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Tennessee v. Garner--The Use of Deadly Force to Arrest as an Unreasonable Search and Seizure

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NOTES

Tennessee v. Garner—The Use of Deadly Force to Arrest as an Unreasonable Search and Seizure

The United States Supreme Court historically has used the fourth amendment[1] as the foundation for examining a wide variety of police practices including a warrantless arrest in a private dwelling,[2] a search incident to arrest,[3] the use of an informant's tip to establish probable cause,[4] a pat-down for weapons,[5] and electronic eavesdropping.[6] In *Tennessee v. Garner*[7] the Court extended its application of the fourth amendment to the use of deadly force by a police officer to apprehend a fleeing felon. The *Garner* Court held that the fourth amendment prohibits the use of deadly force to apprehend a fleeing felon "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[8] The Court in *Garner* thus struck down the common-law rule, still in effect in twenty-three states, which allowed the use of deadly force whenever necessary to effectuate the arrest of a fleeing felon.[9]

This Note analyzes *Garner* in light of other fourth amendment decisions and focuses specifically on the expanded protection given to individual rights in the fourth amendment balancing process when the use of deadly force is involved. It also explores the public policy considerations underlying the abandonment of the common-law rule. The Note concludes that the rule the Supreme Court adopted in *Garner* is a step in the right direction. However, it also concludes that an additional requirement that the threat posed by the suspect be immediate before the police can use deadly force would make the rule more consistent with other fourth amendment cases and more responsive to public policy concerns.

On the night of October 3, 1974, Eugene Garner, a five foot four inch, 110 pound, fifteen year-old, broke the window of an unoccupied residence and stole

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1. The fourth amendment provides:

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

U.S. CONST. amend. IV.

2. *See* Payton v. New York, 445 U.S. 573 (1980).

3. *See* New York v. Belton, 453 U.S. 454 (1981); United States v. Chadwick, 433 U.S. 1 (1977); Chimel v. California, 395 U.S. 752 (1969).

4. *See* Illinois v. Gates, 462 U.S. 213 (1983).

5. *See* Terry v. Ohio, 392 U.S. 1 (1968).

6. *See* Katz v. United States, 389 U.S. 347 (1967).

7. 105 S. Ct. 1694 (1985).

8. *Id.* at 1697.

9. *Id.* at 1703-04.

ten dollars and a purse from inside the house.[10] Alerted by a neighbor, two police officers arrived at the residence in time to see Garner run from the back of the house toward a six foot high chain link fence that enclosed the back yard. After shining a flashlight on Garner and glimpsing his face and hands, Memphis police officer Elton Hymon called out "police, halt" and moved toward Garner, who was crouched beside the fence. Fearing that Garner would avoid capture, Hymon shot at Garner, hitting him in the head while he climbed the fence. Garner eventually died from his injuries.[11] Officer Hymon later testified that he had believed Garner to be about seventeen or eighteen years old, of slight build, and unarmed.[12]

Garner's father subsequently brought suit in the United States District Court for the Western District of Tennessee, naming Hymon, the City of Memphis, and various city officials as defendants.[13] The suit was filed under the federal Civil Rights Act[14] to recover damages for alleged violations of the fourth, eighth, and fourteenth amendments.[15]

The district court dismissed the action, upholding the constitutionality of the Tennessee statute which authorized a police officer to use "all the necessary means" to arrest a felon.[16] The United States Court of Appeals for the Sixth

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10. *Id.* at 1697-98.

11. *Id.* at 1697.

12. *Id.* Hymon stated that he was not "certain" that Garner was unarmed, but that he had believed him to be. *Id.*

13. *See* Garner v. Memphis Police Dep't, 710 F.2d 240, 241-42 (6th Cir. 1983), *aff'd sub nom.* Tennessee v. Garner, 105 S. Ct. 1694 (1985).

14. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within 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 proceeding for redress.

42 U.S.C. § 1983 (1982).

15. *Garner*, 710 F.2d at 241.

16. *Garner*, 710 F.2d at 242. The statute provided: "If, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest." TENN. CODE ANN. § 40-7-108 (Supp. 1985). Case law, rather than statute, establishes that an officer may not use deadly force on a misdemeanant. *See* Johnson v. State, 173 Tenn. 134, 114 S.W.2d 819 (1938).

The district court dismissed the case against the individuals on the basis of their qualified "good faith" immunity, a holding with which both the court of appeals and the Supreme Court later agreed. *See Garner*, 105 S. Ct. at 1698-99; *Garner*, 710 F.2d at 242. The individual officers were entitled to a qualified "good faith" immunity because they acted in reliance on Tennessee law. *See* Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976); Beech v. Melancom, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

The district court initially dismissed the case against the city on the ground that under Monroe v. Pape, 365 U.S. 167 (1961), the definition of "persons" as used in § 1983 did not include municipalities. Subsequently, Monell v. Department of Social Serv., 436 U.S. 658 (1978), overruled *Monroe*, holding that municipalities qualify as "persons" and can be held liable for conduct that results from a city "policy or custom." *Id.* at 690, 694. *Monell* was decided while *Garner* was on appeal; therefore, the court of appeals remanded *Garner* for reconsideration of the issue of the city's liability. Garner v. Memphis Police Dep't, 600 F.2d 52 (6th Cir. 1979). At the second hearing, the district court upheld the statute's constitutionality and thus was unable to find the city liable. *Garner*, 710 F.2d at 242.

