly reflect sensitivity to the pressures generated by the media, citizen groups, and lawsuits (or perceived risks thereof) whenever police action culminates in the use of deadly force. To paraphrase a famous college football coach who decried the evils of the forward pass, when it does occur, "three things can happen and two of them ain't good." Whether such a cautious attitude is in the best interests of society is a matter for debate, but given the pressures on the modern-day American police administrator, it may be at least understandable that the escape of a felon — even a dangerous one — is sometimes viewed as the lesser of several evils.

THE CONSTITUTIONAL CHALLENGE

For most of our 200-year history, the States exercised their police powers unfettered by the Federal courts and Constitution. The Bill of Rights restrained only the powers of the Federal Government and had no application to the States. The first significant change came with the adoption of the 14th amendment in 1868, which specifically requires adherence to "due process of law" before a State can deprive any person of "life, liberty or property," and which paved the way for Federal legislation — e.g., Title 42, U.S. Code, Section 1983 — designed to enforce the provisions of that amendment in Federal courts.

Notwithstanding the apparent importance of the change, both the amendment and the enabling legislation were largely symbolic, with little practical impact on State police powers until well into the 20th century. It was in the 1930's that the Supreme Court began to accept review of State criminal cases in light of the "due process" requirement of the 14th amendment. Viewing due process as requiring adherence by the State to the concept of "fundamental fairness," the Court began the process of selectively applying to the States portions of the Federal Bill of Rights considered by the Court to be "fundamental to the concept of ordered liberty. The result was a phenomenon frequently described as a "criminal procedure revolution," wherein virtually all law enforcement activities have been "constitutionalized."

Coupled with this process of "selective incorporation" were two Supreme Court decisions — *Mapp* v. *Ohio*[6] and *Monroe* v. *Pape*[7] — without which the criminal procedure "revolution" could not have occurred. Decided in 1961, both cases fashioned remedies for alleged violations of Federal constitutional rights by State and local police: The first by requiring the suppression of unconstitutionally seized evidence at State criminal trials; the second by facilitating lawsuits in Federal court against State and local officials for violations of Federal constitutional rights.

Although these developments allowed constitutional challenges to most police practices, they did not have an immediate impact on the "fleeing felon" rule, which was still the prevailing law in most States. The reason lies in the fact that applications of deadly force by police were generally grounded upon either State statute or departmental policy, or both. The 11th amendment to the U.S. Constitution precludes suits against the States without their consent, and in *Monroe* v. *Pape*, the Supreme Court interpreted § 1983 to allow suits only against natural persons, not

". . . the focus of [constitutional] challenges [to the police use of deadly force] was, of necessity, on the officer's actions, rather than the policy or law that may have prompted them."

government entities. Furthermore, in *Pierson* v. *Ray*,[8] the Court held that a police officer sued under §1983 enjoyed a defense of qualified immunity from such suits if the officer was acting in "good faith," with a reasonable belief in the lawfulness of his actions.

In combination, these three factors meant that neither the State which enacted a statute nor the municipality which adopted a policy could be sued under §1983, and an officer acting under the authority of either was generally held to be entitled to a good faith belief in their lawfulness. That is not to say that there were no constitutional challenges to the police use of deadly force. It simply means that the focus of such challenges was, of necessity, on the officer's actions, rather than the policy or law that may have prompted them. Consequently, efforts to reach beyond the officer to challenge the statute or policy were consistently thwarted by these limitations.

A case in point is *Mattis* v. *Schnarr*,[9] in which a Missouri police officer shot and killed a fleeing burglary suspect pursuant to a State statute which codified the common law "fleeing felon" rule. In the resulting §1983 lawsuit filed against the officer, it was determined by the trial court that the officer enjoyed the defenses of good faith and probable cause. Although the Federal appellate court agreed on the issue of the officer's good faith defense, it nevertheless concluded that the State statute under which the officer acted violated the "fundamental right to life" as guaranteed by the 14th amendment Due Process Clause. On review, the Supreme Court set aside the appellate court's decision on the procedural ground that since the only viable defendant, the officer, was shielded by the good faith defense, there remained "no case or controversy" to justify Federal court jurisdiction.[10] Two additional Supreme Court decisions would be necessary to alter this picture, and they were not long in coming.

