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Constitutional Law-Fourth Amendment-Use of Deadly Force to Seize Fleeing Felony Suspects (Tennessee v. Garner)

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—USE OF DEADLY FORCE TO SEIZE FLEEING FELONY SUSPECTS—*Tennessee v. Garner*—In *Tennessee v. Garner*,[1] the Supreme Court held that the Tennessee statute[2] authorizing a police officer to use deadly force to arrest a fleeing felony suspect was unconstitutional under the fourth amendment. This decision rendered unconstitutional all statutes with provisions similar to the Tennessee statute's. At the time of the decision nineteen states had such statutes.[3] Eighteen other states allowed for the use of deadly force if the fleeing suspect had committed a felony involving the use or threat of physical or deadly force, was escaping with a deadly weapon, or was likely to inflict serious physical injury if not arrested.[4] The Court determined that "apprehension by use

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

2. TENN. CODE ANN. § 40-7-108 (1982) [hereinafter "Tennessee statute"]. The statute reads: "Resistance to officer. If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

3. 471 U.S. at 14-15. State statutes which authorize the use of deadly force to seize a fleeing felony suspect are:

> Ala. Code § 13A-3-27 (1982); Ark. Stat. Ann. § 41-510 (1977); Cal. Penal Code Ann. § 196 (West 1970); Conn. Gen. Stat. § 53a-22 (1972); Fla. Stat. § 776.05 (1983); Idaho Code § 19-610 (1979); Ind. Code § 35-41-3-3 (1982); Kan. Stat. Ann. § 21-3215 (1981); Miss. Code Ann. § 97-3-15(d) (Supp. 1984); Mo. Rev. Stat. § 563.046 (1979); Nev. Rev. Stat. § 200.140 (1983); N.M. Stat. Ann. § 30-2-6 (1984); Okla. Stat., Tit. 21, § 732 (1981); R.I. Gen. Laws § 12-7-9 (1981); S.D. Codified Laws §§22-16-32, -33 (1979); Tenn. Code Ann. § 40-7-108 (1982); Wash. Rev. Code § 9A.16.040(3) (1977). Oregon limits use of deadly force to violent felons, but also allows its use against any felon if "necessary." Ore. Rev. Stat. § 161.239 (1983). Wisconsin's statute is ambiguous, but should probably be added to this list. Wis. Stat. § 939.45(4) (1981-1982) (officer may use force necessary for "a reasonable accomplishment of a lawful arrest").

Id. at 16 n.14.

4. 471 U.S. at 16. The following statutes were cited by the Court:

> Alaska Stat. Ann. § 11.81.370(a) (1983); Ariz. Rev. Stat. Ann. § 13-410 (1978); Colo. Rev. Stat. § 18-1-707 (1978); Del. Code Ann., Tit. 11, § 467 (1979) (felony involving physical force *and* a substantial risk that the suspect will cause death or serious bodily injury *or* will never be recaptured); Ga. Code § 16-3-21(a) (1984); Ill. Rev. Stat., ch. 38, § 7-5 (1984); Iowa Code § 804.8 (1983) (suspect has used or threatened deadly force in commission of a felony, or would use deadly force if not caught); Ky. Rev. Stat. § 503.090 (1984) (suspect committed felony involving use or threat of physical force likely to cause death or serious injury, *and* is likely to endanger life unless apprehended without delay); Me. Rev. Stat.

of deadly force is a seizure subject to the reasonableness requirement of the fourth amendment,"[5] just as preventing a person from walking away is a seizure.[6] Conversely, the Court found that the use of deadly force was not unconstitutional when an officer has probable cause to believe that the suspect poses a serious physical threat to the officer or others.[7] Thus, the Tennessee statute which authorized the use of deadly force against a fleeing suspect who was neither armed nor dangerous was unconstitutional.[8]

Edward Eugene Garner, the fifteen-year-old son of the respondent-appellee in *Garner*, was fatally shot in the head by Memphis Police Officer Elton Hymon.[9] Officer Hymon and his partner Leslie Wright had responded to a burglary-in-progress call and encountered Garner, a young, unarmed, black male, crouching in the backyard of the unoccupied dwelling he had broken into.[10]

When Officers Hymon and Wright reached the scene they found the complainant standing on her porch pointing to the house next door.[11] Hymon remained in the car while Wright walked to the porch to talk to the complainant.[12] Hymon opened the car door to listen to the exchange.[13] The complainant stated that she heard glass breaking, and that "somebody" or "they" were breaking into the house next door.[14] Hymon did not interpret her use of the plural form "they," or other language she used, as implying that the complainant had any knowledge that

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Ann. tit. 17-A, § 107(1983) (commentary notes that deadly force may be used only "where the person to be arrested poses a threat to human life"); Minn. Stat. § 609.066 (1984); N.H. Rev. Stat. Ann. § 627:5(II) (Supp. 1983); N.J. Stat. Ann. § 2C-3-7 (West 1982); N.Y. Penal Law § 35.30 (McKinney Supp. 1984-1985); N.C. Gen. Stat. § 15A-401 (1983); N.D. Cent. Code § 12.1-05-07.2.d (1976); Pa. Stat. Ann. tit. 18, § 508 (Purdon); Tex. Penal Code Ann. § 9.51(c) (1974); Utah Code Ann. § 76-2-404 (1978).

Id. at 17 n. 18.

5. 471 U.S. at 7.
6. *Id.*
7. *Id.* at 11.
8. *Id.* at 12.
9. *Id.* at 4.
10. *Id.* at 3.
11. Brief for Respondents at 3, *Garner*, 471 U.S. 1 (1985).
12. *Id.* at 2-3.
13. *Id.* at 3.
14. 471 U.S. at 3.

more than one person was involved in the break-in .[15]

Wright radioed the dispatcher to report their arrival at the scene while Hymon, with his revolver drawn,[16] went around the side of the house.[17] Wright surveyed the opposite side of the house.[18] Hymon reached the backyard, heard a door slam, and saw the suspect run from the back of the house,[19] across the backyard.[20] The suspect, Edward Garner, stopped at a six-foot-high chain-link fence.[21] With the aid of his flashlight Hymon found Garner crouching by the fence about thirty to forty feet away from him.[22] He surmised that Garner was 17 or 18 years old, and approximately 5'5" or 5'7" tall.[23] He testified that he was "reasonably sure that the individual was not armed."[24]

While directing the flashlight beam on Garner, Hymon identified himself and ordered Garner to halt.[25] Hymon paused momentarily, continuing to aim his revolver at Garner[26] and then advanced a few steps toward the suspect.[27] There was a three-

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15. Brief for Respondents at 3, *Garner*, 471 U.S. 1.

16. *Id.* at 4.

17. *Id.*

18. *Id.*

19. *Id.*

20. 471 U.S. at 3. The owner of the house testified that no lights were on in the house, but that a back door light was on. Officer Hymon, though uncertain, stated in his deposition that there were lights on in the house. *Id.* at 3 n.1.

21. *Id.*

22. Brief for Respondents at 4, *Garner*, 471 U.S. 1.

23. 471 U.S. at 3-4. Garner was in fact fifteen years old. He was 5'4" tall and weighed about 100 or 110 pounds. *Id.* at 4 n.2.

24. Brief for Respondents at 5 n.3, *Garner*, 471 U.S. 1. Hymon's conclusion that Garner was unarmed was based on several objective facts. Hymon noted that "had he been armed, I assume that he would have attempted to show that by firing a weapon, or I assume that he would have thrown it down, or I assume that I would have seen it." *Id.* He went on to explain: "I figured, well, if he is armed I'm standing out in the light and all of the light is on me then I assume he would have made some kind of attempt to defend himself. . . ." *Id.*

This conclusion is also corroborated by Hymon's actions. He did not warn his partner that the suspect might be armed, something he "definitely" would have done "if he had any question about whether this person was armed." *Id.* He did not fear for his personal safety either. Otherwise, as he admitted, "I would have taken more cover than what I had." Rather, he knowingly remained in a position where "all of the light is on me" and where he was a superior target. *Id.*

25. *Id.* at 4.

