Michigan Law Review

Volume 86 | Issue 8

1988

Police Liability for Creating the Need To Use Deadly Force in Self-Defense

Frank G. Zarb Jr.
University of Michigan Law School

NOTES

Police Liability for Creating the Need To Use Deadly Force in Self-Defense

Police officers are granted wide discretion in the use of their firearms.[1] Allowing officers some discretion is unavoidable, because they must often make difficult decisions in the face of rapidly changing circumstances.[2] Officers, however, may abuse this discretion and cause injury or death unnecessarily.[3] In the face of this danger of abuse by officers, suspects are, in many states, prohibited from defending themselves.[4] While it is better to have a court decide when a police officer has abused his discretion than to allow the suspect to make that decision at the moment of arrest,[5] it is not clear what standards a court

1. An officer is normally authorized to use deadly force even if it is not necessary for self-defense. Several states, for example, permit the use of such force against a felon involved in a crime involving the use or threatened use of deadly force or when there is a substantial risk that delay of the suspect's apprehension will cause serious bodily injury or death. *See* 2 P. ROBINSON, CRIMINAL LAW DEFENSES § 142(f), at 139-43 (1984); *see also* note 2 *infra.*

2. UNITED STATES COMMISSION ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS: A REPORT ON POLICE PRACTICES v (1985) [hereinafter U.S. COMMISSION ON CIVIL RIGHTS]; *see also* P. SCHARF & A. BINDER, THE BADGE AND THE BULLET: POLICE USE OF DEADLY FORCE 139-79 (1983) (some decisions are inevitably left to officer's intuition).

3. Lack of adequate supervision and training may contribute to the abuse of police discretion. After New York City implemented new policies relating to police supervision, the number of instances of police shooting suspects dropped from 18.4 per week to less than 13 per week. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 2, at 44. *See also* P. SCHARF & A. BINDER, *supra* note 2, at 185-270; Edwards, *The Shot in the Back Case:* Tennessee v. Garner, 14 N.Y.U. REV. L. & SOC. CHANGE 733 (1986) (cases where police abuse of discretion caused unnecessary death); Fyfe, Tennessee v. Garner: *The Issue Not Addressed,* 14 N.Y.U. REV. L. & SOC. CHANGE 721 (1986) (Memphis police use discretion in racially discriminatory manner).

4. By 1984 approximately seventeen states had, by statute or by supreme court decision, limited the common law right to resist an unlawful arrest. P. ROBINSON, *supra* note 1 § 131(e)(3), at 91 & n.80. Some of these states, however, do permit resistance under certain circumstances. Arizona, for example, permits resistance if the officer's physical force exceeds that allowed by law. *See* ARIZ. REV. STAT. ANN. § 13-404(B)(2) (1978). Several federal courts of appeals, moreover, generally deny the common law right to resist an unlawful arrest. *See, e.g.,* United States v. Danehy, 680 F.2d 1311, 1315-16 (11th Cir. 1982); United States v. Johnson, 542 F.2d 230, 232-33 (5th Cir. 1976); United States v. Cunningham, 509 F.2d 961, 963 (D.C. Cir. 1975); United States v. Martinez, 465 F.2d 79, 82 (2d Cir. 1972); United States v. Simon, 409 F.2d 474, 477 (7th Cir. 1969) (dictum), *cert. denied,* 396 U.S. 829 (1969). *But see* United States v. Moore, 483 F.2d 1361, 1364 (9th Cir. 1973).

5. The primary reasons for limiting the common law right to defend against an unlawful arrest are that (1) it is futile since the officer carries a gun, (2) it is too uncivilized, and (3) the lawfulness of an arrest may be too technical for an arrestee to judge accurately. *See,* Chevigny, *The Right To Resist an Unlawful Arrest,* 78 YALE L.J. 1128, 1136 (1969). But some have suggested that the right to resist an unlawful arrest is of constitutional significance. Wainwright v. City of New Orleans, 392 U.S. 598, 613 (1967) (Douglas, J., dissenting); People v. Cherry, 307 N.Y. 308, 311, 121 N.E.2d 238, 240 (1954) ("For most people, an illegal arrest is an outrageous affront and intrusion — the more offensive because under color of law — to be resisted as energetically as a violent assault."); Chevigny, *supra,* at 1138-39.

should apply in evaluating the officer's behavior. To shed light on this confusion, this Note focuses on a controversial subset issue: the liability of a police officer who unnecessarily creates the need to use deadly force in self-defense. In one case, for example, a police officer violated procedure by abandoning the cover of his squad car and, as a result, was forced to shoot and kill a suspect who he erroneously believed was reaching for a gun.[6]

Courts have looked to criminal law,[7] state tort law,[8] as well as to the U.S. Constitution[9] in evaluating such conduct. As well as disagreeing over what substantive law to apply to officers, courts disagree over which constitutional analysis to apply. This Note seeks to resolve this confusion by evaluating the different approaches courts have chosen and determining which of them is most appropriate. Part I analyzes the possibility of imposing criminal sanctions on police officers who have abused their discretion, but concludes that imposition of such sanctions would be unfair to police officers and could chill the legitimate use of deadly force. Even assuming that it would be fair to impose criminal sanctions, this section concludes that an officer who creates the need to use deadly force should be granted a self-protection defense. Part II briefly analyzes the possibility of imposing state tort liability, and concludes that the imposition of such liability would be an appropriate response. It maintains, however, that only grossly negligent conduct should be subject to such liability. Part III discusses when an officer's misconduct in creating the need to use deadly force rises to the level of a constitutional violation subject to liability under section 1983 of the Civil Rights Act of 1871.[10] It concludes that courts should apply fourth amendment analysis rather than substantive due process analysis in evaluating such conduct, and that an officer's grossly negligent conduct in creating the need to use deadly force should always be found to violate the fourth amendment.[11]

---

6. Young v. City of Killeen, 775 F.2d 1349, 1351 (5th Cir. 1985).

7. *See* Part I *infra.*

8. *See* Part II *infra.*

9. *See* Part III *infra.*

10. 42 U.S.C. § 1983 (1982). Section 1983 provides in relevant part that

> 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 the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

11. The fourth amendment guarantees:

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

U.S. CONST. amend. IV.

I. CRIMINAL LIABILITY

An officer's conduct that creates the need to use deadly force could be redressed through the criminal law; he could be charged with some form of homicide if the suspect is killed, or battery if the suspect is just wounded. It seems unlikely that an officer could be charged with the primary offense of homicide (assuming that the officer did not intend to cause the death)[12] but he could be charged for his culpability in causing the injury. If an officer is negligent in causing a suspect's death, he could be sanctioned specifically for that negligence in causing the homicide (an offense commonly called negligent homicide).[13] This approach was recently taken in New York. A New York police officer was indicted for second degree manslaughter after shooting a 66-year-old, mentally unstable woman whom he and other officers were trying to evict from her apartment.[14] Under New York law, a person is guilty of second degree manslaughter if he "recklessly causes the death of another person."[15] One theory of liability in that case was that the killing might not have been necessary had the officers followed different procedures.[16]

This section analyzes the two considerations that weigh against im-

12. Intent is normally an element of the primary offense of homicide. For example, under New York law, a person commits murder in the second degree when "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person." N.Y. PENAL LAW § 125.25 (McKinney 1987).

13. For example, in New York, "[a] person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person." N.Y PENAL LAW § 125.10 (McKinney 1987). A person is guilty of "manslaughter in the second degree" (*i.e.* reckless homicide) if he "recklessly causes the death of another person." N.Y. PENAL LAW § 125.15 (McKinney 1987).

14. People v. Sullivan, 68 N.Y.2d 495, 497-99, 503 N.E.2d 74, 75-76, 510 N.Y.S.2d 518, 519-20 (1986) (per curiam). The case received substantial publicity. *See, e.g.*, Purdom, *Every Police Bullet Fired Must Pass Many Layers of Inquiry*, N.Y. Times, Jan. 25, 1987, § 4 (The Week in Review), at 8, col. 1.

15. N.Y. PENAL LAW § 125.15 (McKinney 1987). *See* note 13 *supra.*

16. In *Sullivan*, two colleagues of the defendant-officer were overcome by a 275-pound mentally-unstable woman as they tried to restrain her using a special bar and hand-held protective shields. Since the woman was threatening the officers with a 10-inch knife, defendant-officer, fearing for the lives of his colleagues, shot her twice with a shotgun, the first shot apparently striking her hand, the second and fatal shot striking her chest. After the Grand Jury indicted the officer for involuntary manslaughter, the trial court dismissed the indictment and the Appellate Division affirmed. The Court of Appeals, however, reversed the Appellate Division. The primary issue before the court was whether the conduct of the police constituted "a gross deviation from the standard of conduct that a reasonable person would observe in the situation." 68 N.Y.2d at 500 n.1 (citing N.Y. PENAL LAW § 15.05(3) (McKinney 1987)). In absolving the officers, the Appellate Division had focused on, among other things, the fact that a "dire emergency confronted [them] and the fact that they gave careful and deliberate consideration to the possible alternative methods before entering the apartment." People v. Sullivan, 116 A.D.2d 101, 116, 500 N.Y.S.2d 644, 653, *revd.*, 68 N.Y.2d 495, 503 N.E.2d 74, 510 N.Y.S.2d 518 (1986). In reversing the Appellate Division, however, the Court of Appeals focused on the time interval between the first and second shot, and held that the Grand Jury was justified in concluding that the officer could have been reckless in firing the second shot. 68 N.Y.2d at 500. *See also* Commonwealth v. Boden, 510 Pa. 287, 507 A.2d 813 (1986) (per curiam) (police officer convicted of involuntary manslaughter after shooting and killing suspect brandishing an axe handle).

posing criminal liability in such situations. The first consideration is that the line of causation between the officer's conduct and the suspect's injury is too indirect to conclude that the officer "caused" that injury for the purposes of the criminal law. The second consideration is that the officer should be entitled to a self-protection defense despite his role in creating the need for the defense.