In 1978, the Court decided *Monell* v. *Department of Social Services*,[11] which held that local government entities could be sued under §1983 in appropriate circumstances. While emphasizing that local government liability does not rest on the doctrine of respondeat superior — i.e., merely because the entity employs a wrongdoer — the Court explained:

> ". . . it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." [12]

Then, in 1980, in *Owen* v. *City of Independence*,[13] the Court held that local government entities properly sued under §1983 may not assert the defense of qualified immunity, or "good faith." Thus, when an individual officer is dismissed from a lawsuit, the action may still, under appropriate circumstances, be maintained against his department or municipality.

These two decisions paved the way for a direct constitutional challenge to the "fleeing felon" rule.

A CONSTITUTIONAL STANDARD — *TENNESSEE* V. *GARNER* [14]

The Facts

Two Memphis, TN, police officers responded to a late night call that a burglary was in progress at a private residence. Upon arriving at the scene, they learned from the woman who had made the call that she had heard glass breaking at the residence next to hers and that someone was breaking in. As one officer radioed to report their location, the second officer walked to the back of the house, where he heard a door slam and saw someone running across the backyard. The officer saw the fleeing suspect stop momentarily at a 6-foot high chain link fence at the edge of the yard. With the aid of a flashlight, the officer was able to see the suspect's face and hands and concluded that though not certain, he was reasonably sure the suspect was not armed. The officer then called out to the suspect, "Police, halt," and took a couple of steps in his direction. At that moment, the suspect began to climb the fence, and the officer fired one shot which struck him in the back of the head, inflicting a fatal wound.

The suspect was identified as Eugene Garner, a 15-year-old eighth grader, described as 5'4" tall and weighing 100-110 pounds. Ten dollars and a purse taken from the house were found on the body.

In using deadly force to prevent Garner's escape, the officer was relying on the authority of a Tennessee statute which, like the common law rule, permitted the use of "all necessary means"

to prevent the escape of a felony suspect if, "after notice of the intention to arrest . . . he either flee or forcibly resist. . . ."

Garner's father filed a suit in Federal court seeking damages pursuant to 42 U.S.C. §1983 and alleging violations of the 4th, 5th, 6th, 8th, and 14th amendments to the U.S. Constitution. The named defendants in the suit were the officer who fired the shot, the Memphis Police Department, its director, and the mayor of the City of Memphis.

Following a 3-day bench trial, the district court entered a judgment in favor of the defendants on the grounds that the officer's actions were authorized by State law, and there was no evidence to sustain the action against the other defendants.

The Court of Appeals for the Sixth Circuit affirmed the judgment as it related to the officer, finding that he had acted in good faith reliance on the statute, but remanded the case to the district court to reconsider the issue of the city's liability in light of the *Monell* decision.[15] On review, the district court held that the State statute and the officer's actions were constitutional, thereby avoiding the question of the city's liability.

On the second appeal, the court of appeals held that killing a fleeing suspect is a fourth amendment "seizure," subject to the requirement that it be "reasonable." The court further held that the statute was unconstitutional because it permitted the use of excessive force by police officers to effect the arrests of nondangerous felony suspects fleeing from nonviolent crimes. The court concluded:

> "A state statute or rule that makes no distinction based on the type of offense or the risk of danger to the community is inherently suspect because its permits an unnecessarily severe and excessive police response that is out of proportion to the danger to the community." [16]

Having determined that the State statute was unconstitutional, the court of appeals held that the Supreme Court's decision in *Owen* precluded the application of the good faith defense to the City of Memphis. The decision was then appealed to the Supreme Court.

The Decision

The Supreme Court viewed the question before it as requiring a determination of "the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon." By a 6 to 3 margin, the Court held that such action violates the fourth amendment protections against "unreasonable" seizures.

Defining a "seizure" as "[w]henever an officer restrains the freedom of a person to walk away," the Court went on to note that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." [17]

Because the reasonableness standard requires a balancing of the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion . . . reasonableness depends on not only when a seizure is made, but also how it is carried out." [18] In other words, notwithstanding the principle that an officer may arrest a person if he has probable cause to believe the person committed a crime, "he may not always do so by killing him." [19]

The use of deadly force not only impinges the individual's interests in his own life but it also "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." [20] Balancing these interests against the community's interest in apprehending criminal suspects, the Court concluded that it is not necessarily better that all felony suspects be shot than that they escape. On the contrary, if the suspect "poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." [21]

Accordingly, the Court held that deadly force may not be used "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." [22] Thus, to the extent that the Tennessee statute permitted the use of deadly force to prevent the escape of nondangerous suspects, it was held to be unconstitutional.