26. Appellee's Brief at 6, *Garner*, 471 U.S. 1.

27. 471 U.S. at 4.

foot chicken-wire fence between Hymon and Garner,[28] and Hymon testified that there was also a clothesline between himself and the suspect.[29] During the moment Hymon paused after ordering Garner to halt, the young man bolted from his crouched position, attempting to scale and jump over the chain-link fence.[30] Garner had half of his body over the top of the fence[31] when Hymon fired, striking Garner in the head.[32] Mortally wounded, Garner later died on an operating table.[33] Hymon subsequently explained that he decided to shoot because he was certain that once over the fence Garner would escape capture.[34]

No one was home when Garner broke into the dwelling.[35] Ten dollars and a purse taken from the house were found on Garner after the shooting.[36] The owner of the house testified that the purse and ten dollars belonged to his wife, and that a ring was missing.[37] The ring was never recovered.[38]

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28. Brief for Respondents at 6-7, *Garner*, 471 U.S. 1. Hymon later testified that after shooting Garner he stepped over the chicken wire fence with no problem. *Id.* at 7.

29. *Id.* When asked how long it took him to get from the side of the house to the fence where Garner was, Hymon testified that it did not take him long, and it was "just a matter of ducking and moving around." *Id.*

30. Brief for Petitioners at 3, *Garner*, 471 U.S. 1.

> Several record facts bear on Garner's attempt to escape. First, Garner had prior brushes with the law that, although minor, had been the occasion for discipline by his parents. At the age of 12, he and two other boys illegally entered the house in whose yard they were playing. He was placed on probation for one year, and counseled and chastised by his father. In June of 1974, he took a jar of pennies from a neighbor's house. Although the neighbor refused to call the police because the incident was so minor, the Garner family insisted and called the police themselves.

Brief for Respondents at 8 n.5, *Garner*, 471 U.S. 1.

On the night of his death, Edward Eugene Garner's judgment was further impaired because he had been drinking. "The medical examiner testified that fifteen-year-old Garner had a blood alcohol content of .09%, just .01% under the level set by Tennessee law as creating a presumption of intoxication for adults." *Id.*

31. Brief for Petitioners at 3, *Garner*, 471 U.S. 1.

32. 471 U.S. at 1.

33. *Id.*

34. *Id.* When asked at trial why he shot Garner, Hymon replied that he felt it was the only way he could seize the suspect, considering the unfamiliar neighborhood and terrain, and that the clutter in the back yard hindered him from quickly reaching Garner. He also noted that he did not think that he could climb the chain-link fence. Brief for Petitioners at 3, *Garner*, 471 U.S. 1. *See also supra* notes 24, and 28.

35. Brief for Respondents at 9, *Garner*, 471 U.S. 1.

36. 471 U.S. at 4.

37. *Id.* at 4 n.4.

38. *Id.*

Officer Hymon's use of deadly force to prevent the escape of Edward Garner was authorized by Tennessee statute and Memphis Police Department policy.[39] The statute provides in pertinent part that, "if, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."[40] While Police Department policy was slightly more restrictive than the statute, it allowed for the use of deadly force in the case of burglary.[41]

The shooting incident was reviewed by the Memphis Police-Firearms Review Board and presented to a grand jury, but neither body took any action.[42]

Edward Garner's father, Cleamtee Garner, brought a wrongful death action in the Federal District Court for the Western District of Tennessee against Elton Hymon for violating his son's constitutional rights.[43] The Memphis Police Department, its Director, and the Mayor of the City of Memphis were added as defendants on the grounds that "their failure to exercise due care in hiring, training and supervision of defendant Hymon made them equally responsible for Garner's death."[44]

Garner sought damages for alleged violation of his son's rights under the fourth, fifth, sixth, eighth, and fourteenth amendments of the Constitution.[45] The fourth amendment[46] was

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39. *Id.* at 4.

40. TENN. CODE ANN. § 40-7-108 (1982).

41. 471 U.S. at 5.

42. *Id.* Respondent notes that Memphis Police Department data reveals that there are significant disparities in the use of deadly force based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as the result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects. Between 1969 and 1976, blacks constituted 70.6% of those arrested for property crimes in Memphis, but 88.4% of the property crime suspects shot at by the Memphis police. In contrast, the percentage of black violent crime suspects shot at by Memphis police was closely proportionate to their percentage in the violent crime arrest population: 85.4% and 83.1%, respectively. . . .Of the blacks shot, 50% were unarmed and nonassaultive, 23.1% assaultive, but not armed with a gun, 26.9% assaultive and armed with a gun. Of the whites shot, only one (12.5%) was nonassaultive, two (25%) were assaultive, but not armed with a gun, and five (62.5%) were armed with a gun.

Brief for Respondents at 23-25, *Garner*, 471 U.S. 1.

43. Brief for the Petitioners at 4, *Garner*, 471 U.S. 1.

44. *Id.*

45. 471 U.S. at 5.

46. "The right of the people to be secure in their persons. . .against unreasonable

allegedly violated because Edward Garner was subjected to an unreasonable search and seizure. The fifth amendment[47] was allegedly violated because Edward Garner was deprived of life without due process of law. The sixth amendment[48] was allegedly violated because Edward Garner was denied the right to a speedy trial. The eighth amendment[49] was allegedly violated because use of deadly force against an unarmed fleeing felony suspect is cruel and unusual punishment. The fourteenth amendment[50] was allegedly violated because the State of Tennessee, by Tenn. Code Ann. § 40-7-108, deprived Edward Garner of life without due process of law.

A three-day bench trial was held.[51] The district court found in favor of all defendants on all the issues.[52] Specifically, it entered judgment for the Mayor of the City of Memphis and the Director of the Memphis Police Department[53] dismissing the claims against them for lack of evidence.[54] With respect to Officer Hymon, the district court found that he had acted under the Tennessee statute, which was constitutional.[55] The court reasoned that because Garner had "recklessly and heedlessly attempted to vault over the fence to escape, [he] thereby assum[ed] the risk of being fired upon."[56] The district court's logic was apparently similar to Hymon's: it concluded that use of deadly force was the only reasonable and practicable means available to prevent Garner's escape,[57] thus implying that the

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searches and seizures, shall not be violated. . ." U.S. CONST. amend. IV.

47. "No person shall be . . . deprived of life. . .without due process of law. . ." U.S. CONST. amend. V.

48. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . .and to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

49. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

50. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

51. 471 U.S. at 5.

52. *Id.*

53. Brief for the Petitioners at 5, *Garner*, 471 U.S. 1.

54. 471 U.S. at 5.

55. *Id.*

56. *Id.*

57. *Id.*

use of deadly force was justified by the state's interest in apprehending suspected felons.

The Court of Appeals for the Sixth Circuit affirmed the district court's decision with respect to Officer Hymon, finding that he had acted in good-faith reliance on the Tennessee statute.[58]

The court remanded for consideration of the possible liability of the City of Memphis in light of the Supreme Court's decision in *Monell v. New York City Department of Social Services*.[59] It also directed the district court to consider whether "a municipality's use of deadly force under Tennessee law to capture allegedly nonviolent felons fleeing from nonviolent crimes [is] constitutionally permissible under the fourth, sixth, eighth and fourteenth amendments."[60]

On remand, the district court entered an order in favor of the City of Memphis and determined that Tennessee Code Ann. § 40-7-108 did not violate either the cruel and unusual punishment prohibitions of the eighth amendment or the due process provisions of the fourteenth amendment.[61] On appeal the Court of Appeals reversed and again remanded.[62]

The Sixth Circuit concluded that Tenn. Code Ann. § 40-7-108 was unconstitutionally violative of the fourth and fourteenth amendments because under the fourth amendment the killing of a fleeing suspect was a "seizure," and thus constitutional only if

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58. *Id.* Garner v. Memphis Police Dept., 600 F.2d 52 (6th Cir. 1979).

59. 436 U.S. 658 (1978). Under a *Monell* analysis the district court was directed to consider whether the city enjoyed qualified immunity, and whether the use of deadly force in the circumstances at issue was constitutional, or whether unconstitutional municipal conduct flowed from police policy and custom. 105 S. Ct. at 1698. In *Monell*, where petitioners brought a class action suit against, *inter alia*, the Department of Social Services and the Board of Education of the City of New York, 436 U.S. at 660, the Court held, *inter alia*, that municipalities could not arrange their affairs on an assumption that they can violate constitutional rights for an indefinite period, *Id.* at 700, and accordingly, municipalities have no reliance interest that would support an absolute immunity. *Id.* at 701.

60. 60 F.2d 52, 55 (6th Cir. 1979).

61. 471 U.S. at 6. In this regard, the court declined to answer the "policy or custom" question of *Monell*. *Id.*

See also Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971) (with regard to TENN. CODE ANN. § 40-7-108, the court concluded that the use of force in the arrest of a fleeing felon does not constitute "punishment" nor is the statute vague in its terms so as to violate due process requirements nor is its distinction between misdemeanants and felons violative of the equal protection clause).