A. *Causation*

In most cases, it would be inconsistent with the principles of the criminal law to conclude that an officer's conduct that creates the need to use deadly force "caused" the arrestee's injury. For the purposes of the criminal law, the defendant's conduct must normally be more than the "proximate cause"[17] of the victim's injury. Because criminal liability often entails loss of personal liberty as well as moral stigma, the courts have generally imposed such liability only on those who can be said to have had meaningful choice in bringing about the harm.[18] How direct the line of causation must be in order to establish that the defendant had such a "meaningful choice" is not always clear.[19] The

17. The concept of "proximate causation," normally used in determining common law tort liability, is an elusive one. Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 314, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169 (1980). Significantly, however, social policy considerations have persuaded courts to find defendants liable for civil damages even in cases in which the line of causation between defendant's conduct and the injury is so indirect that defendant could not have had any meaningful choice in causing that injury. *See, e.g. In re* Kinsman Transit Co., 338 F.2d 708, 725-26 (2d Cir. 1964) ("Where the line [between liability and exoneration] will be drawn will vary from age to age; as society has come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago."), *cert. denied,* 380 U.S. 944 (1965). *See also* H. HART & T. HONORÉ, CAUSATION IN THE LAW 205-49 (2d ed. 1985) (courts may hold the defendant liable in tort for a harm which would not have materialized but for the voluntary intervention of a third person).

18. *See, e.g.,* Commonwealth v. Root, 403 Pa. 571, 576, 170 A.2d 310, 312 (1961) ("Legal theory which makes guilt or innocence of criminal homicide depend upon . . . accidental and fortuitous circumstances . . . is too harsh to be just."); People v. Warner-Lambert Co., 51 N.Y.2d 295, 414 N.E.2d 660, 434 N.Y.S.2d 159 (1980) ("but for" causation not alone sufficient to establish criminal liability); *see also,* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 255 (2d ed. 1960) ("Although there is disagreement regarding the penalization of negligent harmdoing, there is also a very substantial consensus favoring a definite theory which excludes inadvertence from the scope of penal law . . . ."); HART & HONORÉ, *supra* note 17, at 394 ("[Hall's] acknowledgement of the crucial importance of voluntary action [as a basis for criminal liability] seems to us correct.").

19. HART & HONORÉ, *supra* note 17, at 397. Indeed, whether or not a sufficient causal connection exists is essentially left for case-by-case determination. For example, in People v. Kibbe, 35 N.Y.2d 407, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974), the court held that the actions of the defendants must be *"a sufficiently direct cause"* of the resulting death, which begs the question. 35 N.Y.2d at 413 (emphasis in original). For the facts of that case, see notes 25-29 and accompanying text. *See also* People v. Ingram, 67 N.Y.2d 897, 492 N.E.2d 1220, 501 N.Y.S.2d 804 (1986) (defendant's action need not be sole cause of death); People v. Warner-Lambert Co., 51 N.Y.2d at 304 focus on culpability includes foreseeability and causation; existence of broad, undifferentiated risk held not sufficient if triggering cause not foreseeable); People v. Cicchetti, 44 N.Y.2d 803, 377 N.E.2d 739, 406 N.Y.S.2d 285 (1978) (injury caused by defendant need be only one of the several injuries that taken together caused death). *But see* People v. Stewart, 40 N.Y.2d 692, 358 N.E. 2d 487, 389 N.Y.S.2d 804 (1976) (complications during medical treatment for unrelated injury may relieve defendant of responsibility for death).

Model Penal Code leaves the question to the common sense of the jury.[20] This determination is sometimes more easily made if the defendant's conduct is proscribed by the legislature; for such a proscription often reflects a legislative determination that the conduct "causes" the type of harm that materialized.[21] For example, a legislature proscribes reckless driving, because it believes that such driving "causes" injury or death. If a person kills another while driving recklessly, a court could rely on the fact that the legislature has drawn the causal link between the reckless conduct and the resulting harm. Because most states' criminal laws do not address the problem of negligent or reckless arrests, a court may not rely on a legislative determination that such faulty arrests "cause" unnecessary injury or death to criminal suspects.

In assessing causation where there is no such legislative determination, courts often refer to guiding principles. One such principle, that of "intervening causes," is relevant to the resolution of the issue addressed in this Note. According to this principle, the free, deliberate and informed intervention of a second actor relieves the first actor of liability, so long as the first actor's conduct alone was not sufficient to cause the injury.[22] This principle is not a fixed rule but is best understood as a guide designed to assist the finder of fact in determining whether the line of causation is sufficiently direct to hold a defendant liable.[23] For example, if the intervening cause is a reflective response to the first actor's wrongful act, courts generally find the causal link to the first act direct enough to assign liability. In one case where the line of causation was deemed sufficiently direct, the deceased slipped or fell into a river while attempting to escape from the defendant.[24] Attempting to escape is so nearly reflexive that it seems fair to hold the defendant responsible for the resulting harm.

---

20. Under the Model Penal Code, a defendant may not be found criminally liable for having negligently or recklessly caused a particular result unless her conduct is a "but-for" cause, and the harm "is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability." MODEL PENAL CODE § 2.03(3) (1962) (brackets in original). This vague provision is designed to leave the jury some discretion in deciding whether a defendant can "justly" be considered responsible for a particular harm. *See* MODEL PENAL CODE § 2.03 comment at 261 n.16 (1985).

21. *See, e.g.*, Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

22. *See, e.g.*, HART & HONORÉ, *supra* note 17, at 325-40; J. HALL, *supra* note 18, at 261-70.

23. The drafters of the Model Penal Code apparently agree that the principle of "intervening causation" should be viewed as a guide rather than as a rule. In response to criticism that the Code does not give sufficient attention to the problem of intervention by a responsible human agent, the drafters explain that it (the Code) neither accepts nor rejects that principle. Rather, it leaves it to the trier of fact "to give weight to such variables if it is persuaded that these considerations are significant in determining whether the occurrence of the actual result had a [just] bearing on the actor's liability or the gravity of his offense." MODEL PENAL CODE § 2.03 comment at 262-63 (1985) (brackets in original).

24. HART & HONORÉ, *supra* note 17, at 330 (citing Regina v. Pitts, Car. & M. 284, 174 Eng. Rep. 509 (Nisi Prius 1842)). The defendant was not a police officer.

However, a defendant may remain responsible even if the line of causation between his act and the injury is interrupted by a nonreflexive human act, as long as that nonreflexive act was accidental (rather than willful) and foreseeable. In one case, *People v. Kibbe*,[25] the defendants had robbed and partially stripped the intoxicated decedent. They left him, without his eye glasses, in the middle of a two lane highway on a cold winter night, where he was later struck and killed by on-coming traffic. The defendants were convicted of murder. The only issue on appeal was whether the defendants "caused" the death.[26] The defendants claimed that the death was not a sufficiently foreseeable consequence of their actions because it was directly caused by the intervening action of the car that actually hit the decedent. In denying that this intervening cause relieved them of responsibility, the court explained that the accident was essentially inevitable since the highway was unlit and the oncoming car could not have had enough time to stop. Moreover, had the ill-clad decedent not been hit by a car, he would likely have died from the cold.[27] Since the intervening act and the decedent's death were "directly foreseeable,"[28] the court upheld the conviction. Thus, as *Kibbe* demonstrates, when the accident is foreseeable, accidental human intervention will not absolve the original actor of criminal responsibility.[29]

A willful human intervention, on the other hand, is more likely to break the chain of causation and absolve the original actor of criminal responsibility. This holds true because it is generally more difficult to foresee what a person will do intentionally than it is to foresee what he will do accidentally. For example, in *Commonwealth v. Root*[30] the defendant-drag racer was charged with manslaughter for the death of his competitor, who had crashed during the race. The theory of liability was that the defendant was "reckless" in choosing to participate in such a dangerous activity, and that this "recklessness" caused his competitor's death. The competitor apparently had attempted to pass the defendant by swerving his car into the left lane, where he crashed into an oncoming truck.[31] Significantly, the court held that the de-

25. 35 N.Y.2d 407, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974). *See also* note 19 *supra.*

26. 35 N.Y.2d at 411.

27. 35 N.Y.2d at 413.

28. 35 N.Y.2d at 413.

29. *See also* Jacobs v. State, 184 So. 2d 711 (Fla. Dist. Ct. App. 1966); People v. Kane, 213 N.Y. 260, 107 N.E. 655 (1915) (medical malpractice does not break chain of causation); Commonwealth v. Eisenhower, 181 Pa. 470, 37 A. 521 (1897) (same); *cf.* Stephenson v. State, 205 Ind. 141, 179 N.E. 633 (1932) (victim's suicide while in deranged mental state caused by being kidnapped, assaulted, and raped by defendant was sufficiently direct causation to support conviction); People v. Arzon, 92 Misc. 2d 739, 401 N.Y.S.2d 156 (1978) (arsonist convicted although death directly caused by immediately subsequent fire which arsonist did not set); Comment, 31 MICH. L. REV. 659 (1933) (discussing *Stephenson*).

30. 403 Pa. 571, 170 A.2d 310 (1961).

31. 403 Pa. at 573.

ceased competitor's own willful intervening act of swerving into the left lane relieved the defendant of criminal responsibility.[32] As this case demonstrates, an intervening human act that is willful is more likely to be deemed sufficiently unforeseeable and absolve the initial actor of criminal responsibility.

Under the principle of intervening causation, an officer's conduct that creates the need to use deadly force cannot be said to "cause" the suspect's death or injury for the purposes of criminal liability. This is because the line of causation between the police officer's act that creates the need to use deadly force and the injury is interrupted by the decedent's willful intervening act of putting the officer in legitimate fear for his life. A deliberate, unlawful attack by the arrestee should almost never be deemed to be sufficiently foreseeable to invoke criminal liability; most suspects do not resist police officers because officers are normally well-armed, they represent the power of the state, and such resistance is unlawful.