Circuit reversed, holding that the Tennessee statute violated both the fourth and fourteenth amendments when applied to nondangerous fleeing felons.[17] In examining the fourth amendment claim, the court of appeals held that the common-law rule which allowed the killing of any fleeing felon no longer is appropriate.[18] The court held that the Tennessee statute offended the fourth amendment because it did not limit the use of such a drastic measure on the basis of the severity of the offense.[19] The fourth amendment, according to the court of appeals, permits the use of deadly force only to apprehend dangerous fleeing felons.[20]

The Supreme Court affirmed the court of appeals' decision, basing its holding on fourth amendment considerations.[21] The *Garner* Court reiterated the balancing test it had established in previous fourth amendment decisions. Under this test courts are to determine the reasonableness of a police officer's search or seizure by weighing the extent of the intrusion on the individual's rights against the importance of the governmental interests involved.[22] Applying this test the Court balanced the intrusiveness of the use of deadly force on the suspect against the governmental interest in apprehending fleeing felony suspects.[23] Writing for the majority, Justice White concluded that the proper balance is struck when police officers are allowed to apprehend a fleeing felon by means of deadly force only when the officers have probable cause to believe that the suspect poses a serious danger to the officers or others.[24]

Justice White acknowledged that at common law the use of deadly force was considered reasonable whenever necessary to apprehend a fleeing felon.[25] Although this was the accepted definition of reasonableness at the time the

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17. Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983).

18. *Id.* at 242-44; *see also* 4 W. BLACKSTONE, COMMENTARIES *289 (setting forth the common-law rule).

19. *Garner*, 710 F.2d at 246. The court also found that the statute violated the due process requirements of the fourteenth amendment. *Id.* at 246-47.

20. *Id.* at 247. In so ruling, the court approved the Model Penal Code approach, which provides:

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

MODEL PENAL CODE § 307(2)(b) (1962).

21. *Garner*, 105 S. Ct. at 1694.

22. *Id.* at 1699. The cases the Court cited for establishing the balancing test included United States v. Place, 462 U.S. 696 (1983); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967).

23. *Garner*, 105 S. Ct. at 1700-01.

24. *Id.* The Court stated that probable cause would be established "if the suspect threatens the officer with a weapon or there is probable cause to believe he has committed a crime involving the infliction or threatened infliction of serious physical harm." *Id.* at 1701. The rule adopted by the Court is equivalent to the Model Penal Code approach except that the Court's rule requires probable cause, instead of the officer's subjective belief that the suspect is dangerous. For the relevant text of the Model Penal Code, see *supra* note 20.

25. *Garner*, 105 S. Ct. at 1702-03.

fourth amendment was adopted, the majority concluded that application of the common-law rule today is unacceptable.[26] Applying the modern balancing test to the facts of *Garner*, the Court concluded that Officer Hymon did not have probable cause to believe that Garner presented any danger to Hymon or to others.[27] The Court specified that burglary, a crime against property that seldom involves physical violence, is not a sufficiently dangerous crime to justify automatically the use of deadly force.[28] The governmental interest in preventing property crime does not justify the severe intrusion resulting from the use of deadly force.[29] The Court noted, however, that the use of deadly force against an armed burglar would be reasonable.[30]

In her dissent, Justice O'Connor disagreed with the Court's abandonment of the rule accepted at the time the fourth amendment was adopted. Justice O'Connor suggested that a decision based on "purely judicial" constraints would not present the same problem as the case in question which involved constitutional constraints on state action.[31] While the majority analyzed the use of deadly force against any suspected *felon*, O'Connor limited her analysis to the use of deadly force against suspected *burglars*. The dissenting justices would have held that burglary is a per se serious and dangerous felony.[32] Stressing the magnitude of the governmental interest in effective law enforcement and the absence of a protectable interest in avoiding arrest, Justice O'Connor suggested that the fourth amendment balancing test permits the use of deadly force whenever it is necessary to apprehend a suspected burglar.[33]

Prior to *Garner* the Supreme Court had not considered the constitutionality of a police officer's use of deadly force to apprehend a fleeing felon. Although some lower courts have considered the issue,[34] *Garner* is the only case in which

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26. *Id.*

27. *Id.* at 1706.

28. *Id.* at 1706-07.

29. *Id.*

30. *Id.* at 1706.

31. *Id.* at 1709 (O'Connor, J., dissenting). Chief Justice Burger and Justice Rhenquist joined the dissent.

32. *Id.* at 1709-11 (O'Connor, J., dissenting).

33. *Id.* at 1711 (O'Connor, J., dissenting).

34. Only one lower court has declared unconstitutional a statute allowing the use of deadly force to apprehend all fleeing felony suspects. In Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot per curiam sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977), the United States Court of Appeals for the Eighth Circuit held that the use of deadly force to apprehend nondangerous fleeing felons violates due process of law under the fifth and fourteenth amendments. Applying the due process balancing test, the court reasoned that the taking of the fundamental right to life, without the due process safeguards provided by a trial, could only be justified by a compelling state interest. *Id.* at 1017-19. The court rejected plaintiff's arguments that the statute violated equal protection and authorized cruel and unusual punishment. *Id.* at 1009-1011.

