CRIMINAL PROCEDURE—SEARCH AND SEIZURE—LAW OFFICER'S USE OF DEADLY FORCE AGAINST NONDANGEROUS FLEEING FELON HELD VIOLATIVE OF FOURTH AMENDMENT—*Tennessee v. Garner*, 471 U.S. 1 (1985).

Society has long had an interest in the vigorous enforcement of its criminal laws.[1] This interest extends to the apprehension of those individuals who violate laws and attempt to escape justice.[2] Alternatively, society has an interest in the preservation of human life and, consequently, in minimizing the excessive use of force by those who enforce the law.[3] These divergent interests have created a dichotomy in both federal and state courts with regard to the use of deadly force in effectuating arrests.[4] The legality of the use of such force has generated substantial conflict.[5] Recently, however, in *Tennessee v. Garner*,[6] the United States Supreme Court utilized the fourth amendment in holding that a police officer may not use deadly force to prevent the escape of a nondangerous fleeing criminal.[7]

In the evening of October 3, 1974, Officers Hymon and Wright of the Memphis Police Department responded to a radio dispatch regarding the burglary of an unoccupied house.[8] When the officers arrived at the scene, they were directed to the house

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1 *See generally* W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW § 1.2, at 10 (1986) (basic goal of criminal law is to prevent societal harm).

2 *See* Miller v. State, 462 P.2d 421 (Alaska 1969); State v. Richardson, 95 Idaho 446, 511 P.2d 263 (1973), *cert. denied*, 414 U.S. 1163 (1974); State v. Mulvihill, 57 N.J. 151, 270 A.2d 277 (1970); State v. Peters, 141 Vt. 341, 450 A.2d 332 (1982) (cases indicating need of peaceful submission to arrest).

3 *See* Comment, *The Use of Deadly Force in the Protection of Property Under the Model Penal Code*, 59 COLUM. L. REV. 1212, 1222-23 (1959).

4 *Compare* Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975) (deadly force permitted) *with* Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976) (en banc), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam) (deadly force held unconstitutional).

5 *See infra* notes 38-43 and accompanying text (analyzing states' treatment of use of deadly force).

6 471 U.S. 1 (1985).

7 *See id.* at 7-13.

8 *Id.* at 3. Under Tennessee law, burglary is defined as:

> [T]he breaking and entering into a dwelling house, or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging either permanently or temporarily and whether as owner, renter, tenant, lessee or paying guest, by night, with intent to commit a felony.

TENN. CODE ANN. § 39-3-401(a) (1982).

Burglary is punishable by imprisonment in the state penitentiary for a sentence of not less than five years and not more than fifteen years. TENN. CODE ANN. § 39-3-

by an alert neighbor who had placed the initial call to the police department.[9] Officer Hymon went to the rear of the house where he heard a door slam and observed Edward Eugene Garner running across the backyard.[10] With his flashlight, Hymon located Garner crouching in front of a six-foot-high chain link fence.[11] Hymon determined that the suspect was an unarmed youth.[12] Hymon identified himself as a police officer and commanded Garner to halt.[13] When Garner attempted to climb over the fence, the officer fired his revolver fatally wounding him.[14] Officer Hymon acted pursuant to a Tennessee statute which sanctioned the use of deadly force to prevent the escape of a fleeing felon.[15]

Garner's father filed an action in the United States District Court for the Western District of Tennessee seeking redress for his son's death pursuant to 42 U.S.C. § 1983.[16] Mr. Garner alleged violations of the deceased's rights under the fourth, eighth,

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401(b) (1982). The crime is categorized as a felony since conviction subjects violators to imprisonment. *See* TENN. CODE ANN. § 39-1-103 (1982).

9 *Garner*, 471 U.S. at 3. The Court noted that the neighbor who reported the burglary directed the officers to the house, but there was conflicting testimony as to whether she had verbally indicated that there was more than one burglar. *See id.* at 23-24 (O'Connor, J., dissenting).

10 *Id.* at 3.

11 *Id.*

12 *Id.* at 3-4. Office Hymon thought that the suspect was seventeen or eighteen years old; in fact, he was only fifteen. *Id.* at 4 n.2.

13 *Id.* at 4.

14 *Id.* The officer aimed and fired at the upper part of the suspect's body with his 38-caliber pistol that was loaded with hollow point bullets. Garner v. Memphis Police Dep't., 710 F.2d 240, 241 (6th Cir. 1983), *aff'd sub nom.* Tennessee v. Garner, 471 U.S. 1 (1985). Hymon's superiors at the Memphis Police Department had trained him to follow such a procedure. *Id.* The suspect, Edward Eugene Garner, died on the operating table. *Garner*, 471 U.S. at 4. A search of Garner uncovered ten dollars and a coin purse that were taken from the house. *Id.* Although the owner of the house testified that his wife's ring was missing, it was never recovered. *Id.* at 4 n.4.

15 *Garner*, 471 U.S. at 4. The statute provides that "[i]f, 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." TENN. CODE ANN. § 40-7-108 (1982) (emphasis added). The Model Penal Code defines deadly force as: "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person. . . constitutes deadly force." MODEL PENAL CODE § 3.11(2) (Proposed Official Draft 1962).

16 *Garner*, 471 U.S. at 5. Section 1983 of 42 U.S.C. permits a civil action against "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution. . . ." 42 U.S.C. § 1983 (1982).

and fourteenth amendments of the United States Constitution.[17] Officer Hymon, the Memphis Police Department, the director of the police department, the City of Memphis, and the Mayor of Memphis were named as codefendants.[18] The district court granted a directed verdict in favor of the mayor and the police department's director, and rendered a judgment in favor of the other defendants.[19] The trial court held that Officer Hymon "acted in good faith reliance" on the Tennessee statute and was therefore immune from liability.[20] The court also found that the city of Memphis was not a "person" within the purview of 42 U.S.C. § 1983, which only permits actions to be brought against a "person" who, under color of law, deprives another of his constitutional rights.[21]

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment in favor of the individual defendants finding that they acted in good faith reliance on the statute.[22] The court noted that such reliance forms the basis of a qualified immunity and allows individual state officials to defeat liability when they act in good faith upon an existing and apparently valid law.[23] Accordingly, Officer Hymon was exonerated.[24] The case against the City of Memphis, however, was reversed and remanded[25] for reconsideration in light of the United States Supreme Court's intervening decision of *Monell v. Department of*

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17 *Garner*, 471 U.S. at 5. Although the complaint also included counts claiming violations of the fifth and sixth amendments, they were not addressed by any of the reported decisions. *See id.* In pertinent part, the fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. The eighth amendment prohibits the infliction of "cruel and unusual punishment." U.S. CONST. amend. VIII. The fourteenth amendment prohibits, *inter alia*, any state from depriving "any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

18 *Garner*, 471 U.S. at 5.

19 *See Garner*, 710 F.2d at 241-42.

20 *See id.* at 242. While it has been held that a law enforcement officer may assert the qualified immunity defense of good faith reliance on an existing law to avoid liability under a § 1983 claim, *see* Pierson v. Ray, 386 U.S. 547, 555, 557 (1967), a municipality may not claim that its officer acted in good faith as a defense to liability for unconstitutional deprivations against individuals by the officer. *See* Owen v. City of Independence, Missouri, 445 U.S. 622, 638 (1980).

21 *Garner*, 710 F.2d at 242; *see also supra* note 16 (pertinent text of 42 U.S.C. § 1983).

22 *Garner*, 710 F.2d at 242.