Yet an attack is arguably more foreseeable in cases involving violent, mentally disturbed people. They cannot be expected to make a rational calculation about the success or consequences of an attack. Indeed, it was quite probable that the mentally disturbed woman in *People v. Sullivan*[33] would attack the officers. Nonetheless, this is not a case where criminal liability would be appropriate, even if it were established that the officers were culpable in creating the need to use deadly force. Although the woman's attack was arguably foreseeable, her persistence and energy (she was 66 years old) in carrying the attack out were not foreseeable. Indeed, there was evidence that she continued slashing at the officers with her ten-inch knife even after being shot the first of two times with a twelve-gauge shotgun.[34] Thus, this case is not like *Kibbe,* in which it was foreseeable that a car would eventually come along and hit the decedent.[35]

---

32. The court stated that "the action of the deceased driver in recklessly and suicidally swerving his car to the left lane of a 2-lane highway into the path of an oncoming truck was not forced upon him by any act of the defendant; it was done by the deceased and by him alone." 403 Pa. at 576.

33. 68 N.Y.2d 495, 503 N.E.2d 74, 510 N.Y.S.2d 518 (1986) (per curiam). *See* notes 14-16 *supra.*

34. There was a dispute between the parties concerning the time interval between the two shots and about what happened after the first shot was fired. *See* People v. Sullivan, 116 A.D.2d 101, 116-22, 500 N.Y.S.2d at 653-57, *revd.,* 68 N.Y.2d 495 (1986).

35. The unforeseeability of the persistence of the woman's attack of course would not absolve the officer of liability if one agrees with the theory of liability relied on by the Court of Appeals. The Court of Appeals did not consider whether the procedures the officers employed in carrying out the eviction created the need to use deadly force. Instead, it assumed that the first shot was justified and focused solely on the second shot, theorizing that the defendant may have acted recklessly in firing that second shot. It pointed out that the second shot may have been unnecessary because of the possibility that "(a) the first shot removed the threat of the weapon, (b) five seconds passed before the second shot, and (c) defendant's vision was unobscured by a mask." 68 N.Y.2d at 500.

B. *Self-Protection Defense*

Even if the line of causation between the officer's conduct and the suspect's injury is sufficiently direct to impose criminal liability, the officer should be entitled to a self-protection defense. This defense may be predicated on either of two rationales: the "lesser evil" justification or the "excuse" concept. The "lesser evil" justification operates to justify the defendant's otherwise unlawful act if the act represents the lesser of two evils.[36] For example, a person who burned another's field in order to stop a fire from spreading to a nearby town would probably escape prosecution for arson because losing one field is a "lesser evil" than losing an entire town. Alternatively, the self-protection defense may be viewed as an "excuse."[37] The "excuse" defense focuses on the pressures under which the defendant acted and generally absolves him of liability if other people would have acted as he did under the same circumstances.[38] The actor is not sufficiently blameworthy for the purposes of the criminal law because he did not have meaningful choice in carrying out the prohibited conduct, and he could not have been reasonably expected to resist. For example, an innocent actor forced at gunpoint to rob a store would not, under this theory, be criminally liable for robbery. Thus, the justification rationale focuses on the unlawful act itself and deems it justified if it represents the lesser of two evils, while the excuse rationale focuses on the

36. *See, e.g.,* United States v. Kroncke, 459 F.2d 697 (8th Cir. 1972) (whether resistance to draft justified by evils of Vietnam War); United States v. Nye, 27 F. Cas. 210 (No. 15,906) (C.C.D. Mass. 1855) (whether revolt by seamen justified because ship unseaworthy); People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977) (whether there is justification for escape from prison); Chesapeake & O. Ry. v. Commonwealth, 119 Ky. 519, 84 S.W. 506 (1905) (whether railway accident justified by not having segregated cars). Some states have codified the justification defense. *See, e.g.,* N.Y. PENAL LAW § 35.05 (McKinney 1987); *see also* G. FLETCHER, RETHINKING CRIMINAL LAW 857-60 (1978); MODEL PENAL CODE § 3.02 (1962).

37. The self-protection defense is often considered to be predicated on a "lesser-evil" justification, *see, e.g.,* P. ROBINSON, *supra* note 1, § 132, rather than on the "excuse" concept, but the "excuse" rationale nonetheless could support such a defense. Cases employing the excuse rationale are normally categorized by their facts. Such categories include duress, intoxication, and insanity. *See, e.g.,* KADISH, SCHULHOFER & PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 788-911 (4th ed. 1983). But the rationale could apply equally in the self-protection situation. The self-protection case could be viewed as a form of "duress." The "duress" concept generally excuses an actor who is "in a state of coercion caused by a threat that a person of reasonable firmness in his situation would not have resisted." P. ROBINSON, *supra* note 1, § 177(a), at 348. Although the typical duress case involves an actor forced to do something unlawful by a second actor for the benefit of the second actor, *see, e.g.,* State v. Toscano, 74 N.J. 421, 378 A.2d 755 (1977), the analysis should not differ if the facts are changed so that the second actor forces the first actor to do something — kill the second actor — in the first actor's interest. *See generally* P. ROBINSON, *supra* note 1, § 177 (discussion of the duress concept).

38. G. FLETCHER, *supra* note 36, at 856. *See, e.g.,* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (discussing insanity defense); State v. Hall, 214 N.W.2d 205 (Iowa 1974) (drug intoxication not a defense to murder); Roberts v. People, 19 Mich. 401 (1870) (intoxication a defense to charge of intent to murder); State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979) (intoxication not a defense to charge of intent to rob); State v. Toscano, 74 N.J. 421 (1977) (whether defendant made out false insurance report under duress); *see also* MODEL PENAL CODE §§ 2.08, 2.09, 4.01 (1962).

pressures that the defendant acted under and generally absolves him of liability if other people would have acted the same way. Although an officer should be accorded a self-protection defense predicated on the "lesser evils" justification, he should not be accorded such a defense predicated on the "excuse" rationale.

1. *The "Lesser Evil" Justification*

A self-protection defense based upon the "lesser evil" justification should exonerate an officer whose conduct creates the need to use deadly force. In applying this concept to a confrontation between a police officer and a suspect, a court would weigh the two evils: the evil represented by the harm to the suspect against the "evil" represented by the harm to the officer. Since two lives are generally thought to be of equal value, the result is not intuitively clear.[39] In choosing between an aggressor and an aggressee, society prefers the aggressee because it wants to prevent conflict.[40] While this consideration suggests a preference for the officer's life, the analysis is complicated by the fact that the officer is culpable in causing the aggressor's attack. After all, it was the officer's conduct that created the need to use deadly force in the first place. Indeed, some states deny the initial aggressee a self-protection defense if he created the need for the defense.[41] The *Model Penal Code* denies the justification if the actor "was reckless or negligent in bringing about the situation requiring a choice of harms."[42] Thus, if an officer negligently creates the need to use deadly force, he could theoretically be held liable for negligent homicide.

Even assuming, however, that the officer negligently created the need to use deadly force in self-defense, he should not be denied the self-protection justification. Other considerations must be taken into account. The threat of criminal liability could hamper effective law enforcement.[43] An officer may be reluctant to apprehend a violent suspect under difficult circumstances — such as those present in *Sullivan* — if he is afraid that he may be subject to the severe sanctions

39. *See* G. FLETCHER, *supra* note 36, at 858.

40. *Id.* The Model Penal Code provides that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." MODEL PENAL CODE § 3.04(1) (1962).

41. Some states withdraw the self-protection defense whenever the aggressee's conduct contributes in any way to causing the threat of harm, others withdraw the defense when the victim is the "initial aggressor," and still others withdraw it when the victim was somehow at fault for triggering the threat. Other states still allow an "imperfect defense" when the aggressee is at fault with respect to causing the attack. This means that the force of the defense is reduced rather than withdrawn, so that, for example, the defendant may be charged with manslaughter instead of murder. P. ROBINSON, *supra* note 1, § 123.

42. MODEL PENAL CODE § 3.02(2) (1962). The Code also denies the self-protection defense to an actor who provokes an attack with the purpose of causing that attacker death or serious bodily harm. MODEL PENAL CODE § 3.04(2)(b)(i) (1962).

43. *See* P. ROBINSON, *supra* note 1, § 123(d), at 38; G. FLETCHER, *supra* note 36, at 797-98.

associated with criminal liability. If he does attempt to apprehend such a suspect, he may be reluctant to use necessary force, possibly endangering his own life and the lives of others. While a suspect's life is of great value,[44] consideration for his life must be viewed in light of his own culpability in attacking the officer or in appearing to attack the officer.[45] Society has a strong interest in treating such threats to police officers as threats to public order and, therefore, in allowing officers to respond quickly and effectively. If the "lesser evil" justification is the rationale underlying the self-protection defense, courts should grant an officer that defense even if he is culpable in creating the need to invoke it.

2. *The Excuse Concept*

The officer, however, should not be entitled to a self-protection defense predicated on the excuse concept if he is at fault for creating the need for the defense to arise. The excuse concept focuses on the pressures that the defendant acted under and uses a reasonableness standard to judge the behavior.[46] This concept focuses on the fact that an officer acted under the "pressure" of fear for his life, and excuses him for firing his gun in self-protection, because it is an instinctive reaction to kill rather than be killed.[47] This rationale, however, does not affect the officer's culpability with regard to the prior act of creating the need to use deadly force, because the officer was not under any particular excusing "pressure" when he committed that first act. For example, if the officers in *Sullivan* did improperly plan and implement their apprehension of the mentally unstable decedent, the earlier improper conduct could not be excused by the "pressure" they were later subject to when the decedent attacked them. The excuse does not extend back to the first act.

Although an officer who creates the need to use deadly force should be granted a self-protection defense, such a defense must be predicated on the "lesser-evil" justification, not on the "excuse" concept. Further, since an officer should not be found to have had sufficiently meaningful choice in causing the suspect's death for the purposes of criminal liability, the need for the officer to assert the defense should not even arise in most cases.

II. STATE TORT LAW

An officer who creates the need to use deadly force in self-defense could also be subject to liability under state tort law. For example, in

44. *See* note 99 *infra* and accompanying text.