Other courts have upheld the use of deadly force to apprehend all fleeing felony suspects in the face of various constitututional challenges. The United States District Court for the Western District of Tennessee had previously rejected contentions that the Tennessee statute at issue in *Garner* (1) was overbroad in that it authorized an incursion into a person's right to trial by jury; (2) authorized cruel and unusual punishment in violation of the eighth amendment; and (3) violated due process and equal protection by permitting the use of deadly force against felons but not against misdemeanants. Cunningham v. Ellington, 323 F. Supp. 1072, 1075 (W.D. Tenn. 1971) (three-judge court). The United States Court of Appeals for the Second District rejected a due process challenge

a court has analyzed fully the use of deadly force in light of the fourth amendment prohibition against unreasonable searches and seizures.[35] Because the Court based its decision on fourth amendment considerations, the apprehension of a fleeing felony suspect must be re-examined against the background of earlier cases construing that amendment.

The balancing test used by the Court in *Garner* has its origins in a long line of fourth amendment cases.[36] The Court has held that a search and seizure is constitutional only if it is "reasonable" as determined by a balancing of the "nature and quality of the intrusion on the individual's fourth amendment interests against the importance of the governmental interests alleged to justify the intrusion."[37] Implicit in the balancing process is a recognition that as the governmental interest in using a police procedure increases, the permissible amount of intrusion on an individual's rights also increases.[38] Conversely, the more severe the intrusion on the individual's rights, the greater the governmental interest must be to justify the particular procedure under the fourth amendment.[39]

Any type of governmental intrusion into an individual's reasonable expectation of privacy may invoke this fourth amendment balancing process.[40] By its nature, the balancing test is relatively formless, subjective, and, in part, based on a common sense judgment.[41] Nevertheless, the decisions in which the Court has

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to a statute reflecting the common-law rule, stressing its desire to afford the individual states some flexibility in fashioning rules of criminal law, particularly on such a controversial issue. Jones v. Marshall, 528 F.2d 132, 142 (2d Cir. 1975). The *Jones* court, however, agreed with the plaintiff that "the use of the felony label to justify especially severe police behavior has become increasingly strained" and stated a preference for the Model Penal Code approach. *Id.* at 138-40. For the relevant text of the Model Penal Code, see *supra* note 20.

35. Other cases have briefly mentioned the fourth amendment's applicability. For example, in Landrum v. Moats, 576 F.2d 1320, 1324 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978), the court stated in dicta that the use of deadly force to apprehend a nondangerous fleeing felon may be a violation of the fourth amendment. The fourth amendment may also be invoked in cases in which police officers are found to have used excessive force to arrest. *See, e.g.*, Carter v. Carlson, 447 F.2d 358, 361, 363 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973); Jenkins v. Averett, 424 F.2d 1228, 1231-32 (4th Cir. 1970); Cohen v. Norris, 300 F.2d 24, 31-33 (9th Cir. 1962). In these cases "excessive" force was construed to mean more force than was necessary to effectuate the arrest.

36. *See* United States v. Place, 462 U.S. 696 (1983); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967).

37. United States v. Place, 462 U.S. 696, 703 (1983); *see also* Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring) ("[T]he key principle of the fourth amendment is reasonableness—the balancing of competing interests.").

38. Harris, *The Supreme Court's Search and Seizure Decisions of the 1982 Term: The Emergence of a New Theory of the Fourth Amendment*, 36 BAYLOR L. REV. 41, 47 (1984) (analyzing the ingredients of fourth amendment reasonableness).

39. *See id.*

40. *See* Katz v. United States, 389 U.S. 347 (1976) (holding that electronic surveillance of a public telephone booth is a governmental intrusion that may invoke the fourth amendment). *Katz* makes clear that the fourth amendment's applicability is not limited to intrusions on private property, and that the fourth amendment protects persons, not places. *See id.* at 351-52.

41. *See* Harris, *supra* note 38, at 47. Professor Harris contends that the fourth amendment test the Court used from the 1940s to the 1960s was much less subjective and amorphous than is the test the Court uses today. *Id.* at 43-44. He argues that during this period the Court set strict rules concerning the requirements of the fourth amendment, such as one rule which stated that reasonableness requires a warrant and probable cause except in a few "well-delineated" situations. *Id.* at 44. Harris asserts that this approach has now given way to the new "pragmatic balancing approach." *Id.* at 44-48.

applied the balancing test have established certain guidelines that add some uniformity and objectivity to the test's application.

Prior decisions have established guidelines for determining the level of suspicion of illegal activity a police officer must have to justify a particular type of search or seizure.[42] The Court has held that, on balance, certain preliminary inspections, such as observing objects in plain view,[43] approaching and questioning a willing individual in a public place,[44] and stopping motorists at regular roadblocks[45] are reasonable under the fourth amendment even in the absence of any suspicion of illegal activity. In these cases the governmental interest in making a preliminary inspection outweighs the slight intrusion on the individual's rights.

Certain frisks and investigatory detentions that involve a more serious intrusion, however, are not reasonable under the balancing test unless the police officer has a "reasonable suspicion" of illegal activity.[46] Brief detentions and limited pat-downs for weapons have qualified as investigatory techniques that are sufficiently intrusive to require "reasonable suspicion" on the part of the police officer.[47] Furthermore, the Court has held that a balancing of the governmental and individual interests involved in a full scale search or arrest dictates that probable cause must be present before police officers may use these procedures.[48] When a search or arrest is highly intrusive, as in the case of electronic surveillance or a search or arrest in a private home, police officers must also obtain a warrant before proceeding with the search or the arrest.[49]

Beyond the threshold probable cause, reasonable suspicion, or warrant requirements, several decisions have examined the "reasonableness" of the manner in which a particular search was conducted. In *United States v. Sharpe*[50] the Court held that the governmental interest in preventing the transportation of drugs justified detaining suspected drug traffickers for a period of twenty minutes.[51] In *Schmerber v. California*[52] the Court concluded that taking blood from a drunken driving suspect was justified in light of the balancing of compet-

42. *See infra* notes 43-49 and accompanying text.