23 *Id.*

24 *See id.*

25 *Id.*

Social Services.[26] In *Monell*, the Court held that a municipality may be held liable for damages in a § 1983 action if the constitutional deprivation resulted from the execution of a governmentally derived "policy or custom."[27]

On remand, the district court denied the plaintiff any opportunity to introduce evidence of the city's "policy or custom," and entered a judgment for the defendants.[28] Following an appeal, the Sixth Circuit Court of Appeals reversed and held that Officer Hymon's use of deadly force against a nondangerous felon constituted an unreasonable seizure within the meaning of the fourth amendment.[29] The court also concluded that the officer's action amounted to a deprivation of life without due process of law.[30] The United States Supreme Court granted certiorari[31] and affirmed the Sixth Circuit's decision.[32] The Court held that deadly force used to prevent the escape of an unarmed felon is unconstitutional 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."[33]

At common law, a police officer was permitted to use force, including deadly force, that appeared reasonably necessary

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[26] 436 U.S. 658 (1978). On remand, the district court was instructed by the court of appeals to answer the following questions in accordance with *Monell*:

> 1. Whether a municipality has qualified immunity or privilege based on good faith under *Monell*?
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> 2. If not, is a municipality's use of deadly force under Tennessee law to capture allegedly nondangerous felons fleeing from nonviolent crimes constitutionally permissible under the Fourth, Sixth, Eighth and Fourteenth Amendments?
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> 3. Is the municipality's use of hollow point bullets constitutionally permissible under these provisions of the Constitution?
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> 4. If the municipal conduct in any of these respects violates the Constitution, did the conduct flow from a "policy or custom" for which the City is liable in damages under *Monell*?

Garner, 710 F.2d at 242 (citation omitted).

[27] *Monell*, 436 U.S. at 694.

[28] *Garner*, 471 U.S. at 6. The district court held, *inter alia*, that TENN. CODE ANN. § 40-7-108 (1982), which authorizes the use of deadly force to prevent the escape of fleeing felons, was not violative of the provision against cruel and unusual punishment proscribed by the eighth amendment nor did the statute violate the fourteenth amendment's due process clause. Brief for Appellant at 5, Tennessee v. Garner, 471 U.S. 1 (1985) (No. 83-1035).

[29] *Garner*, 471 U.S. at 6.

[30] *Id.* at 6 n.7.

[31] Tennessee v. Garner, 465 U.S. 1098 (1984).

[32] *Garner*, 471 U.S. at 22.

[33] *Id.* at 3.

under the circumstances[34] to effectuate an arrest or to prevent the escape of a suspected felon.[35] In contrast, the use of deadly force to apprehend an escaping misdemeanant was strictly prohibited.[36] The rationale for this distinction was that "the security of person and property is not endangered by the misdemeanant being at large, while the safety and security of society require the speedy arrest and punishment of a felon."[37]

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[34] *See, e.g.*, Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1922). Courts have universally interpreted the common law rule to mean that an officer of the law may be justified in using deadly force only if such force is necessary. *See id.* at 529-30, 238 S.W. at 96. Thus, if the officer could secure the arrest by less intrusive means, the use of deadly force would not be justified. *See id.* This is an issue of fact which is determined by the totality of the circumstances, *see id.* at 530, 238 S.W. at 96, and one in which the courts have given great discretion to defendants. *See* Samuel v. Busnuck, 423 F. Supp. 99, 101 (D. Md. 1976) ("Courts are not to substitute their own judgment, as a 'Monday morning quarterback,' for the official discretion of the functionary in the front line, when such discretion is exercised reasonably and in good faith."); *but see* Fletcher v. State, 15 Misc.2d 1014, 183 N.Y.S.2d 265 (Ct. Cl.), *aff'd*, 9 A.D.2d 862, 194 N.Y.S.2d 456 (1959) (officer not privileged to shoot fleeing felon who was within eight feet of officer's reach without issuing a warning).

In addition, courts are divided as to whether the use of deadly force must be necessary in fact or whether apparent necessity may suffice. *Compare* Union Indem. Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928) (actual necessity required) *with* Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964) (apparent necessity sufficient). *See generally* Annotation, *Modern Status: Right of Peace Officer To Use Deadly Force In Attempting To Arrest Fleeing Felon*, 83 A.L.R.3d 174, 195-98 (1978) [hereinafter *Modern Status*].

The courts have also struggled with the question of whether the common law privilege of using deadly force only extends to those situations in which there has been a felony in fact. *See generally Modern Status*, *supra*, 83 A.L.R. 3d at 198-208. The majority of common law courts, however, held that a felony in fact is not required if the officer acted in good faith and pursuant to a warrant for the arrest of the suspect. *See* Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 273 (1940).

[35] *See, e.g.*, Stinnett v. Virginia, 55 F.2d 644, 645 (4th Cir 1932). Until the fourteenth century, "the rule was that the felon was an outlaw whose life could be taken in the process of effecting an arrest without regard to whether he could be otherwise detained." Schumann v. McGinn, 307 Minn. 446, 458, 240 N.W.2d 525, 532-33 (1976). This rule was subsequently modified in that deadly force could only be used as a "last resort" when the arrest could not be effected by any other means. *Id.* at 458, 240 N.W.2d at 533; *see also* 4 W. BLACKSTONE, COMMENTARIES *292 ("in cafe [sic] of felony actually committed . . . [the officer] . . . is authorized . . . to break open doors, and even to kill the felon *if he cannot otherwise be taken*. . . .") (emphasis added).

[36] *See, e.g.*, State v. Smith, 127 Iowa 534, 536-37, 103 N.W. 944, 945 (1905). One court observed:

> 'an officer is never warranted in law in shooting . . . at one who is guilty of only a misdemeanor either for the purpose of the original arrest or for the purpose of recapture after his escape from arrest . . . . The law considers that it is better to allow [a misdemeanant] to escape altogether than to take his life or do him great bodily harm . . . .'

Fults v. Pearsall, 408 F. Supp. 1164, 1167 (E.D. Tenn. 1975) (citations omitted).

[37] Schumann v. McGinn, 307 Minn. 446, 459, 240 N.W.2d 525, 533 (1976)

The common law was so pervasive that nineteen states have codified it[38] and five others retain it without statutes.[39] Nine states limit an officer's right to use deadly force to persons who commit forcible and violent felonies.[40] Twelve other states have

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(quoting Holloway v. Moser, 193 N.C. 185, 187, 136 S.E. 375, 376 (1927)). One author observed that:

> [t]his rule reflected the social and legal context of felonies in 15th century England and 18th century America. Since all felonies . . . were punished by death, the use of deadly force was seen as merely accelerating the penal process, albeit without providing a trial. 'It made little difference if the suspected felon were killed in the process of capture, since, in the eyes of the law, he had already forfeited his life by committing the felony.'

Comment, *Deadly Force To Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV. 361, 365 (1976) (footnotes omitted) [hereinafter Comment, *Deadly Force To Arrest*]; *see also* MODEL PENAL CODE § 3.07, comment 3(c)(i) (Proposed Official Draft 1962) ("Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than that authorized for punishment of the felony of which the individual was charged or suspected.").