45. This argument is less compelling in cases where the officer mistakenly, though reasonably, believes the suspect is about to attack him. *See* note 86 *infra*.

46. *See* note 38 *supra* and accompanying text.

47. G. FLETCHER, *supra* note 36, at 856.

Young v. City of Killeen,[48] the Fifth Circuit, applying Texas tort law, upheld a verdict against an officer who negligently created the need to use deadly force.[49] In that case, the plaintiff-suspect asserted both state law tort claims and a constitutional tort claim under section 1983.[50]

Finding an officer liable in tort for his culpability in causing the need to use deadly force would not conflict with tort law notions of causation. Some courts, in determining tort liability, do deny the plaintiff recovery if his own conduct represents a voluntary and independent intervening cause of the injury.[51] However, a growing number of courts "discard causal criteria and apply the theory that if the harm is of a foreseeable type and would not have occurred but for defendant's negligence, he is responsible, whatever the manner of its occurrence *or the nature of the intervening acts or events.*"[52] Notions of tort liability are changing because courts that determine causation for the purposes of tort liability are often guided by social policy considerations rather than by the notion that the party burdened with the cost of the injury should have had a "meaningful choice" in bringing it about.[53] A court, therefore, may find an officer liable for damages despite the suspect's intervening act of attacking the officer.

Imposing tort liability on officers who caused the need to use deadly force, moreover, would not conflict with the rationales underlying the self-protection defense. Imposition of such liability would not undermine the "lesser evil" rationale because it would not deter the officer from protecting his own life. The threat of tort liability should have a much weaker deterrent effect than the threat of criminal liability, because civil penalties, unlike criminal penalties, do not involve loss of liberty or severe moral stigma. Any deterrent effect resulting from the possible imposition of tort liability should be weakened to the extent that states or municipalities indemnify officers for acts commit-

48. 775 F.2d 1349 (5th Cir. 1985).

49. 775 F.2d at 1353. For a discussion of the facts of that case, see notes 84-87 *infra* and accompanying text.

50. *See Killeen,* 775 F.2d at 1352-53 (discussion of claims under § 1983). Part III will address the § 1983 liability of an officer who creates the need to use deadly force in self-defense.

51. *See generally* HART & HONORÉ, *supra* note 17, at 133-85. (demonstrating that courts have historically absolved a defendant of tort liability if the line of causation between his wrongful act and the injury is interrupted by an independent, voluntary act).

52. *Id.* at 284 (emphasis added). Plaintiff's contributory fault would not bar recovery since contributory negligence and contributory recklessness are not defenses in cases of intentional harm. M. FRANKLIN & R. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 767 (3d ed. 1983).

53. Social policy considerations include imposing liability on the party better able to bear the loss and on the party in the best position to prevent the harm from recurring. *See, e.g., In re* Kinsman Transit Co., 338 F.2d 708, 725-26 (2d Cir. 1964), *cert. denied,* 380 U.S. 944 (1965); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461-64, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring).

ted within the scope of their employment.[54] Such states realize that officers could become overly cautious and ineffective if personally exposed to tort liability.[55] Although an indemnified officer may still have to suffer the burden of a trial as well as the moral disapproval associated with an adverse verdict, these possibilities probably would not deter an officer from defending his life.[56]

Imposition of tort liability, moreover, would not conflict with the excuse rationale underlying the self-protection defense.[57] The excuse concept is predicated on the notion that an actor should not be subject to the severe penalties associated with criminal liability if he did not have sufficiently meaningful choice in bringing about the injury to be considered morally blameworthy.[58] Because, however, the penalties associated with tort liability are not as severe as those associated with criminal liability, courts, influenced by policy considerations, impose tort liability even on those not blameworthy in the sense discussed in Part I.[59] The reason for according a legal excuse does not exist for the purposes of tort liability; therefore, it should not become the basis of a self-protection defense to such liability.[60]

Courts should apply a "gross negligence" standard in evaluating the tort liability of an officer whose conduct creates the need to use

---

54. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS 1068 (5th ed. 1984) [hereinafter PROSSER].

55. *See* Cass, *Damage Suits Against Public Officers,* 129 U. PA. L. REV. 1110 (1981).

56. It is common sense that an officer will choose his life over the inconvenience of a trial. But this conclusion is open to the criticism that the fear of tort liability may cause the officer to hesitate before using deadly force, and that this hesitation could cost him his life.

It is also important to recognize that if officers are indemnified, the imposition of tort liability will still act to prevent the abuse of police discretion, but in a different way. Although the threat of civil liability will no longer act directly on the individual officer, it will act on him indirectly. This is because a state, burdened with indemnification costs, will have a financial incentive to improve its training and supervision of police officers.

States may also grant their officers immunity predicated on the state's sovereign immunity. Some states, for example, grant officers immunity from liability when they carry out discretionary responsibilities. The most common versions of such immunity are (1) full immunity, (2) good faith immunity, and (3) immunity for "reasonable" actions. RESTATEMENT (SECOND) OF TORTS § 895D comment e (1977). Full immunity absolves the officer of liability in all cases in which he is acting within the scope of his employment. A "good faith" immunity would absolve an officer acting in the scope of his employment if he had a good faith belief that he was acting consistently with his official duty. The third immunity would protect from liability an officer who acted "reasonably," that is, without negligence. An officer may also be granted a privilege protecting him from liability flowing from decisions that turn out to be correct. The existence of such immunities may vitiate the deterrent to improperly executed arrests.

57. The self-protection defense applied in criminal cases was "taken over as an apt analogy in tort cases." M. FRANKLIN & R. RABIN, *supra* note 52, at 782. *See also* Crabtree v. Dawson, 119 Ky. 148, 83 S.W. 557 (1904); Courvoisier v. Raymond, 23 Colo. 113, 47 P. 284 (1896).

58. *See* G. FLETCHER, *supra* note 36, at 798-807.

59. *See* notes 51-53 *supra* and accompanying text.

60. Although most courts, influenced by the criminal law, allow the excuse concept as a defense to tort liability and leave the loss with the victim, other courts do not and thereby shift the loss to the defendant who intentionally, though mistakenly, inflicted the harm. PROSSER, *supra* note 54, at 125.

deadly force.[61] A gross negligence standard is more lenient than a simple negligence standard, but more stringent than a recklessness standard.[62] "Simple negligence" is defined as a deviation from "conduct of the reasonable person of ordinary prudence under the circumstances."[63] Under such a standard, acts of mere inadvertence may lead to liability. "Recklessness," on the other hand, is "an act . . . in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences."[64] Under this standard, the risk of harm must be so obvious that either the actor knew of the risk he was disregarding or such knowledge may be imputed to him; mere inadvertence is not enough. The two standards differ in kind rather than degree[65] since "recklessness," unlike "negligence," involves an element of intent — or imputed intent.

Neither of these standards is adequate. Application of a simple negligence standard would be too harsh.[66] It would be bad policy — and unfair — to hold an officer accountable for ordinary acts of inadvertence, since such acts are all the more likely to occur in the often dangerous and unpredictable environment in which police officers must operate.[67] At the same time, however, a "recklessness" standard would be too lenient, since it would impose liability only on those officers who commit such "obvious" errors that knowledge may be imputed. Even a deviation from normal police procedure may not necessarily be deemed "obvious."

A "gross negligence" standard, on the other hand, would provide suspects adequate means to redress injury resulting from the abuse of police discretion. "Gross negligence" is not easily defined,[68] but it falls somewhere between simple negligence and recklessness. It is perhaps best understood as aggravated negligence, or a *significant* deviation from the standard of ordinary care.[69] In other words, unlike the

61. Only the Fifth Circuit has evaluated an officer's conduct in creating the need to use deadly force as a matter of state tort law. That circuit appears to have applied a simple negligence standard. *See* note 49 *supra.*

62. Prosser criticizes the concept of "gross negligence" as being more than simple negligence, less than recklessness, but ultimately undefinable. PROSSER, *supra* note 54, at 211-14. All of these standards of liability are necessarily vague, but the notion of "gross negligence" can be made sufficiently clear, at least for the purposes of resolving the issues raised in this Note.

63. PROSSER, *supra* note 54, at 209.

64. *Id.* at 213.

65. *Id.* at 212.

66. Some states apply a simple negligence standard. *See, e.g.*, Young v. City of Killeen, 775 F.2d 1349, 1353-54 (5th Cir. 1985).

67. As Justice O'Connor argued in her dissent in *Garner,* "The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances." Tennessee v. Garner, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting).

68. *See* note 62 *supra.*

69. "Gross negligence" has been defined as

"recklessness" standard, the risk of harm need not be so obvious that the officer's knowledge may be imputed, but, unlike the simple negligence standard, the deviation must be a "significant" one.[70] While recognizing the need to grant officers some leeway to commit inadvertent wrongs (negligence) without incurring liability, a gross negligence standard would provide suspects with a means to redress their injuries. It would adequately balance the need to allow officers discretion and the need to provide suspects an adequate remedy for unlawful arrests.

III. CONSTITUTIONAL LIABILITY UNDER SECTION 1983

If a police officer's actions rise to the level of a constitutional violation, the suspect may seek a federal remedy under section 1983.[71] The key question in addressing such a claim under section 1983 is whether or not the defendant's action constitutes a constitutional violation.[72] In answering this question, courts have looked to the fourth amendment as well as to the due process clause of the fourteenth amendment. Although they come to opposite conclusions, the Eleventh and Fifth Circuits have both relied largely on the fourth amendment.[73]

---

substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission . . . of an aggravated character . . . . It is very great negligence, or the absence of slight diligence, or the want of even scant care.

Altman v. Aronson, 231 Mass. 588, 591, 121 N.E. 505, 506 (1919). *See also* Grill v. General Iron Screw Collier Co., L.R. 1 C.P. 600, 612 (1866) (gross negligence is "ordinary negligence with a vituperative epithet") (Willes, J., quoting Rolfe, B., in Wilson v. Brett, 11 M. & W. 113, 152 Eng. Rep. 737, 739 (Ex. 1843)).