43. Harris v. United States, 390 U.S. 234 (1968) (affirming a police officer's right to seize objects in "plain view").

44. Florida v. Royer, 460 U.S. 491 (1983). In *Royer* the Court ruled that a police officer needs no objective justification for approaching an individual in a public place and asking whether the individual is willing to answer questions. *Id.* at 497.

45. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

46. The level of suspicion required for "reasonable suspicion" is less than that required for probable cause; nevertheless, it must be at least an "articulable" suspicion. United States v. Sharpe, 105 S. Ct. 1568, 1577 (1985) (Marshall, J., concurring); *accord* Florida v. Royer, 454 U.S. 1079 (1983); Terry v. Ohio, 392 U.S. 1 (1968).

47. United States v. Sharpe, 105 S. Ct. 1568 (1985) (brief detention of suspected drug trafficker); Terry v. Ohio, 392 U.S. 1 (1968) (pat-down search for weapons).

48. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983); Franks v. Delaware, 438 U.S. 154 (1978); Whiteley v. Warden, 401 U.S. 560 (1971).

49. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980); Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

50. 105 S. Ct. 1568 (1985).

51. *Id.* at 1576.

52. 384 U.S. 757 (1966).

ing interests.[53] In *Cupp v. Murphy*[54] the Court approved the taking of samples from under a murder suspect's fingernails.[55]

Notwithstanding those decisions in which certain police practices were approved, the Court has made clear that the fourth amendment may preclude certain types of searches and seizures entirely, despite the presence of probable cause and a warrant. In *Winston v. Lee*,[56] for example, the Court held that police-ordered surgery on a criminal defendant was unreasonable under the fourth amendment because the governmental interest was not strong enough to justify the resulting intrusion into the individual's body.[57]

In *Garner* the Court made clear that the fourth amendment requires that the use of deadly force to apprehend a fleeing felon be reasonable.[58] The Court stated that a reasonable balance must be struck between the competing governmental and individual interests not only at the threshold stage of making a probable cause or related determination, but also at the second stage when the reasonableness of the manner of a particular search or seizure must be assessed.[59] The Court faced the difficult task of determining the point at which the use of deadly force to apprehend a fleeing felon becomes reasonable under the fourth amendment. Because the use of deadly force is a more significant intrusion than those examined in other fourth amendment cases, the Court imposed a stricter and more limiting standard on its use.[60] Only a strict standard that limits the right to make a severe intrusion on the individual to those instances in which the governmental interest is highest would be consistent with the standards used in other fourth amendment cases.[61]

When a search or seizure involves any manner of intrusion into a person's body, the Court has found individual rights to be worthy of substantial protection. In *Cupp* the Court characterized the taking of samples from beneath a suspect's fingernails as a "severe, though brief intrusion upon cherished personal

53. *Id.* at 771.

54. 412 U.S. 291 (1973).

55. *Id.* at 296.

56. 105 S. Ct. 1611 (1985).

57. *Id.* at 1620.

58. *Garner*, 105 S. Ct. at 1699.

59. *Id.*

60. For example, the intrusions involved in a pat-down for weapons, *see, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968), or a warrantless automobile search, *see, e.g.*, New York v. Belton, 453 U.S. 454 (1981), are very different in degree from the intrusion involved in the use of deadly force. Indeed, deadly force is not comparable to a blood test, *see, e.g., Schmerber*, 384 U.S. 757, or even to surgery under general anesthesia, *see, e.g., Winston*, 105 S. Ct. 1611.

61. None of the variations of the common-law standard are strict enough to achieve this consistency. Most jurisdictions that have used the common-law rule have required (1) that deadly force be "apparently" rather than "actually" necessary to effect the arrest, and (2) that the officer have a reasonable belief that a felony had been committed rather than that a felony had in fact been committed. *See, e.g.* Murphy v. Murray, 74 Cal. App. 726, 729, 241 P. 938, 940 (1925); Martyn v. Donlin, 151 Conn. 402, 412, 198 A.2d 700, 706 (1964). A few courts have required an "actual" necessity for the use of deadly force. *See, e.g.*, Union Indemnity Co. v. Webster, 218 Ala. 468, 478, 118 So. 794, 803 (1928); Fields v. City of New York, 4 N.Y.2d 334, 337, 151 N.E.2d 188, 189, 175 N.Y.S.2d 27, 29 (1958). Several courts have required that a felony in fact had been committed. *See, e.g.*, Johnson v. Chesapeake & O. Ry. Co., 259 Ky. 789, 797, 83 S.W.2d 521, 525 (1935); Commonwealth v. Duerr, 158 Pa. Super. 484, 490, 45 A.2d 235, 239 (1946).

security,"[62] because it went "beyond mere 'physical characteristics . . . constantly exposed to the public.' "[63] Although the Court upheld the search in *Cupp*,[64] by characterizing the taking of fingernail samples as a severe intrusion the decision underscores the magnitude of an intrusion into the body that results from the use of deadly force.