[38] ALA. CODE § 13A-3-27(b) (1985); ARK. STAT. ANN. § 41-510(2) (1977); CONN. GEN. STAT. ANN. § 53a-22(c)(2) (West 1985); FLA. STAT. ANN. § 776.05 (West 1976); IDAHO CODE § 19-610 (Supp. 1986); KAN. STAT. ANN. § 21-3215 (1974); MISS. CODE ANN. § 97-3-15(d) (Supp. 1985); MO. ANN. STAT. § 563.046 (Vernon 1979); NEV. REV. STAT. § 200.140 (1986); N.M. STAT. ANN. § 30-2-6 (1978); OKLA. STAT. ANN. tit. 21, § 732(3) (West 1983); R.I. GEN. LAWS § 12-7-9 (1981); S.D. CODIFIED LAWS ANN. § 22-16-32(2) (1979); TENN. CODE ANN. § 40-7-108 (Supp. 1986); WASH. REV. CODE ANN. § 9A:16.040(3) (Supp. 1987); WIS. STAT. ANN. § 939.45(4) (West 1982). California, which has a common law statute, limits by judicial law the use of deadly force to situations where "forcible and atrocious" felonies have been committed or where there exists a reasonable belief that death or serious bodily injury will result to the officers or others. Kortum v. Alkire, 69 Cal. App.3d 325, 333, 138 Cal. Rptr. 26, 30-31 (Cal. Ct. App. 1977) (interpreting CAL. PENAL CODE ANN. § 196 (West 1970)). Indiana, which has a common law statute, has narrowed the use of deadly force by judicial interpretation to prevent injury but not to prevent escape. Rose v. State, 431 N.E.2d 521, 523 (Ind. App. 1982) (interpreting IND. CODE ANN. § 35-41-3-3 (West 1986)). Oregon permits deadly force to be used against felons but only if "necessary." OR. REV. STAT. § 161.239(1)(d) (1983).

[39] *See* Vaccaro v. Collier, 38 F.2d 862, 868 (D. Md. 1930) (applying Maryland law), *aff'd in part and rev'd in part on other grounds*, 51 F.2d 17 (4th Cir. 1931); Werner v. Hartfelder, 113 Mich. App. 747, 753, 318 N.W.2d 825, 827 (1982); State v. Foster, 60 Ohio Misc. 46, 61-66, 396 N.E.2d 246, 255-58 (Com. Pl. 1979); Berry v. Hamman, 203 Va. 596, 599, 125 S.E.2d 851, 854 (1962); Thompson v. Norfolk & W. Ry. Co., 116 W.Va. 705, 711-12, 182 S.E. 880, 883-84 (1935).

During the late nineteenth and early twentieth centuries, several courts limited the use of deadly force to situations in which the felony committed was a violent one. *See, e.g.*, Storey v. State, 71 Ala. 329 (1882); Donehy v. Commonwealth, 170 Ky. 474, 186 S.W. 161 (1916); Caldwell v. State, 41 Tex. 86 (1874).

[40] *See* ARIZ REV. STAT. ANN. § 13-410 (1978); GA. CODE ANN. § 17-4-20 (Supp. 1986); ILL. ANN. STAT. ch. 38, 7-5(a)(2) (Smith-Hurd 1972); N.H. REV. STAT. ANN. § 627:5(II) (1986); N.J. STAT. ANN. § 2C:3-7 (West 1982); N.Y. PENAL LAW § 35.30 (McKinney 1975); N.D. CENT. CODE. § 12.1-05-07.2(d) (1976); 18 PA. CONS. STAT. ANN. § 508(a)(1) (Purdon 1983); UTAH CODE ANN. § 76-2-404(2)(b) (1978).

adopted various versions of the Model Penal Code, which limits an officer's right to use deadly force in situations when either the crime involved deadly force or the suspect's escape involved a significant threat of danger.[41] Two states prohibit officers from using deadly force to effectuate the arrest of nonviolent felons, despite the absence of a statute on point.[42] The remaining three states either lack any pertinent authority or have unsettled positions.[43]

Both federal and state judicial decisions have overwhelmingly supported the officer's privilege to use deadly force in attempting to capture and arrest fleeing felons.[44] For example, in *Jones v. Marshall*,[45] a West Hartford police officer on car patrol pursued the occupants of a stolen automobile.[46] At the end of a high-speed pursuit, the occupants fled from their vehicle into an adjacent wooded area.[47] Realizing that a felony had been committed and that escape was imminent unless extreme force was used, the officer fired his gun, fatally wounding Dennis Jones.[48]

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41 *See* MODEL PENAL CODE 3.07(2) (Proposed Official Draft 1962). The American Law Institute's Model Penal Code provides that a police officer is justified in using deadly force to arrest a felon only if he believes that "the crime for which the arrest is made involved conduct including the use or threatened use of deadly force," or he believes that "there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed." *Id.* at § 3.07(2)(b)(i), (iv) (Proposed Official Draft 1962). *See also* ALASKA STAT. § 11.81.370(a) (1983); COLO. REV. STAT. § 18-1-707 (1986); DEL. CODE ANN. tit. 11, § 467 (1979); HAW. REV. STAT. § 703-307(3) (1976); IOWA CODE § 804.8 (1979); KY. REV. STAT. ANN. § 503.090 (Michie/Bobbs-Merrill 1985); ME. REV. STAT. ANN. tit. 17-A, § 107 (1983); MINN. STAT. § 609.066 (Supp. 1987); NEB. REV. STAT. § 28-1412 (1978); N.C. GEN. STAT. § 15A-401(d)(2)(b) (1983 & Supp. 1985); TEX. PENAL CODE ANN. § 9.51(c) (Vernon 1974). Several Massachusetts decisions support the conclusion that this jurisdiction also follows the Model Penal Code. *See* Julian v. Randazzo, 380 Mass. 391, 403 N.E.2d 931 (1980); Commonwealth v. Klein, 372 Mass. 823, 363 N.E.2d 1313 (1977).

42 Louisiana and Vermont, however, have justifiable homicide statutes that permit the use of deadly force to *prevent* a violent felony. *See* LA. REV. STAT. ANN. § 14:20(2) (West 1986); VT. STAT. ANN., tit. 13, § 2305(2) (1974). Furthermore, a federal court has specifically held that the Louisiana statute limits the police officer's right to use deadly force against fleeing felons to cases in which life or serious bodily harm is endangered. Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969).

43 These are Montana, South Carolina, and Wyoming.

44 *See, e.g.*, Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975); Hilton v. State, 348 A.2d 242 (Me. 1975).

45 383 F. Supp. 358 (D. Conn. 1974), *aff'd*, 528 F.2d 132 (2d Cir. 1975).

46 *Id.* at 359.

47 *Id.*

48 *Id.* In Connecticut, at the time of the incident, the theft of a motor vehicle was a felonious offense. *Id.* at 360. It was stipulated that neither Jones nor his companions were armed or that they posed a physical danger to Officer Marshall or others. *Jones*, 528 F.2d at 134.

Jones's father filed a civil rights action against the officer.[49] In granting the officer's motion for summary judgment, the district court relied upon both case law and a state statute which codified the common law fleeing felon rule.[50] Specifically, the court applied the law of Connecticut as formulated in *Martyn v. Donlin*[51] and codified in a Connecticut statute, section 53a-22.[52] The *Martyn* court held, *inter alia*, that a police officer is permitted to "use . . . force as he reasonably believes to be necessary, under all [of] the circumstances surrounding its use" in order to effectuate an arrest or to prevent the escape of a suspect.[53]

The Second Circuit Court of Appeals affirmed the judgment of the district court.[54] The court, however, rejected *Martyn* and § 53a-22 as controlling, but recognized their importance when fashioning the appropriate federal law.[55] The court asserted that, in determining the validity of an officer's use of force, it must consider factors such as the necessity of utilizing force, the difference between the amount of force needed and that actually used, the severity of the injury, and whether the officer acted in

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[49] *Jones*, 383 F. Supp. at 359. The action was brought pursuant to 42 U.S.C. § 1983 (1970). *Id. See also supra* note 16 (pertinent text of § 1983).

[50] *See Jones*, 383 F. Supp. at 360-62. The court examined both the officer's conduct and the statute's constitutionality under the "shock the conscience" standard formulated in Rochin v. California, 342 U.S. 165 (1952). *See Jones*, 383 F. Supp. at 361. In *Rochin*, the Supreme Court held that when the conduct of police officers is shocking to the conscience, it violates the fourteenth amendment's due process provision. *Rochin*, 342 U.S. at 172-74. The conduct at issue involved the forcible entry into a suspect's home without a warrant, jumping on him, and ordering his stomach pumped against his will to extract two morphine capsules. *Id.* at 166, 172. Subsequent cases have held that this standard is to be evaluated based on the reasonableness of the force used in making an arrest, in light of the need and motivation of the force, and the extent of the injury inflicted. *See, e.g.*, Roberts v. Marino, 656 F.2d 1112, 1114 (5th Cir. 1981).