70. The "significant deviation" interpretation of the gross negligence standard is not very clear itself, since it may be difficult to distinguish deviations from ordinary care from *significant* deviations from ordinary care. It may take an accumulation of case law to give "significant" a clear meaning. But it is at least possible to see how the two standards would play out in some cases. For example, in Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985), the officer would not have had to shoot and kill the suspect had he not violated *six* police procedures. 775 F.2d at 1352. It seems clear that violation of six police procedures is a "significant" deviation from ordinary care, while violation of one procedure may not be.

71. For the text of section 1983, see note 10 *supra*. This Part addresses the personal liability under section 1983 of the individual officer. Although it is also possible to state a section 1983 claim against the municipality that employs the officer, such a claim faces serious obstacles. First, there is no vicarious liability under section 1983; a plaintiff may recover against a government entity only if he shows that his injury was caused by that entity's "policy or custom." Monell v. Department of Social Serv. of N.Y., 436 U.S. 658, 694 (1978). Second, states have a constitutional immunity to section 1983 suits under the eleventh amendment, which effectively limits the form of relief that plaintiffs can recover against states to prospective relief. Quern v. Jordan, 440 U.S. 332, 337-39 (1978). This eleventh amendment immunity, however, does not extend to local government units such as municipalities.

Although section 1983 provides only for the liability of a state actor, an implied cause of action, the "Bivens" action, provides for the liability of a federal actor who has violated a constitutional right. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *See also* Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983); Carlson v. Green, 446 U.S. 14 (1980).

72. For a discussion of the elements of a section 1983 action, see M. FRANKLIN & R. RABIN, *supra* note 52, at 800-03.

73. *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1500-02 (11th Cir. 1985), *cert. de-*

The Tenth and Eleventh Circuits have asked whether the officer's conduct constitutes a violation of substantive due process under the fourteenth amendment.[74] Finally, the First Circuit has focused on whether the officer's conduct represents a violation of procedural due process under the fourteenth amendment.[75]

This Part will first evaluate an officer's conduct creating the need to use deadly force in terms of fourth amendment analysis. It will then address the possibility of evaluating the officer's conduct in terms of substantive due process analysis.

A. *Fourth Amendment*

The Supreme Court in *Tennessee v. Garner*[76] interpreted the fourth amendment to require that the police employ "reasonable" methods in apprehending suspects even if they have probable cause to believe that the suspects are involved in a crime.[77] The police can violate the fourth amendment not only by arresting a suspect without probable cause, but also by apprehending him using unnecessary force. *Garner* specifically held that it is a violation of the fourth amendment for an officer to shoot a fleeing felon unless "the suspect threatens the officer with a weapon or there is probable cause to believe that [the suspect] has committed a crime involving the infliction . . . of serious physical harm."[78] In *Garner,* the defendant-officer, responding to a burglary report, shot and killed an unarmed teenager, Edward Garner, as he apparently fled from the house in question and was about to mount a six-foot-high fence at the edge of the backyard.[79]

Relying on *Garner,* the Eleventh Circuit, in *Gilmere v. City of Atlanta,*[80] held that an arrest may be "unreasonable" — and therefore an unlawful "seizure" under the fourth amendment — if the officer creates the need to use deadly force.[81] The defendant-officer in that case shot and killed the suspect after provoking him by beating him about the head.[82]

The court allowed that the officer may have legitimately shot the

---

nied, 476 U.S. 1124 (1986); Young v. City of Killeen, 775 F.2d 1349, 1352-53 (5th Cir. 1985). *See also* notes 80-88 *infra* and accompanying text.

74. *See, e.g.,* Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1378-79 (10th Cir.), 474 U.S. 844 (1985); *Gilmere,* 774 F.2d at 1500-01. *See also* notes 129-54 *infra* and accompanying text.

75. *See, e.g.,* Voutour v. Vitale, 761 F.2d 812, 818-19 (1st Cir. 1985), *cert. denied,* 474 U.S. 1100 (1986).

76. 471 U.S. 1 (1985).

77. 471 U.S. at 7-8.

78. 471 U.S. at 11.

79. 471 U.S. at 3-4.

80. 774 F.2d 1495 (11th Cir. 1985), *cert. denied,* 476 U.S. 1124 (1986).

81. 774 F.2d at 1501-02.

82. For the facts of *Gilmere,* see notes 129-34 *infra* and accompanying text.

suspect in self-defense, but it concluded that "a moment of legitimate fear should not preclude liability for a harm which largely resulted from [the officer's] own improper use of his official power."[83] In evaluating the officer's conduct, the court was willing to consider the officer's conduct before the suspect attacked him instead of simply focusing on the officer's conduct at the moment of the attack.

Unlike the Eleventh Circuit in *Gilmere,* the Fifth Circuit in *Young v. City of Killeen*[84] did not consider the officer's conduct prior to the suspect's attack. Also applying a fourth amendment analysis,[85] the court reversed a section 1983 verdict against the defendant-officer after his negligent violation of police procedures created the need to use deadly force in self-defense.[86] The court explained that "[t]he constitutional right to be free from unreasonable seizure has never been equated by the [Supreme] Court with the right to be free from a negligently executed stop or arrest."[87] In his dissent from denial of certiorari in *Gilmere,* Chief Justice Burger agreed with the Fifth Circuit that any use of deadly force in legitimate self-defense is inherently "reasonable" under *Garner.*[88]

In determining whether there has been a violation of the fourth amendment,[89] courts have employed a balancing test. Courts determine the "reasonableness" of the conduct by "balanc[ing] 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."[90] In applying this test, courts take into account "not only when a seizure is made, but also how it is carried out."[91] Accordingly, in *Garner,* the Court balanced the state's interest in apprehending fleeing suspects against the suspect's interest in his

83. 774 F.2d at 1501.

84. 775 F.2d 1349 (5th Cir. 1985).

85. For a description of fourth amendment analysis, see notes 89-91 *infra.*

86. In that case, Officer Olson stopped a car driven by Young after observing an apparent drug transaction between its occupants and a pedestrian. After the officer told the occupants to step out, Young reached down to the floorboard of his car. Officer Olson then shot and killed Young, erroneously believing that he was reaching for a gun. The district court found that officer Olson had created the need to use deadly force by violating at least six police procedures, such as abandoning a covered position and advancing into the open. 775 F.2d at 1351.

87. 775 F.2d at 1353.

88. The Chief Justice stated that "an officer's conduct which makes the need for deadly force more likely does not constitutionally disable the officer from later using deadly force to defend himself." Sampson v. Gilmere, 476 U.S. 1124, 1125 (1986).

89. The text of the fourth amendment is set out in note 11 *supra.*

90. United States v. Place, 462 U.S. 696, 703 (1983).

91. Tennessee v. Garner, 471 U.S. 1, 8 (1985). The *Garner* Court elaborated that "the question was whether the *totality of the circumstances* justified a particular sort of search or seizure." 471 U.S. at 8-9 (emphasis added). This consideration of the *manner* of the search as an element in the balancing test was not an innovation of the *Garner* Court. *See, e.g.,* Florida v. Royer, 460 U.S. 491, 500 (1983) (seizure must be "carefully tailored to [its] underlying justification") (the Court deemed unconstitutional an otherwise lawful "seizure" of a suspect's luggage because the officers negligently kept the luggage longer than necessary).

own life. However, in assessing the state's interest in apprehending the suspect, the Court looked not merely to the state's interest in catching a potential criminal, but also to its interest in catching him in the manner that it did.[92] Indeed, the best way to understand the "manner" aspect of the balancing test is by considering its relationship to the strength of the state's interest.[93] The *Garner* Court recognized that the state had a strong interest in apprehending fleeing felons,[94] but seemed to discount that interest to the extent that it found the government's method "unproductive."[95] From this viewpoint, the Court concluded that the use of deadly force to stop an unarmed, fleeing felon could not outweigh the suspect's interest in his own life.[96]

This same fourth amendment analysis, applied in evaluating an officer's gross negligence in creating the need to use deadly force, indicates that such conduct constitutes a violation of the fourth amendment. A state can have little interest in apprehending a suspect through the use of deadly force when such force is unnecessary. While the state does have an interest in allowing its officers sufficient discretion in determining the means they use in apprehending suspects, a gross negligence standard allows such freedom.[97] A gross negligence standard,[98] by permitting an officer to act with *simple* negligence, allows him sufficient freedom of action in performing his duties, because it allows him to commit acts inadvertently without fear of civil liability. The state's interest in providing an officer even more freedom of action is therefore insignificant. A suspect, on the other hand, has a large interest in his own life. Indeed, the Supreme Court, in *Garner,* reasoned that "[t]he intrusiveness of a seizure by means of deadly force is unmatched," and that a "suspect's fundamental interest in his own life need not be elaborated upon."[99] Because fourth amendment balancing requires that the government interest rise in relation to an amplified individual interest,[100] an officer's gross negligence in the cre-

92. 471 U.S. at 9-10.

93. Although the *Garner* court treated the police's method as more a general consideration than an independent factor to be balanced, *see* note 91 *supra,* the Supreme Court has in other cases treated the method as an independent factor. *See, e.g.,* Bell v. Wolfish, 441 U.S. 520, 559 (1979) (courts should take into account "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted").

94. *Garner,* 471 U.S. at 9 n.8, 10.

95. The Court stated that "we are not convinced that the use of deadly force is a sufficiently *productive* means of accomplishing [its goals] to justify the killing of nonviolent suspects. . . . [T]he fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect." 741 U.S. 10-11 (emphasis added).

96. 471 U.S. at 11.

97. *See* note 69 *supra.*

98. For a definition, see notes 68-70 *supra* and accompanying text.

99. 471 U.S. at 9.

100. The *Garner* Court held that an officer may use deadly force against a suspect only if the suspect poses a roughly reciprocal danger to the officer or a third party; that is, an officer may use deadly force to stop a fleeing felon where "the suspect poses a threat of serious physical harm,

ation of the need to use deadly force should be deemed an impermissible seizure under the fourth amendment.