At the same time, the *Cupp* decision raises a point that may diminish the individual interest in cases involving fleeing felons because it suggests that a greater intrusion may be allowed when necessary to retrieve evanescent evidence, perhaps including a fleeing felon.[65] The Court's decision in *Sharpe* raises another point that may diminish the individual's interest in cases involving a fleeing felon. In *Sharpe* the Court listed a suspected drug trafficker's attempt to avoid arrest as one of the factors that established the reasonableness of a twenty minute investigatory detention.[66] Arguably, a fleeing felony suspect's interest is also dimininshed because the suspect chooses to provoke the police officer by running away.

The critical factors in *Cupp* and *Sharpe*—that a fleeing felon constitutes evanescent evidence and that a fleeing felon has by his or her own actions created a need for more intrusive government actions—clearly increase the magnitude of the governmental interest involved. Nevertheless, even after integrating these factors into the balancing process, the permissible use of deadly force to apprehend all fleeing felons cannot be reconciled with other fourth amendment cases. The use of deadly force constitutes an intrusion that is unique in its severity, thus requiring considerable concern for the individual's rights. Examination of those fourth amendment decisions in which the Court has considered the constitutionality of a police procedure that results in bodily intrusion further supports this proposition.

In *Schmerber* the Court approved the use of a blood alcohol test on an individual suspected of drunken driving; a "seizure" that involved a relatively minor intrusion into the suspect's body.[67] The Court, however, considered the possible risk to the suspect's health, which it deemed a crucial factor in the

62. *Cupp*, 412 U.S. at 295 (quoting Terry v. Ohio, 392 U.S. 1, 24-25 (1968)).

63. *Id.* (quoting United States v. Dionisio, 410 U.S. 1, 14 (1972)). In *Cupp* the husband of a strangulation victim came voluntarily to the police station, where officers saw a spot of blood on his fingernail. *Id.* at 292.

64. The evanescent nature of the evidence in *Cupp* influenced the Court to uphold the search. The evidence would have been lost forever if the officers had not acted quickly. After denying the officers' request to take samples from his fingernails, the suspect began rubbing his hands together and against the change in his pockets. *Id.* at 296.

65. *See id.*

66. *Sharpe*, 105 S. Ct. at 1576. The suspect in *Sharpe* did not pull over when a Drug Enforcement Administration (DEA) agent first tried to stop his vehicle. The suspect's companion pulled his vehicle over in response to the officer's summons, evidently so that the suspect, who was transporting bales of marijuana, could avoid arrest. A twenty minute delay resulted because a state trooper later caught up with the suspect and detained him until the DEA agent arrived. *Id.* at 1571-72.

The Court noted that the officer used all "due diligence" and that the suspect tried to avoid arrest; however, the Court based its decision on other factors. Moreover, the Court emphasized that there should be no fixed time limit on investigatory stops. *Id.*

67. *Schmerber*, 384 U.S. at 771.

balancing process.[68] An individual's interest in his or her own health and safety augments the individual's interest in privacy traditionally analyzed in fourth amendment cases.[69] The *Schmerber* Court stated that when a bodily intrusion is involved, the individual's interest is expanded to include an interest in health and safety.[70] This factor's presence distinguishes the analysis of bodily intrusions from the traditional analysis in which the governmental interest must be weighed against only the individual's interest in privacy. Recognizing this point, the *Schmerber* Court wrote: "[B]ecause we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate."[71] The Court concluded that the intrusion resulting from blood testing was justified largely on the grounds that the risks involved were minimal.[72]

Underscoring the importance of the "health and safety" factor, in *Winston* the Court refused to order the surgical removal of a bullet from beneath a suspect's collarbone when the medical risks were the "subject of sharp dispute."[73] Again, the Court impliedly added a health and safety consideration to the fourth amendment balancing test, suggesting that bodily intrusion cases call for a balancing of the governmental interest in law enforcement against the individual's interest in privacy *and* the individual interest in health and safety. Applying the test established in *Schmerber*, the *Winston* Court held that the governmental interest was insufficient to justify the intrusion even though the highest standard employed in traditional fourth amendment cases—the virtual certainty that the search would disclose relevant evidence—was met.[74] Although the surgery in *Winston* was unessential because other evidence of the suspect's guilt was available,[75] the Court's emphasis on the importance of the individual's interest in health and safety is clear.

Garner involved an individual's interest in avoiding a serious or deadly bodily injury. Thus, the Court was constrained by those fourth amendment deci-

68. *Id.* at 771-72. The Court in Winston v. Lee, 105 S. Ct. 1611 (1985), stated that health and safety factors played a "crucial" role in its decision in *Schmerber*. *Id.* at 1617. Other decisions that have placed heavy emphasis on the health and safety factors include: United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (fourth amendment permits court to order minor operation to remove bullet when evidence could not be obtained in any other way), *cert. denied*, 429 U.S. 1062 (1977); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974) (fourth amendment reasonableness standard prohibits court from ordering removal of bullet from defendant's spinal canal when intrusion would involve trauma, pain, and possibly death); and State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982) (fourth amendment prohibits court from ordering major surgery to remove bullet, but permits court to order minor surgery to remove bullet).

69. *Schmerber*, 384 U.S. at 767.

70. *Id.* at 768.

71. *Id.* at 767-68.

72. *Id.* at 771. The decision in *Schmerber* was limited strictly to its facts. The Court stated: "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.* at 772.