62. 710 F.2d 240 (6th Cir. 1983).

reasonable.[63] Under the facts in *Garner*, such a "seizure" was not reasonable and the use of deadly force under the fourth amendment was not justified.[64] The court reasoned that officers cannot resort to deadly force unless they "have probable cause. . . to believe that the suspect [has committed a felony and] poses a threat to the safety of the officers or a danger to the community if left at large."[65] The court of appeals found that the Tennessee statute authorized the "unnecessarily severe and excessive, and therefore unreasonable," use of deadly force to effect the "arrest" of an unarmed, nonviolent, fleeing felony suspect such as petitioner Garner's son.[66]

Pursuant to federal judicial procedure,[67] the State of Tennessee filed a motion to intervene in the case to defend the constitutionality of the Tennessee statute.[68] The City of Memphis filed a petition for certiorari.[69] The Supreme Court noted probable jurisdiction and granted the petition for certiorari.[70]

The Supreme Court affirmed the judgment of the Sixth Circuit, and remanded the case.[71] The majority held that the Tennessee statute was in violation of the fourth amendment insofar as it gave Officer Hymon authority to use deadly force against an unarmed, nonviolent, fleeing felony suspect.[72] The Court adopted the reasoning of the Sixth Circuit and found that the appropriate standard to determine whether the manner of a seizure was reasonable is to balance an individual's right to be secure from unreasonable searches and seizures against the state's interest in effective law enforcement.[73] It concluded that Garner's right to be secure from unreasonable seizure constitutionally outweighed the interest of the state.[74]

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63. *Id.* at 246.
64. *Id.*
65. 471 U.S. at 6 (quoting 710 F.2d at 246).
66. 710 F.2d at 241.
67. 28 U.S.C. § 2043(b).
68. Brief for Petitioners at 5, *Garner*, 471 U.S. 1.
69. 471 U.S. at 7.
70. 465 U.S. 1098 (1984).
71 471 U.S. 1 (1985).
72. *Id.* at 11.
73. *Id.* at 21.
74. *Id.* at 11.

BACKGROUND: PROBABLE CAUSE AND THE FOURTH AMENDMENT

Tennessee Code Ann. § 40-7-108 has been interpreted by Tennessee courts as a codification of the common-law rule permitting law enforcement officers to use deadly force to seize fleeing felony suspects in order to minimize the risk of such suspects' escape.[75] The statute allows the use of deadly force only if a police officer has probable cause to believe that a person has committed a felony, the officer warns the person that he intends to seize him, and the officer reasonably believes that no means less drastic than the use of such force will prevent the escape.[76]

The statute has been held to be constitutional because the use of deadly force to seize a fleeing felon is not a "punishment," nor is the statute so vague in its terms as to violate due process requirements.[77] The Sixth Circuit Court of Appeals has held that the statute is not unconstitutional by virtue of a racially disproportionate impact,[78] and that no racial bias has been shown to animate the statute's policy.[79]

In *Garner*, the Supreme Court determined that apprehension by use of deadly force is a seizure, thus subject to the fourth amendment's reasonableness requirement.[80] The Court recognized that it is not always clear when forms of police interference become a seizure,[81] but noted that when a police officer prohibits a person from walking away, he or she has seized the person.[82]

The Court made a distinction between police seizure of an individual, and arrest, noting that an officer may arrest a person only when he or she has probable cause to believe that the sus-

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75 TENN. CODE ANN. § 40-7-108 (1982). *See, e.g.*, Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921) (where an automobile driver had committed the felony of assault with intent to kill, by attempting to run down the sheriff when the latter sought to make a lawful arrest, the sheriff was justified in killing such driver, if necessary to prevent his escape).

76. *Id.* Although the statute does not explicitly say so, Tennessee law forbids the use of deadly force in the arrest of a misdemeanant. Johnson v. State, 173 Tenn. 134, 114 S.W.2d 819 (1938).

77. Cunningham v. Ellington, 323 F. Supp. 1072, 1075-76 (W.D. Tenn. 1971).

78. Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

79. *Id.* at 1254. *See supra* note 42 and accompanying text.

80. 471 U.S. at 7.

81. *Id.*. (citing U.S. v. Mendenhall, 446 U.S. 544 (1980)).

82. *Id.* (citing U.S. v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

pect has committed a crime.[83] This principle is central to the fourth amendment's concern with balancing the right of an apprehended suspect to be secure in his or her person from unreasonable searches and seizures, against the state's interest in effective law enforcement.[84]

It noted appellant's argument that when the probable cause requirement is satisfied, the fourth amendment is silent as to *how* the seizure is made.[85] Such contention, however, did not persuade the Court because it did not take into account the many cases which examine the reasonableness of the manner of seizure by balancing the nature of intrusion of the individual's fourth amendment rights against the importance of the government's interests alleged to justify the intrusion.[86]

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83. 471 U.S. at 7.

84. United States v. Watson, 423 U.S. 411 (1976). In *Watson* the Court held that where postal officers have probable cause to believe that a suspect is in possession of stolen credit cards and search his car without securing a search warrant, the fourth amendment is not violated. *Id.* at 423-24. Probable cause was found because the postal officer was informed by a "reliable" informant that the respondent Watson was in possession of stolen credit cards, *id.* at 412, 415, a violation of 18 U.S.C. § 1708. *Id.* at 413 n.2. The Court reversed the Court of Appeals for the Ninth Circuit, which ruled that the fourth amendment prohibited use of evidence of the stolen cards found in Watson's car as evidence because, notwithstanding probable cause for the arrest, the postal officer acted without an arrest warrant, though he had had time to secure one. 504 F.2d 849 (1974).

The Supreme Court reasoned that Watson's arrest without warrant was valid because the postal inspector had acted under statutory authority, 18 U.S.C. § 3061(a)(3), which specifically enables postal officers "performing duties related to the inspection of postal matters" to "make arrests without warrant for felonies. . . ." and that notwithstanding the fourth amendment, the statute "represents a judgment by Congress that it is not unreasonable under the fourth amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so." 423 U.S. at 415. The Court found that the authorization of felony arrests based on probable cause, without warrant, *id*, at 412, is a principle Congress has directed its law enforcement officials to follow for many years. *Id.* at 423.

It argued that rather than encumber criminal prosecutions 'with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like," *id.* at 423-24, state and federal law has long authorized arrest without warrant on probable cause. *Id.* at 423.

85. 471 U.S. at 7.

86. *Id.* So, for example, the Court held in United States v. Place, 462 U.S. 696 (1983), that a prolonged detention of an individual's luggage by police was unreasonable because the state's interest in prohibiting the flow of narcotics was outweighed by the individual's interest in being secure from unreasonable seizures, the practical effect of the luggage detention. *Id.* at 709. The Court determined that seizure of the luggage was unreasonable because drug enforcement agents detained respondent's luggage for ninety minutes and failed to accurately inform him of the whereabouts of the luggage the length

In determining the weight of the respondent's interest vis-à-vis the state's interest, the Court considered the fact that the seizure was unsupported by probable cause.[87] Generally, a seizure of a person must be supported by probable cause.[88]

The Supreme Court considered the nature of police intrusion and its justification in *Michigan v. Summers*.[89] In that case the police had obtained a warrant to search the respondent's premises for narcotics, and detained respondent in his home during the search.[90] The detention was held to be justified because a search for narcotics can give rise to sudden violence or efforts to destroy evidence by occupants of premises.[91] In addition, the nature of the "articulable" suspicion which led to the detention in *Summers* was substantial and clear, since the police had a search warrant issued by a judicial officer with probable cause to believe that criminal activity was taking place at the premises.[92] Moreover, the respondent's presence in the premises gave the police an actual basis for determining that criminal activity was taking place.[93] Considering these factors the Court in *Summers* could not find that the seizure of the respondent at his dwelling, which the police had a warrant to search, violated his

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of the detention and resulting period respondent might be dispossessed, and what arrangements would be made for the return of the luggage if suspicion was dispelled by investigation. *Id.* at 710.