There is an alternative interpretation of *Garner,* but it does not affect this conclusion. A strong argument exists that the *Garner* court did not mandate this type of pure balancing, but that the case was more an expression of revulsion to (and prohibition of) unnecessary killing.[101] After all, if the police officer does not shoot the fleeing felon, the police may have one more unsolved crime on their hands, but *nobody will die.* Certain language in the opinion suggests that the Court was more concerned about this fundamental arithmetic than about the more delicate balancing of interests, discounted by efficiencies. For example, it remonstrated that "[i]t is not better that all felony suspects die than that they escape."[102] Shooting a fleeing felon, in other words, would not be constitutionally permissible even if that were the *only* way of catching him. Moreover, as previously mentioned, the Court states: "The suspect's fundamental interest in his own life need not be elaborated upon."[103] This uncharacteristically emotional and demonstrative statement suggests that a suspect's life will *never* lose a balancing contest against an abstract state interest. However, under this logic, perhaps the only time that an officer may shoot a fleeing felon is if another life is involved to counterbalance the consideration of the suspect's life. The *Garner* Court would, in fact, permit an officer to shoot a fleeing felon when he "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[104]

Superficially, this alternative interpretation seems to suggest that an officer has not violated the suspect's constitutional rights if he creates the need to use deadly force. Unlike the situation in *Garner,* the officer's life appears, or reasonably appears, to be threatened in every case. However, a closer look reveals that this alternative interpretation of *Garner* does not suggest that the court saw such conduct as consistent with fourth amendment principles. This becomes apparent when one distinguishes between the officer's act of creating the need for deadly force and his separate act of firing his weapon in defense of his life. The latter act — the officer's defense of his life — is not challenged, since it is clearly justifiable in fourth amendment terms by the officer's need to protect his own life. The officer's prior act of *creating*

---

either to the officer or to others." *Garner,* 471 U.S. at 11. This form of balancing is consistent with other fourth amendment decisions. *See* Note, Tennessee v. Garner—*The Use of Deadly Force To Arrest as an Unreasonable Search and Seizure,* 65 N.C. L. REV. 155, 165 (1986).

101. This interpretation comports with the view that *Garner* "may have been motivated primarily by the compelling facts of the case." *The Supreme Court—Leading Cases,* 99 HARV. L. REV. 120, 244 (1985).

102. 471 U.S. at 11.

103. 471 U.S. at 9.

104. 471 U.S at 11.

the need to use deadly force, however, is not justifiable by his, or by society's, interest in protecting his life.[105] At the moment this act was committed, the officer's life was not threatened. Recognizing that the officer has committed two separate acts, the act of gross negligence and the act of self-defense, means that the alternative interpretation of *Garner* does not affect the conclusion. An officer should still be held constitutionally liable for his gross negligence in creating the need to use deadly force.

Although this second interpretation of *Garner* does not affect the analysis relating to the officer's liability, it does shed light on Chief Justice Burger's dissent from denial of certiorari in *Gilmere v. City of Atlanta.*[106] For it is this second interpretation of *Garner* that he had in mind when he stated that "an officer's conduct which makes the need for deadly force more likely does not constitutionally disable the officer from later using deadly force to defend himself."[107] He apparently believed that this was a situation where the consideration for the suspect's life was counterbalanced by consideration for the officer's life. Unfortunately, he failed to see the distinction between the officer's act of gross negligence and his act of self-defense. Burger failed to recognize that holding the officer liable for his gross negligence does not "disable" — or otherwise affect — the officer's ability to defend himself. The Chief Justice would probably have thought differently had he been confronted with facts like those in *Young v. City of Killeen,*[108] where the suspect never actually tried to harm the officer, rather than those of *Gilmere,* where the suspect did try to harm the policeman. In *Killeen,* the officer violated police procedure, *inter alia,* by stepping away from the cover of his police cruiser. As a result, he had to shoot and kill the suspect when he erroneously thought the suspect was reaching for a gun.[109] Because the officer's life was never in any actual danger, there was no question of concern for the suspect's life being counterbalanced by consideration of the officer's life.[110]

105. The situation where the officer's gross negligence creates the need to use deadly force in self-defense, therefore, is analogous to the cases where the officer's negligence or gross negligence directly causes the suspect's death, without the suspect's intervening act of attacking the officer. For example, in Leber v. Smith, 773 F.2d 101 (6th Cir. 1985), *cert denied,* 475 U.S. 1084 (1986), the officer slipped while making an arrest and shot the suspect by accident. The court refused to find the officer's apparently simple negligence to be "unreasonable" under the fourth amendment.

106. Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985), *cert. denied sub nom.* Sampson v. Gilmere, 476 U.S. 1124 (1986).

107. Sampson v. Gilmere, 476 U.S. 1124, 1125 (1986).

108. 775 F.2d 1349 (5th Cir. 1985).

109. *See* note 86 *supra.*

110. The Fifth Circuit nonetheless denied the plaintiff recovery, explaining that "[t]he constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest." 775 F.2d at 1353. If the officer was in

The *Garner* Court also expressed concern about the possibility of hampering effective law enforcement[111] and of requiring police to make impossible split-second decisions.[112] Requiring officers to use less injurious but equally effective procedures in apprehending suspects would aid, rather than hamper, effective law enforcement. The police would achieve the same goals without generating the public distrust that could result from the use of unnecessary force.[113] Nor would the officer be required to make impossible split-second decisions. The purpose of permitting an officer to commit acts of negligence without invoking tort liability is to allow him some errors in making fast decisions. If courts applied this permissive standard in evaluating police conduct, officers would be able to handle such split-second decisions.

Despite the often inevitable subjectivity of fourth amendment balancing,[114] an officer's gross negligence in creating the need to use deadly force should always amount to an unreasonable seizure under the fourth amendment. This test allows both the state's interest and the individual's interest — both factors in the balancing test — to vary from one case to another. For example, the state's interest may vary positively as a function of the danger the suspect poses to others and negatively as a function of the egregiousness of the method it uses to apprehend the suspect. In cases involving an officer's gross negligence in creating the need to use deadly force, however, the "method" prong should in every case weigh so heavily in favor of finding a fourth amendment violation that courts would fashion a per se rule that such conduct would always violate the fourth amendment. A number of federal courts of appeals that have addressed the question have held that conduct that amounts to police brutality, even in the context of a legitimate arrest, may rise to the level of a fourth amendment violation.[115] Although these courts did not address whether police brutality will, in every case, constitute a violation of the fourth amendment, without regard to the individual and state interest prongs of the balancing test, they do suggest that the "method" employed may be an

---

fact merely negligent, then the court reached the correct result. *See* notes 61-70 & 97-101 *supra* and accompanying text.

111. Tennessee v. Garner, 471 U.S. at 19.

112. 471 U.S. at 20.

113. *See* note 169 *infra* and accompanying text.

114. *See, e.g.*, Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 989-92 (1987) (discussing *Garner*); *The Supreme Court — Leading Cases*, *supra* note 101, at 244 (suggesting that *Garner* itself "may have been motivated primarily by the compelling facts of the case"); Note, *supra* note 100, at 159 ("By its nature, the balancing test is relatively formless, subjective, and, in part, based on a common sense judgment.").

115. *See, e.g.*, Waggoner v. Mosti, 792 F.2d 595 (6th Cir. 1986); Robins v. Harum, 773 F.2d 1004 (9th Cir. 1985); Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985). *But see* Leber v. Smith, 773 F.2d 101 (6th Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986) (officer slipped and shot suspect by accident in making arrest: held not to violate fourth amendment).

important and sometimes controlling factor in the balancing test.[116] Moreover, the degree to which governmental action represents a threat to individual liberties is a central concern of the fourth amendment.[117] Officers who act with more than mere inadvertence in disregarding the safety of the public represent a serious threat to individual liberties,[118] and this threat heightens the individual's already strong interest in having an effective remedy to the abuse of police discretion. Consistent application of a gross negligence standard in such cases would also fulfill the need to provide police officers with fixed standards to guide their actions.[119] The goal of providing police with clear guidance would be especially well served by application of such a per se rule to the extent that the same standard is applied in state law tort actions.[120]

B. *Due Process Clause*

Courts have also looked to the due process clause of the fourteenth amendment,[121] in evaluating an officer's conduct that creates the need to use deadly force in self-defense. This section will focus on the evaluation of such conduct in terms of "substantive" due process analysis.[122] The Supreme Court has limited the scope of procedural due process analysis, and therefore that analysis is not useful in most cases involving an officer's creation of the need to use deadly force.[123] This

116. The California Supreme Court, for example, has held that use of a motorized battering ram is a per se unconstitutional method of conducting a "search" under the fourth amendment if employed without the explicit permission of a federal magistrate. Langford v. Superior Court (Gates), 43 Cal. 3d 21, 729 P.2d 822, 233 Cal. Rptr. 387, *cert. denied,* 108 S. Ct. 87 (1987).

117. *See, e.g.,* Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) (the use of the military to conduct searches and seizures, rather than police, heightens the need for application of fourth amendment protections, since the military represents a greater threat to individual liberties than do civilian police officers), *affd. on rehearing,* 800 F.2d 812 (8th Cir. 1986), *affd. memo,* 108 S. Ct. 1253 (1988) (affirmed without quorum under 28 U.S.C. § 2109).

118. *See* notes 3 & 5 *supra.*

119. In her dissent in *Garner,* Justice O'Connor criticizes the majority for not providing the police with the "critical factors in the decision to use deadly force." 471 U.S. at 32.

120. *See* notes 61-70 *supra* and accompanying text.

121. The relevant clause of the fourteenth amendment states that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

122. While procedural due process is primarily concerned with guaranteeing fair procedures, substantive due process is concerned with guaranteeing certain substantive rights. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14-21 (1980). The doctrine of substantive due process has been under attack by Ely and other commentators and courts. *See* note 155 *infra.*

123. The First Circuit, which did consider procedural due process analysis in confronting this question, resolved the issue on other grounds. Voutour v. Vitale, 761 F.2d 812, 818 n.4 (1st Cir. 1985) (found defendant-officer entitled to summary judgment on the basis of a good-faith immunity, so did not resolve whether an officer's "negligence" or "gross negligence" in creating the need to use deadly force may represent a procedural violation of due process), *cert. denied,* 474 U.S. 1100 (1986).