73. *Winston*, 105 S. Ct. at 1615.

74. *Id.* at 1611.

75. *Id.* at 1619. The other evidence of the suspect's guilt included an eyewitness identification and the proximity of the scene of the crime to the place where the suspect was found with the bullet wound. *Id.*

sions in which it had found individual rights to be worthy of greater protection when a search or seizure involves an intrusion into a person's body.[76] The health and safety factor was a necessary consideration in the *Garner* Court's balancing process. Further, the Court made clear that the individual's interest involved in *Garner* is unparalleled in importance, stating 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."[77]

Under the fourth amendment balancing test the individual's interest must be weighed against the governmental interest in using the procedure. In *Garner* the Court recognized that the governmental interest in effective law enforcement is very strong.[78] The Court expressed doubt, however, that the use of deadly force to apprehend all fleeing felons facilitates the government's goal of effective law enforcement.[79] The Court pointed to three considerations in support of its conclusion. First, studies show that police use of deadly force generally does not deter individuals from attempting to avoid arrest.[80] Second, the use of deadly force prevents the judicial system from playing its designated role in society.[81] Last, many law enforcement officials already limit the authority to use deadly force on fleeing felons, which suggests that the practice is not essential to effective law enforcement.[82] These factors diminish the governmental interest in using deadly force in apprehending a fleeing felon.

Because of the heightened individual interest and the diminished governmental interest involved in *Garner*, the Court concluded that a proper balance is struck when a polce officer uses deadly force only as a last resort and only to apprehend fleeing felons whom the officer has probable cause to believe are dangerous.[83] The Court refused to condone the infliction of a serious and possibly fatal injury to promote the governmental interest in preventing property crime.[84]

Garner fits squarely within prior fourth amendment cases. The individual's interest in avoiding a serious or deadly bodily injury is much greater than the interests examined in other fourth amendment cases. For example, the intrusiveness of a blood test,[85] the taking of fingernail samples,[86] a brief detention,[87] or even surgery,[88] is minor compared to the intrusiveness of a seizure by means of deadly force. Furthermore, the governmental interest in capturing a

76. *See supra* notes 62-75 and accompanying text.

77. *Garner*, 105 S. Ct. at 1700.

78. *Id.* at 1700-01.

79. *Id.*

80. *Id.* at 1701 (citing W. GELLER & K. KARALES, SPLIT SECOND DECISIONS 67 (1981)); Fyfe, *Observations on Police Deadly Force*, 27 CRIME & DELINQ. 376, 378-81 (1981); Sherman, *Reducing Police Gun Use*, CONTROL IN THE POLICE ORGANIZATION 98, 120-23 (M. Punch ed. 1983)).

81. *Id.* at 1700.

82. *Id.* at 1701.

83. *Id.*

84. *Id.*

85. *See Schmerber*, 384 U.S. at 771 (discussed *supra* notes 67-72 and accompanying text).

86. *See Cupp*, 412 U.S. at 291 (discussed *supra* text accompanying notes 62-65).

87. *See* cases cited *supra* notes 43-45; text accompanying notes 43-45.

88. *See Winston*, 105 S. Ct. at 1615 (discussed *supra* notes 73-75 and accompanying text).

nondangerous felon arguably is no greater than the governmental interests examined in other fourth amendment cases. When a suspected felon is neither armed nor suspected of a violent crime, the felon's arrest cannot be significantly more important than the arrest of a suspected drunken driver[89] or drug trafficker.[90] The governmental interest in *Garner* may be strengthened because the fleeing felon probably never would have been arrested had he gotten away and because his own actions prompted the need for more intrusive action. The Court, however, concluded that other considerations suggest that the use of deadly force is an inferior means of enforcing the law.[91] The Court's decision suggests that if the governmental interest in *Garner* was stronger than the governmental interest in other fourth amendment cases, it was only slightly so.

Both *Winston* and *Schmerber* indicate that because the threat to a suspect's health and safety is unique in its severity, the traditional fourth amendment balancing test must be adjusted to include consideration of this threat. Thus, the *Garner* Court's conclusion that deadly force is reasonable only when it is necessary to remove a threat of physical injury is in line with the other fourth amendment decisions. To achieve consistency among the decisions, the governmental interest must rise in proportion to the heightened individual interest if the police practice is to be permitted. When compared with the individual interests at issue in *Cupp*, *Sharpe*, *Winston*, and *Schmerber*, the individual interest at issue in *Garner* was much more significant. The *Garner* Court concluded that the governmental interest in apprehending a nondangerous felon, when compared with the individual interest involved, is not sufficient to justify the use of deadly force. However, the governmental interest in apprehending a dangerous fleeing felon includes protecting the general public and thus assumes a position of greater significance. The *Garner* decision requires this increased level of governmental interest before a police officer may use deadly force.[92]

The dissent in *Garner* challenged the majority's abandonment of the common-law rule authorizing the use of deadly force if necessary to apprehend a fleeing felon. Justice O'Connor reasoned that "constitutional holdings must be sensitive . . . to the history of the Fourth Amendment"[93] and refused to conclude that the fourth amendment proscribes a police practice that was accepted at the time the Bill of Rights was adopted.[94] Writing for the majority, Justice White concluded that deference to the common-law rule was unwarranted in this situation.[95] Justice White wrote that "reliance on the common-law rule in

89. *See, e.g.*, *Schmerber*, 384 U.S. at 758 (discussed *supra* text accompanying note 53).