Against strong governmental interst in drug enforcement, the Court considered the nature and extent of the intrusion on the individual's fourth amendment rights. *Id.* at 705. When an officer reasonably believes that a traveler is carrying narcotics in his or her luggage, the officer may inspect the luggage briefly to investigate the aroused suspicion. *Id.* at 706. Nevertheless, such a seizure of an individual's property, while not technically impinging upon his or her liberty, effectively restrains the person by disrupting travel plans to remain with the luggage. *Id.* at 708. Hence, the Court concluded, police seizure of a person's luggage should closely follow limitations applicable to investigative detention of persons. In this regard, the Court noted that it has never found constitutional a prolonged ninety minute detention of a person under the facts presented. *Id.* at 709-710.

See also Delaware v. Prouse, 440 U.S. 648 (1979). There the Court held that the state's interest in discretionary traffic spot checks as a means of ensuring safety on its roadways did not outweigh the resulting intrusion on the privacy and security of persons detained.

87. 471 U.S. at 7.

88. *Id.*

89. 452 U.S. 692 (1981).

90. *Id.* at 693.

91. *Id.* at 702.

92. *Id.* at 703.

93. *Id.* at 703-04.

right to be secure from unreasonable seizures guaranteed by the fourth amendment.[94]

The standard of reasonableness was scrutinized with regard to "stop and frisk" seizures in *Terry v. Ohio*.[95] The Court held that where a police officer has reason to believe that his or her safety or the safety of others is in jeopardy, he may make a reasonable search for weapons on an individual's person regardless of the lack of probable cause to arrest the individual for a crime.[96] In examining whether the search and seizure was reasonable, the Court found a search warrant unnecessary, arguing that securing a warrant is not practical where swift action based upon on-the-spot observations by a police officer is required.[97] The reasonableness of a search and seizure depends on the "reasonable man" rule: with regard to the particular circumstances, was the officer justified in suspecting that the individual under observation was armed?[98] If the officer's suspicions were justified, and the officer had some articulable basis for conducting the "stop and frisk," the officer may take necessary steps to discover whether the suspected individual is carrying weapons.[99] The *Terry* Court concluded that in light of the officer's determination that the suspect's and his companions' actions were consistent with the theory that they were contemplating a robbery, and the fact that his search was deemed by the Court to be confined to what was minimally necessary to determine whether the

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94. *Id.* at 705. *See also* United States v. Ortiz, 422 U.S. 891 (1975). In *Ortiz*, the issue of reasonableness of searches at traffic check points focused on whether such searches were based on probable cause. The Court held that such traffic checkpoints removed from the border were unreasonable, and prohibited by the fourth amendment. In the absence of probable cause, based on a rasonable belief that the law is being violated, police discretion to search private vehicles at such checkpoints is not constitutional. Probable cause in *Ortiz* would:

> include the number of persons in the vehicle, the appearance and behavior of the driver and passengers, their inability to speak English, the responses they give to officers' questions, the nature of the vehicle, and indications that it may be heavily loaded . . . In this case, however, the officers advanced no special reasons for believing respondent's vehicle contained aliens.

Id. at 897-98.

95. 392 U.S. 1 (1968). The Court found stop and frisk seizures within the purview of the fourth amendment. *Id.* at 16.

96. *Id.* at 22-26.

97. *Id.* at 20.

98. *Id.* at 21-22.

99. *Id.* at 24.

suspects were armed,[100] the "stop and frisk" search was reasonable under the fourth amendment.

The foregoing cases demonstrate that in conflicts between individuals and governments over search and seizure principles of the fourth amendment the Supreme Court will closely consider the totality of the circumstances, hich may or may not justify a particular sort of search and seizure.[101] Notwithstanding evidence of probable cause, a police officer may not always seize a suspect, particularly when the seizure involves use of deadly force. "The intrusiveness of a seizure by means of deadly force is unmatched."[102] Although recognizing the state's interest in effecting arrests, and the difficulty entailed when the suspect is a fleeing felon, the *Garner* majority was not convinced that use of deadly force was a productive means of achieving these goals.[103]

The Tennessee statute was held unconstitutional because it authorized Police Officer Hymon to use deadly force against a nonviolent fleeing suspect.[104] The majority reasoned that the statute would pass constitutional muster if it authorized use of deadly force only "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[105] A balancing of the suspect's and the state's interests lead the majority to find that "[w]here the suspect poses no immediate threat to the officer and no

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100. *Id.* at 28.

101. 471 U.S. at 8. Cases where the Government's interest did not support the seizure include: United States v. Place, 462 U.S. 696 (1983)(an airport seizure of luggage suspected of containing narcotics was held in violation of its owner's fourth amendment rights because the seizure entailed detaining the owner for a prolonged period); Winston v. Lee, 470 U.S. 753 (1985)(proposed surgery to gather firearm evidence of a robbery would violate the suspect's right to be secure in his person from unreasonable searches and seizures); Davis v. Mississippi, 394 U.S. 721 (1969)(detention for the sole purpose of obtaining fingerprints is subject to fourth amendment constraints).

Cases where the Government's interests did support the seizure include: Cupp v. Murphy, 412 U.S. 291 (1973)(evidence discovered from the taking of samples of the suspect's fingernails during the course of voluntary police station-house questioning, later used to convict the suspect of murder, was not violative of the fourth and fourteenth amendments); Schmerber v. California, 384 U.S. 757 (1966)(the state may, over the suspect's protests, have a physician extract blood from a person suspected of driving while intoxicated without violating the suspect's constitutitonal rights).

102. *Id.* at 9.

103. *Id.* at 11.

104. *See supra* note 24. Officer Hymon determined that the suspect was non-violent.

105. 471 U.S. at 11-12.

threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[106]

THE FOURTH AMENDMENT AND COMMON LAW

The Court considered appellant's assertion that the fourth amendment must be interpreted in accordance with the common law doctrine that authorizes the use of whatever force is necessary to arrest a fleeing individual suspected of a felony, but prohibits the use of such force against one suspected of only a misdemeanor.[107] The doctrine was articulated in Hale's writing as published in *Pleas of the Crown*:

> If persons that are pursued by these officers for felony or the just suspicion thereof. . .shall not yield themselves to these officers, but shall either resist or fly before they are apprehended or being apprehended shall rescue themselves and resist or fly, so that they cannot be otherwise apprehended, and are upon necessity slain therein, because they cannot be otherwise taken, it is no felony.[108]

This quote can best be understood in light of the fact that the common law doctrine arose at a time when virtually all felonies were punishable by death.[109] Felonies were considered inherently dangerous criminal activity and exacted stern punishment.[110] The concept of felony has its roots in the notion of forfeiture.[111]

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106. *Id.* at 11. Apparently, the *Garner* Court does not make the important distinction between the use of deadly force to apprehend a fleeing felon and the use of deadly force in self-defense. Rather, the majority seems to find use of deadly force in self-defense as a constitutional exception to their essential ban on the use of such force to apprehend a fleeing felon. Penal codes, like the New York Penal Law, clearly distinguish between the two contexts, prescribing varying degrees of use of force for self-defense and for police apprehension. N.Y. PENAL LAW §§ 35.00-.35 (McKinney 1984).

107. 471 U.S. at 12-13.

108. 2 M. HALE, HISTORIA PLACITORUM CORONAE 85 (1736).

109. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 465 (1899).

110. *Id.*

111. [I]f we place ourselves in the first years of the thirteenth century some broad statements seem possible. (i) A felony is a crime which can be prosecuted by an appeal, that is to say, by an accusation in which the accuser must as a general rule offer battle. . .(ii) The felon's lands go to his lord or to the king and his chattels are confiscated. (iii) The felon forfeits life or member. (iv) If a man accused of felony flies, he can be outlawed. Conversely, every crime that can be prosecuted by appeal, and every crime that causes a loss of both lands and goods, and every crime for which a man shall lose life or member, and every

Blackstone wrote in his commentaries on the common law that:

> [t]he idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offense felony, the law implies that it shall be punished with death, *viz* by hanging, as well as with forfeiture. . .[112]

The commentaries to the Model Penal Code explain that since at common law "seizure" of a felony suspect using deadly force was effected without the protection and formalities of an orderly trial and conviction, the killing of a resisting felon was merely a speedier means by which to inflict the punishment merited by the felon.[113]

The historical relationship between forfeiture of life and felonious crimes is unclear.[114] Pollock and Maitland note that the age in which "felon" became a common word was the age in which the tie of vassalage was the strongest tie that bound man to man.[115] A vassal was a feudal tenant or grantee who was obligated to render feudal service, usually agrarian and military, to the feudal lord.[116] In turn, the tenant was granted a fief, or a grant of land, upon which he and his family resided and tilled the land.[117]

The *Garner* court considered the fact that the common law doctrine developed during a time when weapons were crude by today's standards.[118] Because of the crudity of available weapons, it was almost impossible to inflict deadly force except through a hand-to-hand struggle, during which the safety of the arresting officer was at risk.[119] Police officers began carrying

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crime for which a fugitive can be outlawed, is a felony.