In Parratt v. Taylor, 451 U.S. 527 (1981), the Supreme Court held that a random and unauthorized "deprivation" of a constitutionally protected interest is not "without due process of

section concludes that courts should not apply substantive due process analysis in this context because it duplicates the fourth amendment analysis, and because it is too subjective and arbitrary to give police adequate guidance.

In *Rochin v. California,*[124] the Supreme Court determined that police conduct that "shocks the conscience"[125] violates substantive rights embodied in the due process clause.[126] Attempting to clarify this vague standard in *Johnson v. Glick,*[127] Judge Friendly announced what has become the prevailing test in cases concerning the use of excessive force by police. Judge Friendly stated:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of the force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[128]

The Eleventh and Tenth Circuits have applied substantive due process analysis in evaluating an officer's conduct in creating the need to

---

law" under the fourteenth amendment so long as the state provides an "adequate" remedy. The use of excessive force by a police officer is such an unauthorized act so long as the officer is not acting pursuant to an official state policy. Since the tort law of most states can be expected to provide an adequate remedy, a suspect alleging excessive use of force in most cases will be unable to predicate a section 1983 claim on a procedural due process theory. It should be noted, however, that there is some controversy over whether *Parratt* should be read to apply to deprivations of "liberty" or "life" interests, or whether it should be limited to deprivations of "property" interests, which were at issue in *Parratt.* Note, *Due Process: Application of the Parratt Doctrine to Random and Unauthorized Deprivations of Life and Liberty,* 52 FORDHAM L. REV 887 (1984) (arguing that *Parratt* does apply to cases involving life and liberty interests); *see also* Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (arguing that "the conclusion that *[Parratt's]* holding applies only to the deprivation of property lacks foundation); Leber v. Smith, 773 F.2d 101 (6th Cir. 1985) (same), *cert. denied,* 475 U.S. 1084 (1986). *But see* Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982) (arguing that *Parratt* does not apply to cases involving intentional deprivation of "liberty"). *See generally* Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment,* 86 COLUM. L. REV. 979 (1986) (criticizing *Parratt*).

A section 1983 claim predicated on a procedural due process theory may also be barred by Daniels v. Williams, 474 U.S. 327 (1986), holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 474 U.S. at 328 (emphasis in original); *see also* Davidson v. Cannon, 474 U.S. 344 (1986) (companion case). Accordingly, a negligent act relating to the use of excessive force or creation of the need to use excessive force is clearly not a "deprivation" for the purposes of the fourteenth amendment. The Court, moreover, may interpret negligence to include "gross negligence."

124. 342 U.S. 165 (1952).

125. 342 U.S. 165, 172 (1952). The Court elaborated that such conduct must "do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically." 342 U.S. at 172.

126. In *Rochin,* the police extracted two capsules (needed as evidence) from the suspect's stomach by forcing medicine into his stomach so that he would vomit. The Court held that this conduct violated the due process clause.

127. 481 F.2d 1028 (2d Cir.) *cert. denied,* 414 U.S. 1033 (1973).

128. 481 F.2d at 1033; *see* Comment, *Excessive Force Claims: Removing the Double Standard,* 53 U. CHI. L. REV. 1369, 1371 (1986).

use deadly force in self-defense. Applying such an analysis in *Gilmere v. City of Atlanta,*[129] the Eleventh Circuit found that the officer's conduct in creating the need to use deadly force violated the due process clause and gave rise to a section 1983 claim. In that case, defendant-officer Sampson and officer Craig, a colleague, started to bring Patillo, plaintiff's decedent, to their patrol car for questioning.[130] The police intended to question him about a report that he had threatened a third party with a gun. Patillo, however, attempted to flee and then began "flailing" his arms in resistance.[131] In part, apparently, because Patillo was intoxicated, the officers quickly regained control and began to escort Patillo "by force."[132] They also began to beat him about the head. Apparently in response to the beating, Patillo again tried to flee.[133] A scuffle ensued, during which Patillo lunged at officer Sampson. Sampson reacted by shooting and killing Patillo.[134]

The Tenth Circuit, however, applied substantive due process analysis in *Hewitt v. City of Truth or Consequences*[135] and concluded that the defendant-officer should not be liable for his conduct in creating the need to use deadly force. The plaintiff in that case alleged that defendant-officers "negligently"[136] searched,[137] handcuffed,[138] and secured[139] Hewitt, the plaintiff's decedent, so that he was able to escape from the back of a parked police car with a nonshooting starter pistol hidden in his boot.[140] After escaping, Hewitt pointed the pistol at himself and threatened to commit suicide.[141] One of the officers, Sarembar, pointed a shotgun at Hewitt and told him to drop his pis-

129. 774 F.2d 1495 (11th Cir. 1985), *cert. denied,* 476 U.S. 1124 (1986).

130. 774 F.2d at 1496-97.

131. 774 F.2d at 1497.

132. 774 F.2d at 1497. The term "by force" probably means that they held him tightly and pulled him along.

133. The trial court and court of appeals apparently believed that the beating caused Patillo to try to flee. The court of appeals, in upholding the trial court's decision to hold defendant-officer liable for the shooting (in addition to liability for the beating alone), stated that "a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power." 774 F.2d at 1501.

134. 774 F.2d at 1497.

135. 758 F.2d 1375 (10th Cir.), *cert. denied,* 474 U.S. 844 (1985).

136. The plaintiffs apparently specifically alleged negligence. *See* 758 F.2d at 1378.

137. One of the officers apparently had searched Hewitt twice, the second time finding a pistol grip in Hewitt's front pocket, but not the starter pistol Hewitt later pointed at the officers. 758 F.2d at 1377.

138. One of the officers had originally handcuffed Hewitt with his hands behind his back. After Hewitt worked his hands around in front of him, that officer readjusted Hewitt's cuffs but did not recuff his hands behind his back. 758 F.2d at 1377.

139. Officer "Calahan testified at trial that he knew it was possible for someone in the back seat of the car [where he put Hewitt] to get out of the locked vehicle by reaching through a gap in the metal grid and manipulating the lock mechanism." 758 F.2d at 1377.

140. 758 F.2d at 1378.

141. 758 F.2d at 1377-78.

tol.[142] Hewitt then turned and aimed his gun at Sarembar, who responded by firing his shotgun and killing Hewitt.[143]

The results in these cases seem intuitively correct, but the courts did not apply objective standards. The *Gilmere* case involved allegations of police brutality, so that the resulting harm somehow seems "shocking to the conscience,"[144] or at least more so than the "negligent"[145] conduct alleged in *Hewitt.* Yet a close look at the standards the courts used reveals the arbitrary and inherently subjective nature of substantive due process analysis.[146] In *Gilmere,* the court separated the issues regarding the officers' liability for beating the suspect from their liability for shooting the suspect in self-defense, and it affirmed the officers' liability on both grounds. It rationalized holding the officers liable for the shooting because "a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power."[147] This statement, however, is more an expression of moral indignation than a standard; the court seems to be saying that the officer should suffer (or be liable for) the consequences of his own wrongdoing. Even though it separated the allegations relating to the beating from those relating to the shooting, the court seems to have been outraged by the beating from used that outrage as a basis for holding the officers liable on both grounds. The court never really focused on the officers' degree of culpability with regard to the shooting.[148] As a practical consequence, this standard could support the liability of any officer courts consider culpable (through negligence, gross negligence, recklessness or worse) for caus-

142. 758 F.2d at 1378.

143. 758 F.2d at 1378.

144. This is the standard the Supreme Court set out in *Rochin v. California* for evaluating police conduct pursuant to substantive due process analysis. *See* notes 124-26 *supra.* The test set out by Judge Friendly in *Johnson v. Glick* is widely applied but is not mandatory, since *Johnson* is not a Supreme Court opinion. *See* note 128 *supra* and accompanying text.

145. This was the plaintiff's characterization of that conduct. *Hewitt,* 758 F.2d at 1378.

146. Commentators have criticized substantive due process analysis on these grounds. *See* note 155 *infra.*

147. *Gilmere,* 774 F.2d at 1501.

148. The court never asked whether the officers, in beating the suspect, were negligent, grossly negligent, reckless, or worse, in creating the need to use deadly force. It is not clear that beating a suspect about the head after he tries to run away will *cause* him to try to run away again. Normally, "punishing" a suspect for trying to escape would *prevent* him from trying again, even if he is intoxicated. This is an empirical question to which there is no clear, nonintuitive answer, but the very question highlights the fact that the court ignored the question entirely.

The court made the same mistake that Chief Justice Burger made in his dissent from denial of certiorari in *Gilmere.* In that dissent, the Chief Justice confused the officer's conduct in creating the need to use deadly force with his right to defend himself, in effect absolving him of liability with regard to his first action because of his privilege with regard to the second action. *See* notes 107-10 *supra* and accompanying text. In effect, the *Gilmere* court did the same thing, but in reverse, when it focused on the officers' culpability for beating the suspect as justification for holding them liable both for the beating and for the shooting.

ing the need to use deadly force. As discussed in Part II,[149] however, this may not be the best approach. The fact that the court's standard seems to be more an expression of moral indignation may be an inevitable result of the fundamental subjectivity of the "shocks the conscience" standard. The court in *Gilmere,* moreover, did not explicitly discuss the *Johnson* factors, except to point out that the trial court "noted . . . such action [by the police officers] clearly implicated at least one of the *Johnson* factors in that the injury inflicted constituted the most serious harm possible."[150]

The *Hewitt* court applied a standard as subjective and arbitrary as that applied in *Gilmere,* although it differed in form. In *Hewitt,* the Tenth Circuit first suggested that it was going to consider whether the *Johnson* factors indicated that the conduct represented a denial of substantive due process,[151] but it ultimately ignored the factors entirely in favor of considering whether the conduct represented an "abuse of state power." This language, which the court borrowed from a *procedural* due process case,[152] is vague at best. Like the "standard" applied by the *Gilmere* court, it invites the court to decide according to its own subjective opinion. Indeed, the court did not attempt to explain why the officer's actions did not represent an "abuse of state power" but, like the *Gilmere* court, merely stated with certainty that "[w]herever th[e] line may be drawn, the conduct complained of here simply is not an abuse of power condemned by the Constitution."[153] Although the fact that these decisions seem intuitively correct may lull an observer into believing that the courts are applying objective standards, a closer look at the courts' rationales indicates that the "shocks the conscience" standard is, as Judge Easterbrook has stated, "a vague standard . . . inviting decisionmakers to consult their sensibilities rather than objective circumstances."[154]

These two cases demonstrate that a substantive due process analy-

149. *See* Part II *supra.*

150. *Gilmere,* 774 F.2d at 1501.