90. *See, e.g.*, *Sharpe*, 105 S. Ct. at 1570 (discussed *supra* text accompanying note 51).

91. *Garner*, 105 S. Ct. at 1700-01.

92. *Id.*

93. *Id.* at 1707 (O'Connor, J., dissenting).

94. *Id.* at 1709 (O'Connor, J., dissenting). Justice O'Connor wrote:

> Although the Court has recognized that the requirements of the Fourth Amendment must respond to the reality of social and technological change, fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when the Fourth Amendment was adopted are now constitutionally impermissible.

95. *Id.* at 1702-03.

this case would be a mistaken literalism that ignores the purposes of a historical inquiry."[96] The majority concluded that the common-law rule cannot be transferred to modern day society for several reasons. First, when the common-law rule was first applied, all felonies were punishable by death.[97] Second, today many felonies are nondangerous offenses.[98] Third, the lack of a means of long-range deadly force gave the common-law rule a practical limitation that it does not have today.[99] Last, the Court found support for its abandonment of the common-law definition of reasonableness in the use of deadly force in statistics showing that more than one-half of the states and over eighty-five percent of all police department policies limit the common-law rule to some degree.[100]

Previous fourth amendment cases provide little direct support for the Court's refusal to defer to the common-law rule. The Court traditionally has been reluctant to overturn a clear definition of "reasonable" that was universally accepted at the time of the fourth amendment's adoption.[101] Some support for the *Garner* Court's decision, however, may be found in the Court's emphasis in prior decisions on the importance of factors such as an announced congressional determination on the issue, the prevailing law in the states, or the Model Penal Code, in addition to the common-law interpretation.[102]

In *Carroll v. United States*[103] the Court approved the common-law definition of reasonableness, but also found support for its decision in several federal statutes incorporating the same definition.[104] Similarly, in *United States v. Watson*[105] the Court looked not only to the common-law rule prevailing at the time the fourth amendment was adopted, but also to acts of Congress, state laws, and the Model Penal Code in deciding to uphold the common-law rule.[106] Abandoning the common-law approach, the Court in *Payton v. New York*[107] noted that there was no federal statute expressing a congressional determination on the proper definition of the reasonableness of a warrantless arrest in a private home and that although a majority of states applied the common-law rule, the trend was away from that rule.[108] However, *Payton* is distinguishable from *Carroll*, *Watson*, and *Garner* because the Court in *Payton* found much uncertainty and

96. *Id.* at 1702.

97. *Id.*

98. *Id.* at 1703.

99. *Id.*

100. *Id.* at 1705 (citing K. MATULIA, A BALANCE OF FORCES: A REPORT OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE 161 (1982) (table)).

101. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980) (abandoning the common-law approach); United States v. Watson, 423 U.S. 411 (1976) (upholding the common-law approach); Gerstein v. Pugh, 420 U.S. 103 (1975) (upholding the common-law approach).

102. *See infra* notes 106-16 and accompanying text.

103. 267 U.S. 132 (1925).

104. *Id.* at 151. In *Carroll* the Court approved a warrantless search of an automobile, distinguishing automobiles from houses on the basis of the common law.

105. 423 U.S. 411 (1976).

106. *Id.* at 421-23. In *Watson* the Court approved a warrantless arrest conducted by a postal inspector.

107. 445 U.S. 573 (1980).

108. *Id.* at 598-99, 601. The *Payton* Court prohibited, under the fourth amendment, a warrantless entry into a suspect's home for the purpose of making a routine felony arrest.

ambiguity in the common-law rule.[109] In *Payton* the Court stated that "a study of the common law . . . reveals a surprising lack of judicial decisions and a deep divergence among scholars" and that "our study of the relevant common law does not provide the same guidance that was present in *Watson*."[110] Thus, *Garner* appears to be the only decision in which the Supreme Court has examined the common law and found a clear and unequivocal common-law definition of reasonableness, yet has abandoned that definition.

As the majority noted, the *Garner* Court's decision to abandon the common law does not contradict its earlier fourth amendment decisions because the use of deadly force against a fleeing felon was very different at common law.[111] Indeed, the *Payton* Court recognized that a "longstanding, widespread practice is not immune from constitutional scrutiny. . . . This is particularly so when the constitutional standard is as amorphous as the word 'reasonable,' and when custom and contemporary norms necessarily play such a large role in the constitutional analysis."[112] In addition to the difference between the circumstances surrounding the use of deadly force to apprehend all fleeing felons in the era during which the common-law rule arose and those that surround it today, support for the Court's decision in *Garner* is manifested in the recent trend away from the common-law rule.[113]

Public policy concerns also suggest that a police officer's right to use deadly force to apprehend a fleeing felon should be limited. A number of commentators have criticized the use of deadly force to apprehend nondangerous fleeing felons as unusually cruel.[114] The irrationality of the practice was well characterized by Professor Mikell, who wrote:

> May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? . . . It cannot be then that we allow the officer to kill him because he stole the automobile, because the statute provides only three years in a penitentiary for that . . . . Is it for fleeing that we kill him? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing the automobile. If we are not killing him for stealing the automobile and not killing him for fleeing, what are we killing him for?[115]

Concern about the use of deadly force to apprehend nondangerous fleeing felons is not misplaced. A Memphis study, for example, showed that in almost

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109. *Id.* at 592.