The application of this principle to the facts of the case led the Court to conclude that the mere fact Garner was a suspected burglar could not, without more, justify the use of deadly force to prevent his escape. The Court noted that the officer had no reason to believe that Garner was armed or otherwise posed a threat to him, and furthermore,

". . . 'there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.' "

that burglary is commonly characterized by law enforcement agencies as a property crime. The Court observed:

> "Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much." [23]

Upon reaching its conclusion, the Court remanded the case to the lower courts to determine the liability of the police department and the City of Memphis. The Court noted that all individual defendants (the police officer, the director, and the mayor) had been dismissed from the complaint, that the State of Tennessee was not subject to liability in this lawsuit, and that any liability of the department and city would depend upon a determination of whether the unconstitutional action upon which this suit is based resulted from the deadly force policy of the department.

Analysis

Clearly, the *Garner* decision is one of great importance. It represents a dramatic departure from the traditional deference historically given to the States on such issues as when a police officer may be justified in using deadly force to effect an arrest. Furthermore, the impact of the decision is not limited to the State of Tennessee or the City of Memphis. At the time *Garner* was decided, almost one-half of the States retained the "fleeing felon" rule — either by statute or court decision. Several others followed modifications of the rule which were somewhat more restrictive, but which would in all likelihood have permitted the use of deadly force under the circumstances proscribed in the *Garner* case. The Court was not unmindful of the long history of the common law rule and its continued prevalence among the laws of the States; however, it viewed those factors as insufficient to outweigh what the Court described as ". . . the long-term movement . . . away from the rule that deadly force may be used against any fleeing felon . . . ." [24]

The Court then considered the historical underpinnings of the "fleeing felon" rule and observed that modern-day developments in law and law enforcement have largely undermined them. First, the Court observed that the distinction between felonies and misdemeanors today is often minor, artificial, and arbitrary. Crimes characterized as misdemeanors in one State may be felonies in another, or vice versa, and such distinctions often change with time. Furthermore, offenses which did not even exist at common law may today be classified as felonies. Second, it is no longer true — as it was at the time of the rule's inception — that most felonies are punishable by death. One of the historical justifications for the "fleeing felon" rule was that the killing of an escaping felon — whose life was already presumably forfeit under the law — served to expedite the process. The Court emphasized that changes in the law have "undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life." [25] Third, the Court noted that the emergence of firearms as standard tools of law enforcement during the past century, with the resulting ability to use deadly force from a distance, makes it difficult to view the common law rule in the same light as in the days when deadly force could be inflicted "almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk." [26]

One additional factor to which the Court obviously attached great significance was the existence of departmental policies governing the use of deadly force. The Court observed that overwhelmingly, "these are more restrictive than the common law rule" and therefore serve to rebut the assertions that the more restrictive rules unnecessarily hamper law enforcement and are more difficult for officers to apply.

Specifically focusing on the potential which a change in the rule might have for hampering effective law enforcement, the Court stated:

> "We would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules similar to that announced today." [27]

A Dissenting View

A strong dissent, written by Justice O'Connor and joined by then Chief Justice Burger and present Chief Justice Rehnquist, condemned the majority's holding as effectively creating "a Fourth Amendment right

allowing a burglary suspect to flee unimpeded from a police officer who has probable cause to arrest, who has ordered the suspect to halt, and who has no means short of firing his weapon to prevent escape." [28] The dissent is significant, not simply because it expresses a different point of view concerning a complex and sensitive issue, but because it also reflects the breadth and intensity of the debate within the Court which preceded the decision.

Without challenging the majority's holding that killing a fleeing suspect constitutes a fourth amendment "seizure," and is therefore subject to the "reasonableness" requirement of that amendment, the dissent nevertheless vehemently disagreed with the point at which the majority chose to strike the balance between the interests of society and those of the individual as they relate to the apprehension of suspected burglars. As to society's interest, O'Connor stated:

> "The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries represent not only the illegal entry into a person's home, but also 'pose real risk of serious harm to others.' . . . Moreover, even if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the 'harsh potentialities for violence' inherent in the forced entry into a home preclude characterization of the crime as 'innocuous, inconsequential, minor, or nonviolent.' . . . Because burglary is a serious and dangerous felony, the public interest in the prevention and detection of the crime is of compelling importance." [29]

With respect to the individual's interest:

> "Against the strong public interests justifying the conduct at issue here must be weighed the individual interests implicated in the use of deadly force by police officers . . . . Without questioning the importance of a person's interest in his life, I do not think this interest encompasses a right to flee unimpeded from the scene of a burglary." [30]

Considering the facts of the *Garner* case, where the officer was investigating a nighttime burglary, had probable cause to arrest the suspect for that offense, and ordered him to halt, Justice O'Connor attributed the risk to the suspect's life to his own refusal to heed the officer's command. Thus, "to avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt."