[51] 151 Conn. 402, 198 A.2d 700 (1964).

[52] *Jones*, 383 F. Supp. at 360, 361 n.5.

[53] *Martyn*, 151 Conn. at 411, 198 A.2d at 705.

[54] *See Jones*, 528 F.2d at 143.

[55] *Jones*, 528 F.2d at 137, 140. In dismissing the allegation that state law was controlling under a § 1983 action, the court recognized that "[i]t has long been understood that in interpreting the scope of § 1983 we are not bound by . . . state law . . . ." *Id.* at 137. Judge Oakes, writing for the panel, reasoned that "one of the principle purposes underlying the Civil Rights Acts of 1871 and 1875 were to protect individuals against '[m]isuse of power, possessed by virtue of state law. . . .'" *Id.* (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

Many other cases have held that federal law rather than state law is supreme in determining whether a police officer's use of deadly force imposes liability under a § 1983 claim. *See, e.g.*, Qualls v. Parrish, 534 F.2d 690, 694 (6th Cir. 1976); Clark v. Ziedonis, 513 F.2d 79, 81 (7th Cir. 1975); Willis v. Tillrock, 421 F. Supp. 368, 371 (N.D. Ill. 1976).

good faith in applying such force.[56] The Second Circuit, however, noted that these factors were considered by the state legislature when it recodified the state's criminal laws.[57] The court, therefore, deferred to the legislature's judgment and held that the use of deadly force was permissible in this instance.[58]

Challenges to the constitutionality of the common law fleeing felon rule have been relatively sparse.[59] In the last fifteen years, however, the Sixth Circuit Court of Appeals has addressed numerous challenges to the Tennessee statute which permits police officers to use all necessary means, including deadly force, to effect the arrest of escaping felons.[60] The Tennessee statute was first challenged in the 1971 case of *Cunningham v. Ellington*.[61] In *Cunningham*, the plaintiffs were the beneficiaries of James Ivey, who was fatally shot by two Memphis Police officers while fleeing from an attempted burglary.[62] The plaintiffs commenced an action for damages and a declaratory judgment to invalidate the Tennessee fleeing felon statute.[63]

The district court upheld the constitutionality of the statute despite the plaintiff's allegation that the law violated the eighth amendment's proscription of cruel and unusual punishment.[64] In dismissing this claim, the court stated that "the short answer

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56 *Jones*, 528 F.2d at 139 (citation omitted).

57 *Id.* at 139-40. Various other courts also have expressed the view that the validity of the use of deadly force by law officers is a public policy decision and, as a result, the state legislature is the proper body to make the decision. *See* Cunningham v. Ellington, 323 F. Supp. 1072, 1075 (W.D. Tenn. 1971); Hilton v. State, 348 A.2d 242, 245 (Me. 1975); Werner v. Hartfelder, 113 Mich. App. 747, 751, 318 N.W.2d 825, 827 (1982); Schumann v. McGinn, 307 Minn. 446, 467, 240 N.W.2d 525, 537 (1976); *but see* Mattis v. Schnarr, 547 F.2d 1007, 1019 (8th Cir. 1976) (en banc), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam) ("The legislature has an important role to play in the balancing process, but the court has the ultimate responsibility to determine whether the balance struck is a constitutional one.").

58 *Jones*, 528 F.2d at 139-40. Judge Oakes recognized the trend away from the common law and espoused that "[t]he preferable rule would limit the privilege to the situation where the crime involved causes or threatens death or serious bodily harm, or where there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed." *Id.* at 140 (footnote omitted). Judge Oakes, however, was not willing to impose this rule in view of his deference to the legislature on the matter. *Id.*

59 Note, *The Unconstitutional Use of Deadly Force by the Police*, 55 CHI.[-]KENT L. REV. 539, 548 (1979) [hereinafter Note, *Unconstitutional Use of Deadly Force*].

60 *See* TENN. CODE. ANN. § 40-7-108 (1982); *see also supra* note 15 (text of § 40-7-108).

61 323 F. Supp. 1072 (W.D. Tenn. 1971).

62 *Id.* at 1073-74.

63 *Id.* at 1074.

64 *Id.* at 1075.

to [the] plaintiffs' contention is that we simply are not dealing with punishment."[65] The court further denied that a claim under the fourteenth amendment's due process clause existed since the Tennessee statute was not vague and would not require the officer "to guess as to its meaning."[66] Finally, the court rejected the plaintiffs' contentions that the statute violated the decedent's right to equal protection of the laws under the fourteenth amendment[67] and that the statute was overbroad.[68]

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65 *Id.* This narrow construction of "punishment" has been followed by other courts. *See, e.g.*, Wiley v. Memphis Police Dep't., 548 F.2d 1247, 1251 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); *but see* Mattis v. Schnarr, 547 F.2d 1007, 1020 n.32 (8th Cir. 1976) (en banc), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam) (court should consider proportionality of force used based upon eighth amendment). *See generally* Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71, 88-95 (1980).

66 *Cunningham*, 323 F. Supp. at 1076. In particular, the court rejected the plaintiffs' due process argument by ruling that the Tennessee statute was not " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . .' " *Id.* at 1076 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). A different approach was used by the eighth circuit in finding that a Missouri statute, which was a codification of the common law fleeing felon rule, was an unconstitutional deprivation of life without due process of law. *See* Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976) (en banc), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam). The *Mattis* court adopted a balancing test which weighed society's interest in insuring public safety against the individual's right to life. *See id.* at 1019; *see also infra* notes 92-110 and accompanying text (discussing *Mattis*).

67 *Cunningham*, 323 F. Supp. at 1076. The plaintiffs, relying on Skinner v. Oklahoma, 316 U.S. 535 (1942), argued that the statute, which permitted deadly force to be used against fleeing felons but not as against fleeing misdemeanants, violated the equal protection clause. *Cunningham*, 323 F. Supp. at 1076. The court disagreed and distinguished *Skinner* based on the fact that the statute treated violators who had committed *similar crimes* differently. *Cunningham*, 323 F. Supp. at 1076 (emphasis added).

The eighth circuit in *Mattis*, although for different reasons, also rejected the plaintiff's equal protection argument: " 'The real objection to the use of deadly force against non-violent felony suspects is not that such laws discriminate between non-violent suspects and misdemeanants, but that nonviolent suspects are shot at all.' " *Mattis*, 547 F.2d at 1020 n.32 (citation omitted). The *Cunningham* and *Mattis* decisions regarding equal protection have been subject to attack. *See, e.g.*, Note, *Unconstitutional Use of Deadly Force*, *supra* note 59, at 569 n.189.

68 *Cunningham*, 323 F. Supp. at 1075. An overbreadth challenge asserts that a law "offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to [governmental] regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' " Zwickler v. Koota, 389 U.S. 241, 250 (1967) (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)). In *Cunningham*, the court held the plaintiffs' claim that the statute was overbroad because it violated the right of the deceased to have a trial by jury, to confront witnesses, or to the assistance of counsel was without merit because "we are not dealing with punishment. Moreover, all that needs to be done by one sought to be arrested is to submit to the arrest and he will enjoy these rights." *Cunningham*, 323 F. Supp. at 1075-76.