Id. at 466 (footnote omitted).

112. *See also* 4 W. BLACKSTONE, COMMENTARIES 98.

113. MODEL PENAL CODE § 3.07, comment 3, at 56 (Tent. Draft No. 8, 1958). *See generally* R. PERKINS & R. BOYCE, CRIMINAL LAW 1098-1105 (3d ed. 1982).

114. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 465 (1899).

115. *Id.*

116. BLACK'S LAW DICTIONARY 1393 (5th ed. 1979).

117. *Id.*

118. 471 U.S. at 14.

119. *Id.*

handguns only in the latter half of the last century.[120] Only then could deadly force be used at a distance. Today the use of such force has an altogether different meaning, and harsher consequences, as seen in the death of Edward Garner.[121]

Generally, early American jurisdictions followed the common law doctrine that a police officer may slay a fleeing felon but not a fleeing misdemeanant.[122] In *Holloway v. Moser*,[123] the Supreme Court of North Carolina upheld that doctrine.[124] At the time of the shooting in *Moser* the decedent had been sentenced to road labor after being convicted of carrying a concealed weapon, a misdemeanor offense.[125] The decedent took flight after a dynamite explosion.[126] A guard for the work crew ordered the decedent to halt, then shot and killed him.[127] The assertion that the officer could not tell whether the decedent was a felon or misdemeanant was no excuse, the court wrote.[128] The common law rule was justified because felons were considered relatively more dangerous than misdemeanants.[129]

There were states, however, that were cautious about accepting the doctrine. In *State v. Smith*,[130] the Supreme Court of Iowa held that an officer may not use deadly force against a misdemeanant.[131] When the officer reasonably believed that the suspect was engaged in a felonious crime, however (in *Smith*, attempting to effect the escape of a prisoner in police custody), a jury must decide whether the use of deadly force was justified.[132] At the time of the shooting, the police officer had arrested the decedent's father for drunkenness.[133] The decedent interfered, allegedly to free his father, and as a result of the ensuing alter-

120 L. KENNETT & J. ANDERSON, THE GUN IN AMERICA 150-51 (1975).
121. 471 U.S. at 15.
122. *Id.* at 12.
123. 193 N.C. 185, 136 S.E. 375 (1927).
124. *Id.* at 189, 136 S.E. at 379.
125. *Id.*
126. *Id.* at 187, 136 S.E. at 376.
127. *Id.* at 186, 136 S.E. at 376.
128. *Id.*
129. *Id.*
130. 127 Iowa 534, 103 N.W. 944 (1905).
131. *Id.* at 537, 103 N.W. at 945.
132. *Id.* at 539, 103 N.W. at 945.
133. *Id.* at 535, 103 N.W. at 944.

cation was fatally shot.[134] The officer asserted that the shooting was in self-defense, and that, believing the decedent was committing a felony (attempting to effect a prisoner's escape), he used necessary force to prevent it and arrest the decedent.[135]

An early Tennessee decision, based on events which occurred nearly one century before *Garner*, followed the common law's interest in protecting the misdemeanant. In *Reneau v. State*,[136] the Supreme Court of Tennessee upheld the common law doctrine, reasoning that it is better to let one convicted merely of a misdemeanor escape, rather than take his or her life.[137] It suggested that the doctrine be modified to proscribe the use of deadly force against lower grade felons.[138] In *Reneau* the decedent prisoner, Thomas, was convicted for assault and battery.[139] En route to jail, he fled.[140] Neither the police officer, Reneau, nor the accompanying guard gave chase, but rather commanded Thomas to halt three times and when such command was not obeyed fired two shots, killing him instantly.[141] In his defense, Reneau argued that the prisoner had a violent temper and had threatened to escape.[142] In broad language, perhaps meant to embrace the use of deadly force against felons, the court wrote that:

> Officers should understand that it is their duty to use such means to secure their prisoners as will enable them to hold them in custody without resorting to the use of firearms or dangerous weapons, and that they will not be excused for taking life in any case, where, with diligence and caution, the prisoner could be otherwise held.[143]

While North Carolina, Iowa, and Tennessee thus appear to have relied on the common law doctrine to some extent,[144] an

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134. *Id.*
135. *Id.*
136. 70 Tenn. 720 (1879).
137. *Id.* at 721.
138. *Id.*
139. *Id.* Despite the felonious nature of the charges, the Tennessee court characterized the decedent as a misdemeanant.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 722.
144. *See also* Brooks v. Commonwealth, 61 Pa. 352 (1869); Roberts v. State, 14 Mo.

early case in Texas rejected it. In *Caldwell v. State*[145] the court found that a lower court's instruction directing the jury to consider evidence of the officer's desire to prevent the escape of the decedent prisoner, and the non-violent character of the prisoner, was proper.[146] The case involved one Lackey, who, with arrest warrant in hand, sought the decedent Gilmore for the theft of Lackey's two mules.[147] The defendant officer of the peace, Caldwell, along with Lackey and others, rode to the residence of Gilmore, where he arrested Gilmore without resistance while Lackey cursed and abused the prisoner.[148] On departing from the residence Gilmore broke from the group, and ran towards a fence and a field of high grown cotton.[149] Perhaps confused, Gilmore then ran back toward his home and Caldwell fatally shot him as he ran.[150] The Texas court reasoned that while Gilmore was a felony suspect, he was merely attempting escape, and was neither armed nor violent.[151] It wrote that "[t]he law places too high an estimate upon a man's life, though he be a poor, friendless prisoner, to permit an officer to kill him, while unresisting, simply to prevent an escape."[152]

With regard to private citizens and the common law doctrine, courts held differently. In *Storey v. State*,[153] the Supreme Court of Alabama found the common law doctrine unsound, and decided instead to adopt a "safer" view, in which the use of deadly force is not permissible against persons attempting " 'secret' felonies, not accompanied by force."[154] In *Storey*, the defendant pursued the decedent to recover a horse the latter had stolen. The defendant killed the horse thief and sought immunity under the common law doctrine, arguing that stealing the

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138 (1851).

145. 41 Tex. 86 (1874).

146. *Id.* at 97.

147. *Id.* at 87.

148. *Id.*

149. *Id.*

150. *Id.* at 88.

151. *Id.*

152. *Id.* at 88-89.

153. 71 Ala. 329 (1882).

154. *Id.* at 339. The court fails to define "secret" felonies. Although the court addressed the issue of the use of deadly force by private citizens against felony suspects in flight, the court's writing seems to apply to the use of deadly force by officers of the law as well.

horse was felonious, and killing the thief was necessary to recover the horse and terminate the larceny.[155] The court reasoned that the defendant had had an opportunity to obtain redress at law against the decedent, and therefore the killing was not justified.[156]

Similarly, the Supreme Court of North Carolina held in *State v. Bryant*[157] that "extreme measures" may be taken to secure the arrest of suspects of capital felonies such as murder and rape.[158] When such measures are taken in cases involving felonies of a lesser degree, however, care must be taken that the use of such force is necessary, and that no other method is available to capture the suspect.[159] In *Bryant* the defendant shot the decedent when he fled after being accused of stealing a hog from the defendant's employer.[160]

The *Garner* majority conceded appellant's assertion that the common law doctrine, authorizing police officers to use deadly force to arrest fleeing felony suspects, prevailed when the fourth amendment was adopted,[161] and recalled that it has considered the common law in evaluating the reasonableness of police activity for fourth amendment purposes.[162] Nevertheless, it

155. *Id.* at 338.

156. *Id.* at 340.

157. 65 N.C. 327 (1871).

158. *Id.* at 328.

159. *Id.*

160. *Id.* The butchered hog was later found at the decedent's home.

161. 471 U.S. at 12. The early cases show courts struggling with the doctrine however, refusing to implement it fully. As seen in *Smith*, the Iowa court let the jury decide whether use of deadly force was justified in the killing of the felon attempting to secure his father's escape from police custody. Had the court adopted the common law doctrine without reservation, the use of deadly force would have been justified.

While the decedent was a misdemeanant in *Reneau*, the Tennessee court seemed to have had all escapees in mind, both felons and misdemeanants, when it ordered that officers would not be excused for the taking of a life, if other means to prevent escape could have been used. Finally, the cases involving private citizens suggest a general repugnance to the common law doctrine.