151. Although not citing *Johnson,* it considered similar factors "relevant," though apparently not conclusive. *Hewitt,* 758 F.2d at 1379.

152. The court borrowed the language from Parratt v. Taylor, 451 U.S. 527 (1981). The court may have been anticipating the Supreme Court's recent holding that negligence may not constitute a deprivation of procedural due process. Daniels v. Williams, 474 U.S. 327, 328 (1986); Davidson v. Cannon, 474 U.S. 344 (1986). Even if this is true, however, that holding is not directly relevant in a substantive due process case. Although a court may conclude that negligence is not enough to constitute a violation of substantive due process, that conclusion has not been mandated by the Supreme Court. *See, e.g.,* Gumz v. Morrissette, 772 F.2d 1395, 1409 (7th Cir. 1985) (Easterbrook, J., concurring) (arguing that certain limitations on application of procedural due process analysis should be applied in substantive due process cases as well, even though the Seventh Circuit had decided that it is not bound by precedent to do so), *cert. denied,* 475 U.S. 1123 (1986).

153. *Hewitt,* 758 F.2d at 1379.

154. *Gumz,* 772 F.2d at 1407 (Easterbrook, J., concurring).

sis is inherently arbitrary and subjective.[155] The possibility that courts will apply such a subjective analysis in evaluating the conduct of police in creating the need to use deadly force undermines the goal of providing officers with clear guidance.[156] Police officers will be unable to predict when certain conduct will "shock the conscience" of a particular judge. It may be true that, *as a matter of theory,* only conduct that violates the fourth amendment under *Garner* may be found to violate substantive due process. That suggests that officers need only guide themselves according to the law provided by fourth amendment jurisprudence in order to protect themselves from liability under substantive due process.[157] As a practical matter, however, a court applying substantive due process analysis may impose liability even when fourth amendment analysis does not suggest that result.[158] Indeed, the court in *Hewitt* considered the possibility of finding a violation of substantive due process in a case where the officer acts with *simple* negligence,[159] a situation where courts should not impose fourth amendment liability.[160] If, therefore, the fourth amendment balancing

155. Professor Ely believes that due process is about procedure, not substantive rights, and should be applied only when questions of fair procedure arise. To say "*substantive* due *process,*" he points out, "is a contradiction in terms — sort of like 'green pastel redness.' " J. ELY, *supra* note 122, at 18 (emphasis added). Judge Easterbrook agrees that due process should be about procedure and has pointed out that "[s]ubstantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand." *Gumz,* 772 F.2d at 1406. *See also* Comment, *supra* note 128, at 1389-92 (arguing that substantive due process analysis should no longer be applied to claims concerning excessive force during arrest).

156. Courts and commentators have underscored the value of providing police officers with sufficiently clear rules by which to guide their conduct. *See, e.g.,* Tennessee v. Garner, 471 U.S. 1, 20, 32 (1985) (both the majority and the dissent agree that clear guidance is an important goal); LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 SUP. CT. REV. 127 (arguing that the Supreme Court should take advantage of opportunities for establishing generalized rules for police in cases dealing with fourth amendment issues, rather than relying on case-by-case adjudication). *But see* Alschuler, *Bright Line Fever and the Fourth Amendment,* 45 U. PITT. L. REV. 227 (1984) (arguing in favor of case-by-case adjudication; suggesting that police are more confused by hundreds of categorical bright-line rules).

157. Because the balancing test is roughly equivalent to one of the three factors in Judge Friendly's substantive due process test set out in *Johnson,* an act cannot theoretically violate substantive due process unless it also violates the fourth amendment. *See Gumz,* 772 F.2d at 1404-09 (Judge Easterbrook argues in concurring opinion that fourth amendment analysis should apply instead of substantive due process analysis); Comment, *supra* note 128, at 1381-86 (arguing that substantive due process analysis should not be applied in arrest-related excessive force claims because it is duplicative of fourth amendment analysis).

158. Courts outside the Second Circuit — as both *Hewitt* and *Gilmere* demonstrate — are free to ignore the *Johnson* factors, in part or in whole, and rely entirely on the Supreme Court's "shocks the conscience" standard set out in *Rochin,* which is vague and inherently subjective. *See* notes 145-55 *supra* and accompanying text. As a practical matter, therefore, judges have a great amount of discretion in finding a violation of substantive due process even where there is not a violation of the fourth amendment.

159. *Hewitt,* 758 F.2d at 1379. The Court did not answer its own question concerning whether negligence is sufficient for imposing substantive due process liability, since it decided for other reasons that such liability could not be imposed. 758 F.2d at 1379.

160. This Note proposes that only acts of gross negligence should be subject to fourth amendment liability. *See* Part III.A *supra.*

test is susceptible to clear, universal rulemaking (as this Note argues), then the application of substantive due process analysis will interfere with an opportunity to provide police officers with the guidance they require.

Exclusive application of the fourth amendment balancing test in arrest-related excessive force cases would provide police officers with relatively clear guidance. Although commentators have also characterized the fourth amendment balancing test as arbitrary and subjective,[161] it is more predictable and less subjective than substantive due process analysis.[162] Further, since one of the three factors a court must consider in applying the fourth amendment balancing test is the method the police use in carrying out their objective, some types of cases may be subject to per se rules or presumptions making liability depend on whether the officer's method reflects a particular common law level of culpability — such as negligence, gross negligence, or recklessness.[163] As this Note proposes, it is possible to create a per se rule that an officer who, with gross negligence, creates the need to use deadly force in self-defense will be subject to liability under the fourth amendment.[164] This outcome arises because a method of gross negligence will, in every case, discount the state's interest in apprehending the suspect. The state has little interest in achieving a certain end by means of gross negligence when it can achieve the same end without such negligence, and without causing harm.[165] Its primary interest is in allowing its officers sufficient discretion, an interest which is adequately served by allowing officers to act with simple negligence without fear of liability.

Substantive due process analysis, moreover, is essentially duplicative of fourth amendment liability. This is true especially to the extent that courts apply the three *Johnson* factors. These factors are (1) the need for the force, (2) the relationship between that need and the

---

161. *See* note 114 *supra.*

162. As Judge Easterbrook pointed out:

> The notorious difficulties in defining reasonableness under the Fourth Amendment are insignificant compared to the randomness that flows from asking people what shocks their consciences. Reasonableness is an open-ended approach, to be sure, but it has roots in tort law. It calls for an objective balancing of the harms from the arrest . . . against the potential harms to effective law enforcement of delaying the action or not acting at all. The graver the crime . . .the more the police can do . . . .
>
> . . . There is now a tremendous body of precedent dealing with searches and seizures, and these cases furnish rules that ought to be sufficient guidance in [such cases.]

Gumz v. Morrissett, 772 F.2d at 1406, 1407 (Easterbrook, J., concurring); *see also* Comment, *supra* note 128, at 1385-86.

163. For explanation of these terms, see notes 63-70 *supra* and accompanying text.

164. The second interpretation of *Garner, see* notes 101-04 *supra,* suggests that even acts of simple negligence should invoke fourth amendment liability, since it suggests that *all* unnecessary deaths are "unreasonable" under that amendment. It is unlikely, however, that any court would carry the implications of this second interpretation so far as to chill police discretion.

165. *See* notes 98-100 *supra* and accompanying text.

amount of force used, and (3) whether the force was used in good faith or for malicious reasons.[166] Because the second factor is essentially the same as the fourth amendment balancing test, any act deemed a deprivation of substantive due process must necessarily be "unreasonable" under the fourth amendment, as long as the court is applying the *Johnson* factors.[167] Accordingly, not only is substantive due process analysis inherently subjective, as pointed out earlier, but it is also potentially duplicative. A court should, therefore, evaluate an officer's conduct in creating the need to use deadly force in terms of fourth amendment analysis to the exclusion of substantive due process analysis.

IV. CONCLUSION

The excessive use of force by police can generate anger and distrust. This anger was reflected in some of the language in the *Garner* opinion.[168] Taking a more practical view, one former police commissioner explained that the use of excessive force "interfered with the strenuous efforts being made to still strife between the . . . Police Department and the citizens it served."[169]

In a few instances, this anger and "strife" have resulted in calls for criminal prosecution of the officers involved. This Note has tried to demonstrate, however, that imposition of criminal sanctions is normally unfair to the police and bad social policy. Recourse to state tort law and to constitutional tort law would be more fair and effective. Furthermore, application of a gross negligence standard would appropriately take into consideration the officers' simultaneous need for discretion and clear guidance. In imposing constitutional tort liability, however, a court should apply fourth amendment analysis to the exclusion of substantive due process analysis, since application of the latter analysis would undermine the officers' need for clear guidance.

— *Frank G. Zarb, Jr.*

166. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973).

167. *See* Comment, *supra* note 128, at 1383-85. It is important to note, however, that it is quite possible, though perhaps unlikely, for a court to find that an act violates substantive due process and not the fourth amendment. *See* notes 158-60 *supra* and accompanying text.

168. *See* notes 102-03 *supra* and accompanying text.

169. Edwards, *supra* note 3, at 733.