One year later, in *Beech v. Melancon*,[69] the Court of Appeals for the Sixth Circuit was again confronted with the constitutionality of the Tennessee statute.[70] In *Beech*, the plaintiff instituted a civil rights action after he was shot by a police officer while attempting to flee from the scene of a burglary.[71] The court noted that *Cunningham* had held the statute to be constitutional; therefore, the court declined to specifically decide the issue of constitutionality.[72] Instead, the *Beech* court held that police officers were entitled to presume that the statute was constitutional until it was judicially invalidated.[73] In a concurring opinion, Judge McCree agreed that the officers were justified in using deadly force in this case.[74] He specifically reserved judgment, however, on the statute's constitutionality in a situation in which an escaping felon poses no threat of death or significant physical harm to the officer or others.[75]

In the 1976 case of *Qualls v. Parrish*,[76] two undercover policemen driving an unmarked car attempted to stop a vehicle which they believed was driven by a suspected kidnapper.[77] A seven-mile, high-speed pursuit culminated when one of the officers fired his gun at the automobile, which resulted in the almost instantaneous death of the passenger.[78] The surviving suspect and the plaintiff-decedent of the other suspect brought a § 1983 action, and the Sixth Circuit affirmed the district court's judgment in favor of the defendant.[79] The *Qualls* court followed the rationale of *Jones*,[80] ruling that federal, and not state law, determines the results of a § 1983 action.[81] The Sixth Circuit, however, held

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69 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

70 *Id.* at 426.

71 *Id.*

72 *See id.*

73 *Id.*

74 *Id.* (McCree, J., concurring).

75 *Id.* at 426-27 (McCree, J., concurring). Judge McCree echoed this same sentiment in Wiley v. Memphis Police Dep't., 548 F.2d 1247, 1256 (6th Cir.) (McCree, J., concurring), *cert. denied*, 434 U.S. 822 (1977).

76 534 F.2d 690 (6th Cir. 1976).

77 *Id.* at 692. The vehicle was occupied by two persons, but, as was later discovered, neither were connected with the suspected kidnapping. *Id.* at 691-92. The district court, however, found that the officers had probable cause to stop the vehicle and to question the occupants. *Id.* at 693. This finding was based upon the fact that the suspects attempted to flee, drove recklessly, and feloniously assaulted the officer with their automobile. *Id.* at 692-94.

78 *Id.* at 692-93.

79 *Id.* at 691.

80 *See supra* notes 45-58 and accompanying text (discussing *Jones*).

81 *Qualls*, 534 F.2d at 694.

that the district court did not err in considering Tennessee law in fashioning the federal law to be applied in this case.[82] Accordingly, the court concluded that the officer was privileged to use deadly force.[83]

The Tennessee fleeing felon statute was next analyzed in 1977 in *Wiley v. Memphis Police Department*.[84] In *Wiley*, a sixteen year-old boy was killed by police officers while attempting to escape from the scene of a burglary.[85] The deceased's mother sought damages and a declaratory judgment that the statute was unconstitutional.[86] In declining relief, the Sixth Circuit ruled that the officers had neither deprived her son of due process nor inflicted cruel and unusual punishment.[87] In dismissing these claims, the court of appeals deferred to the Tennessee district court's holding in *Cunningham v. Ellington*.[88] Balancing the state's interest in protecting its citizens against the rights of the escaping suspect, the court concluded that " '[t]here is no constitutional right to commit felonious offenses and escape the consequences of those offenses.' "[89] The *Wiley* court further rejected the plaintiff's claim that the statute's application amounted to a denial of equal protection because a disproportionate number of felons killed by police officers were black.[90] The court implied that the mere showing of a disproportionate impact, without proof of a racially discriminatory purpose, was insufficient to uphold an equal protection claim.[91]

In finding the statute constitutional, the *Wiley* court was

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82 *Id.* This was the same result that Judge Oakes reached in *Jones*. *See Jones*, 528 F.2d at 142. The *Qualls* court reasoned that it would be unfair for a police officer, who relied upon the law in good faith, to be held liable. *Qualls*, 534 F.2d at 694.

83 *Id.* at 695.

84 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

85 *Id.* at 1248.

86 *Id.* The plaintiff sought relief pursuant to 42 U.S.C §§ 1981, 1983, 1985, 1986, and 1988 and alleged violations of the fourth, fifth, sixth, eighth, thirteenth, and fourteenth amendments to the United States Constitution. *Id.*

87 *See Wiley*, 548 F.2d at 1250-54.

88 *Id.* at 1250-51; *see also supra* notes 61-68 and accompanying text (discussing *Cunningham*).

89 *Wiley*, 548 F.2d at 1253 (quoting Mattis v. Schnarr, 547 F.2d 1007, 1023 (8th Cir. 1976) (en banc) (Gibson, C.J., dissenting), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam)).

90 *Wiley*, 548 F.2d at 1254.

91 *Id.*; *accord* Washington v. Davis, 426 U.S. 229, 239 (1976) ("our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact") (emphasis in original).

sharply critical of the decision in *Mattis v. Schnarr*,[92] a 1976 Eighth Circuit case. *Mattis* marked the first time a federal court of appeals held that a state statute codifying the common law fleeing felon rule was violative of the due process clause of the United States Constitution.[93] In *Mattis*, two youths, Michael Mattis and Thomas Rolf, burglarized the office of a golf driving range at night.[94] As they climbed out of a window and began to flee, they were confronted by Richard Schnarr, a police officer, who ordered the youths to halt.[95] Officer Schnarr and a companion officer, Robert Marek, issued numerous warnings and threatened to shoot if the youths did not stop.[96] A brief struggle ensued and Marek, when he realized that the escape of the suspects was imminent, fired one shot at Mattis which fatally wounded him.[97]

Robert Dean Mattis, father of the deceased, brought an action against the officers alleging violations of the United States Constitution and specific civil rights laws.[98] Mr. Mattis further sought a declaratory judgment requesting that the Missouri statutes which gave officers the authority to use deadly force when

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92 *Wiley*, 548 F.2d at 1252. One author has observed that the *Wiley* court was so zealous to point out the flaws in the *Mattis* decision, that the court made errors of its own. *See* Note, *Unconstitutional Use of Deadly Force*, *supra* note 59, at 559 n.137. *See also infra* notes 93-110 and accompanying text (discussing *Mattis*).

93 Mattis v. Schnarr, 547 F.2d 1007, 1020 (8th Cir. 1976) (en banc), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam); *see also Wiley*, 548 F.2d at 1252. There were two Missouri statutes under attack in *Mattis*. *See Mattis*, 547 F.2d at 1009. The statutes provide in pertinent part:

> *Justifiable Homicide*
>
> Homicide shall be deemed justifiable when committed by any person in either of the following cases:
>
> . . .
>
> (3) When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully . . . keeping or preserving the peace.

Mo. ANN. STAT. § 544.040 (Vernon 1979).

> *Rights of Officer in Making Arrests*
>
> If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

Mo. ANN. STAT. § 544.190 (Vernon 1972).

94 *Mattis*, 547 F.2d at 1009.

95 *Id.*

96 *Id.* The boys did not stop and Schnarr fired two shots; one shot into the air and another toward Thomas Rolf. *Id.*

97 *Id.* The officers contended that the Missouri statutes permitted the use of their weapons in order to effect the arrest. *Id.*

98 *Id.* The plaintiff alleged violations of due process and equal protection under the fourteenth amendment and cruel and unusual punishment under the eighth amendment. *Id.* at 1009-10.

effectuating an arrest be declared invalid.[99] The officers defended on the ground that they acted in good faith pursuant to the statutes, which they believed to be constitutional.[100] Unsuccessful at trial, the plaintiff appealed to the Eighth Circuit.[101] There, the court limited its review to the question of "whether deadly force could constitutionally be used to effect the arrest of [the] fleeing eighteen-year-old burglar who threatened no one's life . . . and posed no threat to the apprehending officers or others."[102]

The Eighth Circuit began its analysis with a review of the history of the common law "deadly force" rule.[103] The court concluded that there was no longer any support for such an arcane law in contemporary times.[104] In discussing the due process claim, Judge Heaney disagreed with the district court's ruling that the legislature had the sole responsibility of balancing the interests of society in ensuring public safety against an individual's constitutional rights.[105] Although the judge conceded that the legislature's role is important, he opined that the court holds the ultimate responsibility in ensuring that the balance be constitutional.[106] In finding the statutes invalid, the court asserted that the state's interest in maintaining public safety did not outweigh the individual's interest in life.[107] Specifically, the *Mattis* court found the statutes invalid because they allowed law enforcement officers to use deadly force to effectuate an arrest of an escaping felon without regard to whether the suspect committed a violent

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99 *Id.* at 1010.