110. *Id.* at 592, 597.

111. *See supra* text accompanying notes 99-103.

112. *Payton*, 445 U.S. at 600.

113. *See Garner*, 105 S. Ct. at 1699 n.7, 1703-05. Over one-half of the states and the Model Penal Code have followed this trend. *Id.*

114. *See, e.g.*, Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957 (1930); Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71 (1980); Comment, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566 (1961). The argument that use of deadly force to apprehend a nondangerous felon violates the eighth amendment's prohibition against cruel and unusual punishment has never been accepted by a court. *See, e.g.*, Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971) (three-judge court).

115. 9 A.L.I. PROC. 187 (1931) (quoting Professor Mikell).

two-thirds of the instances in which police officers fired their weapons, the target was a nonviolent felony suspect.[116] Equally unsettling is the arbitrariness of the distinction between felonies and misdemeanors as the basis for determining when police officers may use deadly force to apprehend a fleeing suspect. In certain cases misdemeanants arguably present a greater danger to society than do felons.[117]

Additional criticisms of the unlimited right to use deadly force to apprehend a fleeing felon can be found in the literature. First, the use of deadly force cannot be justified on the grounds of general deterrence[118] because studies of the rates of police shootings indicate that these rates have little or no association with crime rates.[119] Second, one commentator has pointed out that the argument that a fleeing suspect has given up his or her constitutional rights is neither consistent with our system of justice[120] nor necessarily true; the reasons underlying a suspect's flight may be distrust and fear rather than a lack of concern for constitutional rights.[121] Last, an important issue associated with a police officer's right to use deadly force is that of racial discrimination. The available studies indicate that minorities are the victims of police shootings in disproportionate numbers.[122] This imbalance represents a sharp deviation from societal notions of equality under the law. Because these policy considerations are compelling, they undermine the justification for police use of deadly force and suggest that it should only be permitted when necessary to dispel an immediate threat.

One commentator has called the standard set by the *Garner* Court "moderate."[123] Indeed, the Court could have imposed additional restrictions on law

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116. Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV. 361, 362 n.4 (1976) (citing Brief for Appellant at Appendix A, Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977)).

117. *See* MODEL PENAL CODE § 3.07(2)(b) explanatory note (1962). "[T]he felony/misdemeanor distinction is inherently incapable of separating out those persons of such dangerousness that the perils arising from failure to accomplish immediate apprehension justifies resort to extreme force to effect arrest." MODEL PENAL CODE, Part I, 2 Commentaries, at 106 (1962).

118. Fyfe, *supra* note 80, at 379-81. Fyfe argues that deterrence is a popular rationale for justifying police practices, despite the paucity of support for its effectiveness, because it is simplistic. *Id.*

119. Fyfe, *supra* note 80, at 379 n.7.

120. Mogin, *The Policeman's Privilege to Shoot a Fleeing Suspect: Constitutional Limits on the Use of Deadly Force*, 18 AM. CRIM. L. REV. 533, 549 (1981). To illustrate the point that a suspect does not give up his or her constitutional guarantees by merely refusing to cooperate with law enforcement officers, Mogin describes what happens when the orderly progression of a trial is interrupted by a disorderly defendant. At most, the disorderly defendant will lose his or her right to be present at the trial. The defendant will not lose the right to a jury trial and will not be declared guilty immediately after the incident. *Id.*

121. *Id.*

122. *See id.* (citing Brief for Appellant at Appendix A, Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977)). A study of the Memphis Police Department showed that 96 of 114 victims of police deadly force who were suspected of property crimes were black. *Id.* at 540 n.42. A Philadelphia study reported that blacks were shot and killed by police four times more often than would be expected based on their percentage in the general population and three times more often than would be expected from their percentage among arrestees. *Id.* at 540 n.42 (quoting Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L., CRIMINOLOGY & POL. SCI. 225, 226 (1963)).

123. *High Court Curbs Police Force Against Nonviolent Suspects*, 16 CRIM. JUST. NEWSLETTER 4, 5 (1985) (quoting James Fyfe, consultant to the Police Foundation).

enforcement practices by permitting police use of deadly force to arrest a fleeing felony suspect only when the suspect presents an *immediate* threat to the officer or to others. The common-law standard—that the police officer must have a reasonable belief that a felony had been committed, or that a felony in fact had been committed—is too liberal to be consistent with other fourth amendment decisions. To be consistent, a standard at least as strict as the one imposed by the Court in *Garner* is required. Indeed, because the fleeing felon's interest in health and safety is so strong, consistency arguably calls for an even stricter standard, such as probable cause to believe that the suspect presents an immediate danger to the officer or to others before the officer uses deadly force. A comparison of the interests and rights involved in *Garner* to those involved in other fourth amendment decisions supports this position.

The rule adopted by the Supreme Court in *Garner* may have limited practical effect because most police departments already impose similar limitations on a police officer's right to use deadly force. Nevertheless, because the Court's decision in *Garner* makes it clear that the Constitution forbids a hasty decision to kill a perpetrator of a nonviolent crime, and because it may save the life of a youth who steals ten dollars and runs from a police officer in fear, it is long overdue. Public policy concerns and the strong interest in the individual's health and safety, however, indicate that additional restrictions should have been placed on the use of deadly force to apprehend fleeing felons. The *Garner* Court should have expanded its decision by holding that the use of deadly force to apprehend a fleeing felon is justified only when the suspect poses an immediate danger to the officer or to others.

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