The dissent concludes then:

> "A proper balancing of the interests involved suggests that the use of deadly force as a last resort to apprehend a criminal suspect fleeing from the scene of a nighttime burglary is not unreasonable within the meaning of the Fourth Amendment." [31]

As noted previously, the dissent agreed with the majority's holding that killing a person to prevent his escape from arrest is a "seizure" within the meaning of the fourth amendment. Although not entirely clear, it appears that the dissent also accepted the general proposition of the majority that the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." (Justice O'Connor describes such statements in the majority opinion as "unexceptional" and "rhetorically stirring.")[32] Notwithstanding this apparent unanimity on the general principles, however, the lack of consensus on the Court as to how those principles should be applied reflect the continuing dilemma faced by law enforcement officers who must decide — usually in a moment's time and under less than optimum conditions — whether a suspect is "dangerous."

In that respect, it becomes exceedingly important to understand the scope of the Supreme Court's decision in *Garner* and the factors that are likely to govern future litigation of this issue. The majority in *Garner* identified two general criteria which are relevant in deciding whether a suspect is dangerous: (1) Where the suspect threatens the officer with a weapon; or (2) where the officer has probable cause to believe that the suspect committed an offense in which he inflicted or threatened infliction of serious physical injury.[33] However, as the dissent points out, the majority opinion provides no clear guidance to the police for judging "which objects, among an array of potentially lethal weapons ranging from guns to knives to baseball bats to rope, will justify the use of deadly force." Likewise, the dissent notes that assuming an officer has

". . . deadly force may not be used 'unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' "

probable cause to arrest and a suspect refuses to obey an order to halt, the majority "declines to outline the additional factors necessary to provide 'probable cause' for believing that a suspect 'poses a significant threat of death or serious physical injury.' " [34]

Obviously, the unanswered questions invite — indeed demand — additional litigation, and the dissent's prediction that there would now, of necessity, be an "escalating volume" of cases has been largely borne out. Part II of this article will examine that burgeoning area of fourth amendment doctrine in an effort to find some of the answers and provide some guidance to those who must give practical effect to the law. FBI

Footnotes

[1]14 McGill L.J. at page 311.
[2]*Tennessee* v. *Garner*, 471 U.S. 1, at 9 (1985).
[3]*Id.*, O'Connor, J. dissenting at 21.
[4]4 W. Blackstone, Commentaries 203-204 (Beacon Press, 1962).
[5]Cited in *Garner*, *supra* note 2, at 10.
[6]367 U.S. 643 (1961).
[7]365 U.S. 167 (1961).
[8]386 U.S. 547 (1967).
[9]547 F.2d 1007 (8th Cir. 1976).
[10]*Ashcroft* v. *Mattis*, 431 U.S. 171 (1977).
[11]436 U.S. 658 (1978).
[12]*Id.* at 694.
[13]445 U.S. 622 (1980).
[14]*Supra* note 2.
[15]*Garner* v. *Memphis Police Department*, 600 F.2d 53 (6th Cir. 1979).
[16]*Garner* v. *Memphis Police Department*, 710 F.2d 240 (6th Cir. 1983).
[17]*Tennessee* v. *Garner*, 471 U.S. 1, at 7 (1985).
[18]*Id.* at 7-8.
[19]*Id.* at 8.
[20]*Id.*
[21]*Id.* at 9-10.
[22]*Id.* at 4.
[23]*Id.* at 16.
[24]*Id.* at 14.
[25]*Id.* at 11.
[26]*Id.* at 12.
[27]*Id.* at 14-15.
[28]*Id.*, O'Connor, J. dissenting, at 17.
[29]*Id.* at 19-20.
[30]*Id.* at 21.
[31]*Id.*
[32]*Id.* at 18.
[33]*Id.* at 10.
[34]*Id.* at 23.

National Law Enforcement Officers' Memorial Fund

Director Sessions, in the April 1988, issue of the *FBI Law Enforcement Bulletin*, endorsed the law enforcement community's efforts to build a memorial to the thousands of peace officers who have given their lives to protect their fellow citizens. The *FBI Law Enforcement Bulletin* also has run articles (November 1987) on this worthwhile effort.

Fundraising efforts to build a memorial in Washington, DC, on Judiciary Square, are now underway. To contribute, or for further information, contact Mr. Craig Floyd, Executive Director, National Law Enforcement Officers' Memorial Fund, 1360 Beverly Road, McLean, VA, 22101 telephone 703-827-0518.