100 *Id.*

101 *Id.* The trial court held that the plaintiff lacked standing and that the officers could invoke good faith as a defense in the cause of action for money damages, but the defense was not available in the declaratory judgment action. *Id.* On appeal, the Eighth Circuit reversed the trial court. *Id.* The case was remanded for a determination of the constitutionality of the statutes, and the district court upheld the statutes' constitutionality. *Id.* Mr. Mattis appealed that decision to the Eighth Circuit. *Id.*

102 *Id.* at 1011.

103 *See id.* at 1011-16.

104 *Id.* at 1016. Moreover, the court noted the trend away from permitting the use of deadly force against nonviolent felons. *Id.*

105 *Id.* at 1019.

106 *Id.*

107 *Id.* at 1019-20. The court noted there was no evidence to support the proposition that the statutes actually "deter crime, insure public safety or protect life." *Id.* at 1020. In addition, the court found that the statutes created "a conclusive presumption that all fleeing felons pose a danger to the bodily security of the arresting officers and of the general public" and that there was nothing in the record to support such a conclusion. *Id.* at 1019 (footnote omitted).

crime.[108] Significantly, the court noted that under the statutes the officers did not need to consider whether a suspect poses a danger to life.[109] Since the statutes allowed the officers to use deadly force even if a suspect committed a nonviolent crime and posed no danger to the officer or the public, the court held that the statutes, as applied, violated due process.[110]

A number of jurisdictions have utilized the fourth amendment to the United States Constitution in restricting the use of deadly force by law enforcement officials.[111] These jurisdictions have followed the *Mattis* rationale in concluding that restrictions should be placed on the use of lethal force in apprehending a fleeing felon.[112] In *Taylor v. Collins*,[113] a federal court followed the Sixth Circuit's opinion in *Garner* and applied the fourth amendment in the context of the use of deadly force.[114] *Taylor* involved the shooting of an unarmed youth in his attempt to escape from the scene of a burglary.[115] The boy's parents brought an action pursuant to 42 U.S.C. § 1983, claiming that a police department regulation permitting the use of deadly force against fleeing burglars violated the fourth amendment.[116]

The *Taylor* court analyzed the court of appeals' decision in

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108 *Id.* at 1020.

109 *Id.* The court reasoned that because the life of an individual is a fundamental right, due process mandates that the statutes could be upheld only if they were narrowly tailored to protect a compelling state interest. *Id.* at 1019.

110 *Id.* at 1020. The court, however, found that the statutes were not violative of the fourteenth amendment's equal protection clause or the eighth amendment's cruel and unusual punishment provision. *Id.* at 1020 n.32. The court did not analyze the statutes under the fourth amendment's unreasonable seizure provision because the appellants did not advance this issue on appeal. *Id.*

111 *See, e.g.*, Taylor v. Collins, 574 F. Supp. 1554 (E.D. Mich. 1983).

112 *See, e.g.*, Jacobs v. City of Wichita, 531 F. Supp. 129, 132 (D. Kan. 1982) (advocating restrictions on deadly force); Ayler v. Hopper, 532 F. Supp. 198, 201 (M.D. Ala. 1981) (state's deadly force rule unconstitutional to extent that it permitted deadly force to be used under circumstances where it was not necessary to prevent death or serious bodily injury).

113 574 F. Supp. 1554 (E.D. Mich. 1983).

114 *Id.* at 1556. Prior to *Taylor*, few plaintiffs successfully adjudicated a fourth amendment claim to the use of deadly force. *See* Note, *The Unconstitutional Use of Deadly Force Against Nonviolent Fleeing Felons:* Garner v. Memphis Police Department, 18 GA. L. REV. 137, 152-53 (1983); *see also* Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). In *Jenkins*, the plaintiff was observed concealing what appeared to be a gun during a street brawl. *Id.* at 1230. While Jenkins was attempting to flee, a pursuing police officer accidentally shot him. *Id.* at 1230-31. The court found that the officer's gross negligence amounted to a fourth amendment violation within the purview of the Civil Rights Act because the "plaintiff was subjected to the reckless use of excessive force." *Id.* at 1232.

115 *Taylor*, 574 F. Supp. at 1555.

116 *Id.* at 1556.

Garner[117] and concluded that upper-level law enforcement officials should have anticipated a declaration that the fleeing felon rule was unconstitutional.[118] The court therefore concluded that the *Garner* ruling should be applied retroactively.[119] As to the constitutional claim, the court held that a police department regulation permitting the killing of a fleeing burglar was both overbroad and violated the fourth amendment.[120] The court based its conclusion on the rationale that an escaping burglar is not an inherently violent criminal.[121] Furthermore, the regulation failed to insure that the police would "establish probable cause to believe that the fleeing burglar [was] armed" or dangerous.[122]

The common law rule regarding deadly force, after predominating for hundreds of years, was being met with increasing opposition.[123] While the circuit courts rarely relied on the fourth amendment in deciding "deadly force" issues, the United States Supreme Court in *Tennessee v. Garner*[124] tailored the law governing the use of deadly force with a unique utilization of the fourth amendment.[125]

Justice White, writing for the *Garner* six-justice majority, recognized that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[126] The Justice noted that any restraint upon the freedom of an individual to "walk away" constitutes a "seizure."[127] The majority rejected the state's contention that once probable cause is established, the fourth amendment does not mandate the means by which a seizure is made.[128] The Court

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117 *See supra* notes 29-30 and accompanying text.

118 *Taylor*, 574 F. Supp. at 1557-58.

119 *Id.* at 1559. The defendants argued that *Garner* was inapplicable since the events in *Taylor* occurred prior to the rendering of the *Garner* decision by the Sixth Circuit. *Id.* at 1557. The *Taylor* court asserted that the *Garner* decision was not an unforeshadowed departure from the prior law and that no substantial inequity would result from a retroactive application of its ruling. *Id.* at 1557-59.

120 *Id.* at 1559-60.

121 *Id.*

122 *Id.*

123 *See generally* Blume, *Deadly Force in Memphis:* Tennessee v. Garner, 15 CUMB. L. REV. 89, 98 (1984) [hereinafter Blume, *Deadly Force in Memphis*].

124 471 U.S. 1 (1985).

125 *See id.* at 7. The fourth amendment consists of two conjunctive clauses: the first prohibits "unreasonable searches and seizures;" the second requires that search warrants may only be issued upon a showing of probable cause. U.S. CONST. amend. IV.

126 *Garner*, 471 U.S. at 7.

127 *Id.* at 7-8.