162. *Id.* Indeed, in United States v. Watson, the Court wrote that cases interpreting the fourth amendment reflect the common law doctrine that police officers were permitted to arrest without warrant for felonies and misdemeanors committed in their presence and for felonies not committed in their presence if there is probable cause to believe that the suspect is the culprit. 423 U.S. 411, 418-19 (1976).

By similar reasoning, the *Gerstein v. Pugh* Court held that the fourth amendment requires that prolonged restraint be supported by judicial determination of probable cause. 420 U.S. 103, 114 (1975). The Court noted that the decision had historical support in common law doctrine guiding interpretation of the fourth amendment. *Id.* At common

was not constrained by early enforcement practices prevailing when the fourth amendment was adopted.[163] The majority concluded that the appellant's reliance on the common law doctrine as it prevailed at the time the fourth amendment was adopted is an example of "mistaken literalism that ignores the purposes of a historical inquiry."[164] Rather than imply such literalism, the purpose of historical inquiry is to focus on circumstantial inquiry in light of the Constitution.

In this regard, the Court noted that crimes previously punishable by death at common law are so no longer, thus "undermin[ing] the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life."[165] Moreover, it noted that the presumed distinction between the not-so-dangerous misdemeanant and the dangerous felon is "untenable." Some misdemeanors, like drunken driving, are more

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law a person was entitled to see a justice of the peace shortly after arrest, whereupon the justice would decide if there was probable cause to restrain the suspect further. *Id.* at 114-15.

163. 471 U.S. at 13. In Payton v. New York, 445 U.S. 573 (1980), the Court noted that present legal contexts substantially differ from those surrounding the development of common law rules of arrest. *Id.* at 591:

> For example, whereas the kinds of property subject to seizure under warrants had been limited to contraband and the fruits or instrumentalities of crime, *see* Gouled v. United States, 255 U.S. 298, 309, the category of property that may be seized, consistent with the fourth amendment, has been expanded to include more evidence. Warden v. Hayden, 287 U.S. 294 (1967). Also, the prohibitions of the amendment have been extended to protect against invasion by electronic eavesdropping of an individual's privacy in a phone booth not owned by him, Katz v. United States, 389 U.S. 347 (1967), even though the earlier law had focused on the physical invasion of the individual's person or property interest in the course of a seizure of tangible objects. *See* Olmstead v. United States, 277 U.S. 428, 466 (1928).

445 U.S. at 591 n.33.

164. 471 U.S. at 13.

165. *Id.* at 14. For example, recently in Enmund v. Florida, 458 U.S. 782 (1982), the Court held that the imposition of the death penalty was an excessive punishment for robbery. *Id.* at 797. The Court focused on the petitioner's culpability, and the fact that while the robbers he accompanied did commit murder, the petitioner did not kill nor intend to kill. *Id.* at 798. It relied on its decision in Coker v. Georgia, 433 U.S. 584 (1977), where it held that the death penalty is an excessive punishment for the felony of rape, and is prohibited by the eighth amendment as cruel and unusual punshment. *Id.* at 592. The *Coker* plurality observed that only three states provide the death penalty for rape, *id.* at 594, concluding that the lower court's judgment of death for rape is an anomaly, which forces the Court to reject the penalty. *Id.* at 596.

dangerous than some felonies.[166] The majority concluded that the Tennessee statute at issue, though a literal translation of its common law pedigree, fails constitutionally in its comtemporary application because of legal and technological changes.[167]

STATE STATUTES AND POLICE PROCEDURE

The *Garner* majority ultimately considered police procedure in individual jurisdictions.[168] No overwhelming trend away from the common law rule was seen in the pertinent statutes of all fifty states.[169] Nineteen states have codified the rule, and two state courts have significantly limited the statutes' applicability.[170] Michigan, Ohio, Virginia, and West Virginia have adopted the common law rule through case law rather than legislation.[171] The Model Penal Code, which follows from the common law rule, has been adopted by Hawaii and Nebraska.[172] Massachu-

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166. *Id.* at 14 n.12.

167. *Id.* at 15.

168. *Id.* at 15-16.

169. *Id.* at 16.

170. *See supra* note 3. *See also*

> In California, police may use deadly force to arrest only if the crime for which the arrest is sought was "a forcible and atrocious one which threatens death or serious bodily harm" or there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed.

Kortum v. Alkire, 69 Cal. App. 3d 325, 333, 138 Cal.Rptr. 26, 30-31 (1977), *quoted in* 471 U.S. at 16 n.15. "In Indiana, deadly force may be used only to prevent injury, the imminent danger of injury or force, or the threat of force. It is not permitted simply to prevent escape." Rose v. State, 431 N.E.2d 521 (Ind.App. 1982), *quoted in* 471 U.S. at 16 n.15.

171. Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982); State v. Foster, 60 Ohio Misc. 46, 59-66, 396 N.E.2d 246, 255-258 (Com.Pl. 1979); Berry v. Hamman, 203 Va. 596, 125 S.E.2d 851 (1962); Thompson v. Norfolk & W.R.Co., 116 W.Va. 705, 711-712, 182 S.E. 880, 883-84 (1935), *cited in* 471 U.S. at 16 n.16.

172. HAW. REV. STAT.. § 703-307 (1976); NEB. REV. STAT. § 28-1412 (1979), *cited in* 471 U.S. at 17 n.17. The relevant portion of the Model Penal Code provides:

> The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes the (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft 1968).

setts has also adopted the Model Penal Code, with limitations with regard to both private citizens and police officers.[173]

In eighteen other states the use of deadly force is only authorized "if the suspect has committed a felony involving use of deadly force or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested."[174] Louisiana and Vermont authorize use of deadly force only to prevent the commission of violent felonies.[175] The remaining four states, Maryland, Montana, South Carolina, and Wyoming, have no relevant case law or statutes, or have positions which are unclear.[176]

Some states have recently expressed a desire to maintain the common law rule,[177] yet in a significant minority of the states movement away from the common law doctrine is apparent.[178]

This apparent trend is more clearly evinced by the policies adopted by police and other law enforcement departments, which are "overwhelmingly . . . more restrictive than the common-law view."[179] For example, the Federal Bureau of Investigation authorizes use of firearms only when necessary to prevent death or grievous bodily harm.[180] Similarly, the Commission on Accreditation for Law Enforcement Agencies limits accreditation to those departments which restrict use of deadly force to situations where "the officer reasonably believes that the action is in defense of human life . . . or in defense of any person in immediate danger of serious physical injury."[181] All indications

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173. 471 U.S. at 17 n.17.

174. *Id. See supra* note 4.

175. LA.REV.STAT.ANN. § 14:20(2) (West 1974); VT.STAT.ANN., tit. 13, § 2305 (1974 & Supp. 1984). "A Federal District Court has interpreted the Louisiana statute to limit the use of deadly force against fleeing suspects to situations where 'life itself is endangered or great bodily harm is threatened.' " Sauls v. Hutto, 304 F.Supp. 124, 132 (E.D.La. 1969), *quoted in* 471 U.S. at 17 n.19.

176. *Id.* at 17-18 n.20.

177. *Id.* at 18 n.21.

178. *Id.*

179. C. MILTON, J. HALLECK, J. LARDNER & G. ABRECHT, POLICE USE OF DEADLY FORCE 45-46 (Police Foundation 1977).

180. 471 U.S. at 18.

181. Program Commission on Accreditation for Law Enforcement Agencies, Inc., Standards for Law Enforcement Agencies: The Standards Manual for the Law Enforcement Agency Accreditation (Aug. 1983.).

suggest that use of deadly force against felons is unnecessary and therefore unjustifiable.[182] Jurisdictions that have abandoned the common law rule by legislation or police department policy have not seen a concomitant increase in criminal activity.

Amici Curiae reported that

> "[a]fter extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime fighting ability of law enforcement agencies."[183]

From the foregoing it is clear that states' interests in effective law enforcement are not sufficient to warrant the use of deadly force against suspected felons in flight.[184]

THE SUPREME COURT DECISION: THE FOURTH AMENDMENT PROHIBITS USE OF DEADLY FORCE AGAINST UNARMED, NONVIOLENT FLEEING FELONS

The *Garner* majority based its analysis of the constitutionality of Tenn. Code Ann. § 40-7-108 on case law under the fourth amendment and the balancing of individuals' and states' interests. Where individuals' and states' interests are considered, the deciding issue is whether the totality of the circumstances justifies a particular sort of seizure.[185]

The opinion assumed as true that apprehension by use of deadly force is a seizure, and therefore subject to the fourth amendment's reasonableness requirements.[186] The majority considered other fourth amendment restrictions on police power to seize, such as an individual's freedom to walk away,[187] and concluded that restrictions on individuals' physical liberty at a spe-

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182. *Id.*

183 Brief for Police Foundation *et al.* as *Amici Curiae* in support of Respondent-Appellee at 11, *Garner*, 471 U.S. 1.