128 *See id.* at 8.

then declared that, in determining whether a seizure is reasonable, the extent of the infringement on the suspect's rights under the fourth amendment must be balanced against the government's interest in effective law enforcement.[129] Justice White posited that using deadly force was the *ultimate* intrusion upon a suspect's rights and of only limited assistance to law enforcement.[130] The Court further asserted that the shooting of nondangerous felons did not "outweigh the suspect's interest in his own life."[131]

The *Garner* Court next observed that the Tennessee statute was not unconstitutional on its face.[132] In so finding, the Court asserted that an officer may prevent a suspect's escape by the use of deadly force if the officer has probable cause to believe that the suspect presents a threat of death or serious bodily injury.[133] The *Garner* Court specifically held, however, that the Tennessee statute was constitutionally unreasonable insofar as it permitted law officers to use deadly force against *all* escaping felons without regard to their propensity for danger or violence.[134]

The *Garner* Court then analyzed the common-law rule governing the use of deadly force.[135] The majority declared that while the common law provides guidance in evaluating the reasonableness of police action, it " 'has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.' "[136] The Court asserted that the common-law rule pertaining to the use of deadly force is no longer justifiable in today's society.[137] Justice White noted that at common law all felons were subjected to the death

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129 *Id.* at 9. The Court recognized that "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Id.* Not only is the use of such force intrusive upon the suspect's life, but it "also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* In dismissing the contention that the use of deadly force is a productive means of law enforcement, the Court recognized that a majority of police departments have promulgated regulations prohibiting their officers from using deadly force against nonviolent felons. *Id.* at 10-11, 18.

130 *Id.* at 10-11.

131 *Id.* at 11.

132 *Id.*

133 *Id.* The Court also stated that deadly force could be used if the fleeing suspect committed a felony that involved death or serious bodily injury, but suggested that a warning should be given when feasible. *Id.* at 11-12.

134 *Id.* at 11.

135 *Id.* at 12-15.

136 *Id.* at 13 (quoting Payton v. New York, 445 U.S. 573, 591 n.33 (1980)).

137 *Id.* at 14-15.

penalty.[138] Thus, the use of deadly force resulted in the same punishment that the felon would have received upon conviction.[139] In addition, the Court recognized that the number of crimes classified as felonies at common law were few.[140] Conversely, the Court observed that relatively few crimes are currently punishable by death[141] and that the number of offenses which are now classified as felonies are numerous.[142] Thus, the *Garner* Court asserted that the rationale which had justified the common law rule was no longer valid.[143]

The *Garner* Court also recognized the absurdity of the felony-misdemeanor distinction.[144] The Court noted that the absurdity was evident by the fact that there are many misdemeanors which pose a greater physical threat than certain felonies.[145] Additionally, the Court stated that the common-law rule developed in an era when weapons were unsophisticated and deadly force was most often used when the parties were in close proximity.[146]

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138 *See id.* at 13.

139 *Id.* at 13-14.

140 *See id.* at 14. The following crimes were felonies at common law: arson, burglary, manslaughter, murder, rape, and robbery. Jones v. Marshall, 528 F.2d 132, 138 (2d Cir. 1975). Other authorities have added larceny, mayhem, prison break, and sodomy to the list of the common law felonies. *See* Comment, *Deadly Force To Arrest*, *supra* note 37, at 365.

141 *Garner*, 471 U.S. at 14. For example, rapists are no longer subject to the death penalty. Coker v. Georgia, 433 U.S. 584, 592 (1977).

142 *Garner*, 471 U.S. at 14. Over the years, numerous nonviolent crimes have been upgraded to the status of felonies, such as bribery, false imprisonment, forgery, and kidnapping. *See* United States v. Watson, 423 U.S. 411, 440 n.9 (1976) (Marshall, J., dissenting). In examining the deadly force issue, however, courts have tended to disregard the violent or nonviolent nature of the crime and have primarily focused upon the crime's label as a felony. Thus, although the nature of felonies has evolved, the courts' interpretation of the deadly force rule has failed to develop concomitantly. Blume, *Deadly Force in Memphis*, *supra* note 123, at 92-93.

143 *Garner*, 471 U.S. at 14.

144 *See id.* & n.12. For example, misdemeanors such as drunken driving involve conduct that is more dangerous than felonies such as white collar crime. *Id.* at 14 n.12. *See also* MODEL PENAL CODE § 3.07, comment (3)(c)(i) (Official Draft 1962) ("Today, the significance of the distinction between felony and misdemeanor has wholly altered.").

In Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973), Judge McCree, in his concurring opinion, said that he "would find it difficult to uphold as constitutional a statute that allowed police officers to shoot, after an unheeded warning to halt, a fleeing income tax evader, antitrust law violator [or a] selective service delinquent. . . ." *Id.* at 426-27 (McCree, J., concurring).

145 *Garner*, 471 U.S. at 14 n.12.

146 *Id.* at 14-15. The Court reasoned that in "hand-to-hand" struggles where deadly force was used, "the safety of the arresting officer was [almost always] at risk." *Id.* In addition, police officers did not carry handguns until the late nineteenth century. *Id.* at 15.

Justice White then examined the law of deadly force in various jurisdictions and noted the trend away from the rule allowing its use against all escaping felons.[147] The Court stated that statistical data has demonstrated that there has not been an increase in crime in jurisdictions which have restricted a police officer's right to use deadly force.[148] Moreover, the Court dismissed the contention that limiting police officers' right to use deadly force will make it impossible for them to make split-second decisions.[149]

The *Garner* majority concluded that Officer Hymon did not have any articulable basis to believe that Garner was armed or dangerous.[150] The officer, therefore, was not justified to use deadly force to prevent the suspect's escape.[151] Although admitting that burglary is a serious offense, the Court concluded that the crime "is [not] so dangerous as automatically to justify the use of deadly force."[152]

In a vigorous dissent, Justice O'Connor[153] emphasized the particular facts of the case[154] and concluded that Officer Hymon's use of deadly force did not violate the constitutional rights of Garner.[155] Justice O'Connor conceded that the use of deadly force constituted a seizure and was subject to the balancing of interests analysis.[156] Justice O'Connor, however, stressed that Garner's interests were outweighed by the need to insure " 'swift [police] action predicated upon the on-the-spot observa-

147 *Id.* at 15-19. *See also* notes 38-43 and accompanying text (analyzing states' treatment of use of deadly force).

148 *Garner*, 471 U.S. at 19.

149 *Id.* at 20. Moreover, it has been shown that the common law rule does not serve as a deterrence to crime or in any way improve the ability of police departments to fight crimes. *See id.* at 19.

150 *Id.* at 21.

151 *Id.*

152 *Id.* Furthermore, the Court examined statistical data compiled by the Federal Bureau of Investigation and the Bureau of Justice Statistics which revealed that burglary is rarely accompanied by physical violence. *Id.* at 21-22.

153 Chief Justice Burger and Justice Rehnquist joined in Justice O'Connor's dissenting opinion.

154 *See id.* at 23-24 (O'Connor, J., dissenting). In particular, Justice O'Connor pointed out that the burglary occurred late at night, that it was a forcible entry, and that Officer Hymon had reason to suspect that there might be more than one burglar. *Id.*

155 *See id.* at 33 (O'Connor, J., dissenting). Justice O'Connor criticized the majority's abstract approach, which centered on the constitutionality of the Tennessee statute and failed to consider the particular facts of the case—that is, the constitutional rights of Garner. *Id.* at 25 (O'Connor, J., dissenting).

156 *Id.* at 25-26 (O'Connor, J., dissenting).

tions of the officer on the beat.' "[157] In emphasizing this point, Justice O'Connor stated that the fleeing felon has "[no] right to flee unimpeded from the scene of a burglary."[158] Citing various authorities for the proposition that burglary is an inherently dangerous felony,[159] the Justice concluded that the public interest in preventing the escape of burglary suspects was compelling.[160]

The dissent further criticized the majority opinion as providing insufficient guidance to police officers regarding the circumstances when deadly force may be used.[161] Justice O'Connor noted that the Court's opinion failed to suggest when an officer would have probable cause to believe that a felon poses a threat of death or serious bodily injury.[162] Finally, the Justice opined that the majority erred in setting aside a "long standing police practice that predates the Fourth Amendment" and is still condoned by a majority of the states.[163]

Although the Court's decision to invoke the fourth amendment in the context of the use of deadly force was without persuasive precedent,[164] it was nevertheless logical. The use of

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157 *Id.* at 26 (O'Connor, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

158 *Id.* at 29 (O'Connor, J., dissenting) (citation omitted). This was especially true in light of the warning to halt given by the officer. *Id.* at 30 (O'Connor, J., dissenting). The dissent posited that the use of deadly force is proper in a situation where the suspect has had an opportunity to save his own life merely by obeying an order to halt. *Id.* at 29 (O'Connor, Jr., dissenting).