184. 471 U.S. at 19. *See generally id.* at 10 n.10.

185. *Id.*

186. *Id.* at 7.

187. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). *Compare* United States v. Mendenhall, 446 U.S. 544 (1980) (noting that it is not always clear when minimal police interference becomes a seizure).

cific place, for a specific time, implicate a fourth amendment analysis. Shooting an individual "seizes" his or her person,[188] because physical liberty is severely restricted by the debilitating effect of a gunshot wound.[189] If the wound is fatal, the use of such force permanently destroys all freedom of movement.[190] While deprivation of life is generally a fifth amendment subject,[191] the use of deadly force (or any other method of effectuating custody) causes a deprivation of freedom and the tenets of the fourth amendment are invoked.[192]

The majority also relied upon the premise that probable cause is central to constitutional seizures.[193] While recognizing that the fourth amendment requires probable cause as a basis for any lawful seizure, the majority found that this requirement should be tempered by considering parties' competing interests in the seizure context.[194]

It found that the manner of the seizure is of key importance in balancing the two competing interests.[195] While the Justices conceded that probable cause was not the sole determinant of reasonableness, it remained a critical notion because it protects the individual from unnecessary searches and seizures. In light of Officer Hymon's strong belief that Garner was unarmed,[196] and testimony that other means of seizure were available,[197] the Court concluded that the seizure by deadly force was completely

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188. 471 U.S. at 7.

189. "Seizure of an individual, within the Fourth Amendment, connotes the taking of one physically or constructively into custody and detaining him, thus causing a deprivation of his freedom in a significant way, with real interruption of his liberty of movement." People v. P.A.J. Theater Corp., 72 Misc.2d 354, 356, 339 N.Y.S. 2d 152, 155 (N.Y.Crim.Ct. 1972), *noted in* BLACK'S LAW DICTIONARY 1219 (5th ed. 1979).

190. "No person shall. . .be deprived of. . .life, liberty or property. . .without due process of law." U.S. CONST. amend. V.

191. *Id.*

192. "The right of the People to be secure in their persons. . .against unreasonable searches and seizures, shall not be violated, and no Warrants shall, issue, but upon probable cause. . ." U.S. CONST. amend IV.

193. *Id.*

194. 471 U.S. at 8. So, for example, the Court referred to *Place*, 462 U.S. 696, in which the government's interest in effective drug enforcement, while based on probable cause, was insufficient to substantiate an intrusion on an indidividual's fourth amendment interest to be secure from unreasonable seizures. *See supra* notes 84-98 and accompanying text.

195. 471 U.S. at 8.

196. *See supra* note 23 and accompanying text.

197. *See supra* note 34 and accompanying text.

unnecessary.

The notion of balancing competing individual and state interests compels the question of "whether the totality of the circumstances" of the seizure at issue justified the use of deadly force.[198] To begin to answer this question, the majority asserted that the use of deadly force to seize a felon is unmatched in intrusiveness when compared with other forms of seizure.[199] The point needs little elaboration. Use of deadly force has the potential of immediately and permanently destroying all freedom of physical movement, and life itself. Although an analogy may perhaps be made between seizure by use of deadly force and lifelong imprisonment with its general restraint on physical freedom, the crucial distinction is that in the case of life imprisonment movement and activity are maintained, albeit in varying degrees of quantity and quality, and life is not extinguished.

The majority rejected common law reasoning that the concept of "felony" lay in the idea of forfeiture of life,[200] and that "the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected."[201] It pointed to recent cases wherein crimes formerly punishable by death no longer mandate such an onerous sentence, and that such charges demonstrate a gradual undermining of common law reasoning.[202] It concluded that the intrusion of a deadly seizure, historically considered of no consequence because a captured felon looked forward to certain execution, is no longer tenable. Thus a suspect's fundamental interest in his own life cannot be outweighed by states' interests in effective law enforcement.

The majority referred to numerous authorities to rebut appellant's argument that effective law enforcement requires resort to deadly force, or the meaningful threat thereof.[203] The Court noted "that laws permitting police officers to use deadly force to apprehend unarmed, nonviolent, fleeing felony suspects actually do not protect citizens or law enforcement officers, [and] do not

198. 471 U.S. at 8-9.
199. *Id.* at 9.
200. *Id.* at 13-14. *See also id.* at 13 n.11.
201. MODEL PENAL CODE § 3.07 comment 3(c)(i)(1962).
202. 471 U.S. at 14. *See supra* note 162 and accompanying text.
203. 471 U.S. at 10.

deter crime or alleviate problems caused by crime. . . ."[204] Hence, Edward Garner's death served absolutely no community interest. Given that he was unarmed and apparently non-violent, the use of deadly force was unnecessary, especially in the absence of probable cause that Garner posed a serious threat of physical harm to Officer Hymon or others.[205]

Moreover, the majority assumed that the interest of both the individual and society in the judicial determination of guilt was frustrated by use of deadly force.[206] Deadly force is self-defeating because it fails to recognize the purposes of the judicial mechanism, and if such force finds its target, the mechanism may not be activated at all.[207] Judicial determination is in both the private citizens' and states' interests. In the former, the private citizen needs a mechanism that will guarantee that his or her constitutional rights are protected. In the latter, the states need a mechanism that will support their efforts at law enforcement. Use of deadly force severely interferes with the administration of criminal justice.

The majority's analysis was strengthened by an overview of pertinent statutes from all fifty American jurisdictions and pertinent police department policies, which indicated a long-term movement away from the common law rule authorizing use of deadly force against fleeing felons.[208]

The Tennessee statute at issue was subject to the fourth amendment because the use of deadly force against a fleeing felony suspect is a seizure. The statute fails the probable cause requirement of the fourth amendment because it authorized Officer Hymon to shoot and kill fifteen year old Edward Garner, despite the officer's determination that Garner was unarmed and nonviolent. Probable cause to believe that Garner posed a serious physical threat to Hymon or others was never shown.[209] The statute fails the balancing test of the fourth amendment because Garner's fundamental interest in his life was so vital as to out-

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204. Brief for Police Foundation *et al.* as *Amici Curiae* in support of Respondent-Appellees at 11.

205. 471 U.S. at 21.

206. 471 U.S. at 10.

207. *Id.*

208. *Id.* at 18.

209. *Id.* at 21.

weigh the State of Tennessee's interest in securing his capture by any means necessary.[210] The statute fails the reasonableness standard of the fourth amendment because the manner of the seizure authorized, use of deadly force—which abruptly and permanently destroyed a young life—so intruded on the person of the suspect as to be completely unreasonable and wholly unnecessary.[211]

DISSENT

The dissenting opinion,[212] written by Justice O'Connor with whom Chief Justice Burger and Justice Rehnquist joined, rejected the majority's reasoning. Justice O'Connor stated that the majority obscured the issue at hand and she argued that the "precise" issue was whether Officer Hymon's use of deadly force under the circumstances of a residential burglary investigation violated Garner's constitutional rights.[213] The majority's misplaced emphasis on the validity of the Tennessee statute on its face compelled entertainment of hypothetical facts with little relevance to the problem posed by the facts on October 3, 1974, O'Connor wrote.[214]

The dissent accepted two basic premises of the Court's opinion: (1) that young Garner was seized for the purposes of fourth amendment analysis; and (2) that deciding whether the seizure was constitutionally proper requires a balancing of competing interests of the public and the suspect.[215] From this point on, however, decidedly opposing premises are relied upon in evaluating the reasonableness of Officer Hymon's use of deadly force to arrest burglary suspect Edward Garner. Unlike the majority opinion, the dissent qualified police resort to deadly force as falling under the "rubric of police conduct . . . necessarily [involving] swift action predicated upon on-the-spot observations of the officer on the beat."[216] Clarity of hindsight provided

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210. *Id.* at 11.
211. *Id.* at 20.
212. *Id.* at 22.
213. *Id.* at 25.
214. *Id.*
215. *Id.* at 25-26.
216. *Id.* at 26 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

a limited basis for which to examine the reasonableness of police decisions made in uncertain and dangerous circumstances.[217]

This assumption was strengthened by the forceful argument that residential burglary is a serious and dangerous crime that concerns public interest in protecting not only private property but also protecting individuals harmed by such intrusions.[218] Citing Department of Justice reports, the dissent noted that "[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars."[219]

Justice O'Connor contradicted the majority's assertion that physical violence is rarely a part of burglaries in citing these reports.[220] It was noted that while a residential burglary, in hindsight, did not involve physical violence, the "potentialities for violence" inherent in the forced entry into a home preclude the characterization of the crime as "innocuous, inconsequential, minor, or 'nonviolent.' "[221] Thus, the dissent challenged the majority's implied assertion that the Tennessee statute at issue was an ill-considered adoption of the common law doctrine authorizing use of deadly force to seize fleeing felons, asserting instead that the statute codifies legislative determination that use of deadly force in closely circumscribed contexts is quite justified because public interest is being served.[222]

Justice O'Connor returned to the facts of October 3, 1974 to review Edward Garner's respective interest under the fourth amendment. She concluded that Hymon had probable cause to arrest Garner that evening, based on the fact that as the Officer

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217. *Id.*

218. *Id.* at 27.

219. *Id.* (*quoting* BUREAU OF JUSTICE STATISTICS BULLETIN, HOUSEHOLD BURGLARY 1 (January 1985)). *But see id.* at 27 n.23.

220. *Id.* at 21, 27.

221. *Id.* at 27 (quoting Solem v. Helm, 463 U.S. 277, 316 (1983) (Burger, C.J., dissenting.)). *See also* RESTATEMENT OF TORTS § 131 comment g (1934)(burglary is among felonies that normally cause or threaten death or serious bodily harm); R. PERKINS & R. BOYCE, CRIMINAL LAW 1110 (3d ed. 1982) (burglary is a dangerous felony that creates unreasonable risk of great personal harm).

222. 471 U.S. at 28. The dissent's conclusion was based on the presumed dangerous nature of residential burglaries, and the dissent's concern in adequately representing the extent of public interest involved in effective law enforcement. Adequate representation of public interest, it was implied, was lacking in the majority's balancing of interests for the purpose of the fourth amendment. *Id.* at 25-29.

approached the back of the house he heard a door slam and saw Garner run across the backyard to the chain-link fence.[223] The dissent recounted the now familiar and tragic decision young Garner made: refusing to heed the Officer's warning, he attempted to escape over the fence.[224] This conclusion was based on the assumption that the fifteen-year-old consciously decided to take the risk, deliberately forfeiting his fundamental interest in his own life. Furthermore, the disputed contention that the Officer believed the only way to seize Garner was by use of deadly force was accepted without question.[225]

Rather than weigh young Garner's interest in his life against the public's interest in apprehending a suspect who was neither armed nor violent, as the majority did, the dissent concluded that Garner's interest did not encompass "a right to flee unimpeded from the scene of a burglary."[226] This assertion was supported, the dissent believed, by the language of Tenn.Code Ann. § 40-7-108 (1982), which was interpreted as adequately accommodating a suspect's interests in such circumstances because it was in the suspect's power to avoid risk of life or grievous harm by heeding officers' warnings to halt.[227]

In conclusion, the dissent found that a "proper" balancing of the circumstances, considering the dangerous nature of residential burglaries along with the determination that the suspect's interests did not encompass the right to flee unimpeded from the scene of the burglary, demonstrated that Officer Hymon's use of deadly force against Edward Garner was not unreasonable, and therefore was not prohibited by the fourth amendment.[228]

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223. *Id.* at 3, 24.

224. *Id.* at 24.

225. *Id. But see supra* notes 28-29, and note 34.

226. *Id.* at 29.

227. *Id.* at 29. TENN. CODE ANN. § 40-7-108 (1982) read: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

228. The dissent also noted:

> that no other constitutional provision supports the decision below. In addition to his fourth amendment claim, appellee-respondent also alleged violations of due process, the sixth amendment right to trial by jury, and the eight amendment proscription of cruel and unusual punishhment . . . Whatever the validity of Tennessee's statute in other contexts, I cannot agree that its application in this case resulted in a deprivation "without due process of law".

CONCLUSION

Two months after *Garner* was decided the Tennessee statute was rewritten to accommodate the Supreme Court's holding.[229] The new statute restricts the use of deadly force to situations in which a police officer has probable cause to believe that the suspect has committed a felony involving the infliction or the threatened infliction of serious physical harm to the officer or others, or a police officer has probable cause to believe that the suspect poses a significant threat of physical harm to himself, herself, or others.[230] Moreover, the use of deadly force must be preceded by a warning and all other means of apprehension must be exhausted before its use.[231]

Notwithstanding such guidelines, the re-written Tennessee statute continues to authorize the killing of fleeing felony suspects. Under the new statute officers retain vast discretion with regard to determining whether the suspect has committed a felony involving the infliction or threatened infliction of serious physical harm and whether the suspect is dangerous.[232] Such

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Cf. Baker v. McCollan, 443 U.S. 137, 144-145 (1979).

> Nor do I believe that a criminal suspect who is shot while trying to avoid apprehension has a cognizable claim of a deprivation of his sixth amendment right to trial by jury. *See* Cunningham v. Ellington, 323 F.Supp. 1072, 1075-1076 (W.D. Tenn. 1971)(three judge court). Finally, because there is no indication that the use of deadly force was intended to punish rather than to capture the suspect, there is no valid claim under the eighth amendment.*See* Bell v. Wofish, 441 U.S. 520, 538-539 (1979).

Id. at 30-31.

229. TENN. CODE ANN. § 40-7-108 (1985): Resistance to officer. (a) 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. (b) Notwithstanding subsection (a), deadly force is authorized to effect an arrest only if all other reasonable means of apprehension have been exhausted, and, where feasible, warning has been given the defendant, by identifying himself or herself as such officer, or an oral order to halt, or an oral warning that deadly force might be used, and: (1) The officer has probable cause to believe defendant has committed a felony involving the infliction or threatened infliction of serious physical harm to the officer or to any person in the presence of the officer; or (2) The officer has probable cause to believe that the defendant poses a threat of serious physical harm, either to the officer or to others unless he is immediately apprehended. (c) All law enforcement officers, both state and local, shall be bound by the foregoing provisions and shall receive instruction regarding implementation of same in law enforcement training programs.

230. *Id.*

231 *Id.*

232. *Id.*

discretion contradicts the spirit of *Garner*, for it invites a determination of probable cause for a seizure. As the majority held, under a fourth amendment analysis involving the use of deadly force to arrest fleeing felony suspects, an individual's interest in life shall categorically outweigh the state's interest in securing arrests of fleeing felony suspects.[233] The threat of serious physical danger to the officer or others aside, under *Garner's* fourth amendment analysis the use of deadly force to secure a seizure of a fleeing felony suspect is constitutionally unreasonable.[234] The use of deadly force is permissible only when the officer reasonably determines that the suspect poses a threat of serious physical danger to himself, herself or others.[235]

Moreover, officers maintain vast discretion with regard to exhausting alternative means of arrest.[236] The statute does not, for example, specifically compel an officer to give chase. Rather, the statute's language suggests that a police officer may shoot a fleeing felony suspect should he or she surmise that the suspect will evade capture.[237] In *Garner*, Officer Hymon shot Edward Garner in the back as the youth attempted to scale a chain-link fence.[238] The new statutory provisions authorize such killing as long as the officer believes that no other means of arrest are available.[239]

Use of deadly force in self-defense does not fall under the purview of the fourth amendment, notwithstanding language in the *Garner* holding.[240] Fourth amendment scrutiny is required only when deadly force is used as a method of seizure. Otherwise, use of deadly force in self-defense is proscribed by state penal codes.[241] A statute strictly in accordance with the *Garner* holding must prohibit all use of deadly force to seize fleeing fel-

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233. 471 U.S. at 11.

234. *Id.*

235. *Id.*

236. *See supra* note 229 and accompanying text.

237. *Id.*

238. 471 U.S. at 4.

239. *See supra* note 229 and accompanying text.

240. 471 U.S. at 11.

241. *See, e.g.*, N.Y. PENAL LAW § 35.00-.30 (McKinney 1984).

ony suspects unless the officer has probable cause to believe that the suspect poses a significant threat to either himself, herself or others.

Georgia McMillen