159 *See id.* at 26-27 (O'Connor, J., dissenting).

160 *Id.* at 27 (O'Connor, J., dissenting). Justice O'Connor also could find no violation of the fourteenth amendment's due process clause, the sixth amendment's right to trial by jury provision, or the eighth amendment's provision prohibiting cruel and unusual punishment. *Id.* at 30-31 (O'Connor, J., dissenting). Furthermore, Justice O'Connor criticized the majority for judging the constitutional validity of the Tennessee statute based upon its ineffectiveness and unpopularity. *Id.* at 28 (O'Connor, J., dissenting).

161 *See id.* at 32 (O'Connor, J., dissenting).

162 *Id.* Justice O'Connor predicted that there would be "an escalating volume of litigation as the lower courts struggle to determine if a police officer's split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime." *Id.*

163 *Id.*

164 *See* Comment, *Deadly Force To Arrest*, *supra* note 37, at 384-85 ("[n]o court has ever specifically found force necessary to effect arrest to be unreasonable under the fourth amendment."). The *Garner* Court summarily concluded that the use of deadly force on fleeing felons fell within the scope of the fourth amendment. *Garner*, 471 U.S. at 7. In Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), the Fourth Circuit discussed the limitations imposed by the fourth amendment on the use of deadly force. *See id.* at 1231-32. In that case, however, the court was faced with a claim of assault and battery rather than an attack on the constitutionality of a deadly force statute. *See id.* at 1229. In addition, the case involved a situation where an

deadly force clearly constitutes a "seizure" of the suspect within the purview of the fourth amendment.[165] Thus, the Court was correct in balancing the competing interests to determine whether the fleeing felon rule was reasonable under the fourth amendment.[166] Since the fourth amendment requires all seizures to be reasonable,[167] the majority rationally concluded that the use of deadly force against nondangerous escaping felons could not pass constitutional muster unless the *method* of the seizure was reasonable.[168]

The *Garner* majority also conceded that the rationale of the rule permitting deadly force to effect arrests of all felons no longer exists. The Court correctly concluded that no longer are all felons subject to the death penalty.[169] Furthermore, many crimes, including ones that are not inherently dangerous, have been added to the list of felonies.[170] In addition, weapons are built with such precision in today's society that law enforcement

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officer accidentally fired his gun when no crime was committed, and the issue was one of reasonableness of the officer's action. *Id.* at 1229-31.

In Taylor v. Collins, 574 F. Supp. 1554 (E.D. Mich. 1983), however, the court ruled that a police department regulation that permitted the shooting of a fleeing felon was both overbroad and violative of the fourth amendment. *Id.* at 1559. The court reasoned that the felon, a burglar in this case, did not commit a violent crime and that the regulation did not require the police to establish probable cause to believe that the suspect was armed or dangerous. *Id.* This case is one of the few decisions which even remotely supports the majority opinion in *Garner*. *See supra* notes 113-22 and accompanying text (discussing *Taylor*).

In Wiley v. Memphis Police Dep't., 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977), the district court held that the plaintiff's claim under the fourth amendment was meritless. *See* Note, *Unconstitutional Use of Deadly Force*, *supra* note 114, at 574 (plaintiff "unable to cite any federal cases which had construed the amendment to apply to the use of deadly force"). On appeal, the Sixth Circuit affirmed without discussing the fourth amendment issue.

The Eighth Circuit, in *Mattis*, recognized that "[i]t has . . . been suggested that statutes of this type can be held to be violative of the Fourth Amendment[,]" but the court did not address the issue since it was neither considered at trial nor advanced on appeal. *Mattis*, 547 F.2d at 1020 n.32.

165 *See generally* Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, the Supreme Court observed that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16.

166 *See* Delaware v. Prouse, 440 U.S. 648 (1979) (requiring balancing of interests in fourth amendment cases). Even the *Garner* dissent acknowledged Officer Hymon's use of deadly force constituted a seizure that was subject to a balancing of interests. *See Garner*, 471 U.S. at 25 (O'Connor, J., dissenting). Justice O'Connor, however, felt that the balance should be struck in favor of the state. *Id.* at 29 (O'Connor, J., dissenting).

167 *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

168 *See Garner*, 471 U.S. at 8; *see also* Terry v. Ohio, 392 U.S. 1, 28-29 (1968).

169 *See supra* note 141 and accompanying text.

170 *See supra* note 142 and accompanying text.

officers can debilitate felons from greater distances.[171] Finally, the Court acknowledged that the interests asserted by the government in this case were insignificant.[172] Evidence indicated that the use of deadly force is not necessary for police officers to effectively apprehend criminals.[173]

The majority opinion effectively adopted a modified version of the Model Penal Code's suggested rule.[174] Thus, an officer is now justified in using deadly force to prevent the escape of a criminal suspect only if either one of two situations exist. In the first situation, the use of deadly force must be necessary to prevent the escape of a suspect who presents a threat of death or significant bodily injury to the arresting officer or others.[175] Alternatively, the officer may use deadly force if the crime that the arrestee is suspected of committing involved death or serious physical harm.[176] The majority, therefore, has taken a medial approach between the need of society to capture those who violate the criminal laws and the right of suspects to be free from the use of excessive force by law officers.

The Court's opinion, however, contains some inherent flaws. The Court indicated that an officer might be able to use deadly force if he has probable cause to believe that the fleeing suspect has committed a crime involving serious bodily harm.[177] This expression purports to authorize the use of deadly force in spite of the fact that the suspect might not pose any threat of harm to the officer or others. While the commission of a crime involving violence is an important factor in determining the means of effectuating an arrest, it certainly should not be determinative. This is

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171 *See supra* note 146 and accompanying text.

172 *See Garner*, 471 U.S. at 9-12.

173 *See id.* at 19 (citation omitted).

174 *Compare Garner*, 471 U.S. at 11-12 ("[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.") *with* MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft 1962) ("the use of deadly force is not justified 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 or is assisting a person whom he presumes 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 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 a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.").

175 *Garner*, 471 U.S. at 3.

176 *See id.* at 11-12.

177 *See id.*

especially true when the force used by the police results in the taking of an individual's life.

Perhaps Justice O'Connor's most significant insight was that the majority incorrectly focused upon the constitutionality of the Tennessee statute rather than the constitutionality of the use of deadly force against the particular suspect.[178] Although the majority suggested that Garner's crime did not involve violence, the Court never actually decided the question of "whether the use of deadly force by Officer Hymon under the circumstances of this case violated Garner's constitutional rights."[179] Instead, the Court centered its focus on deciding an issue which had already been decided in many jurisdictions—that the use of lethal force as a means of apprehending *all* felons was untenable.[180] Additionally, the dissent observed that statistical evidence indicates burglary is often accompanied by violence.[181] According to published reports, a majority of all the rapes and assaults committed in the home, as well as residential robberies, are committed by burglars.[182]

On the other hand, by concluding that the suspect could save his life by the mere act of surrendering, Justice O'Connor failed to recognize the reality of the situation.[183] For example, as a matter of law, many jurisdictions do not make flight from arrest a crime.[184] Moreover, due to the intensity of the situation, many suspects will flee despite the possible application of deadly force as a means to prevent their escape.

The Court's decision to invalidate Tennessee's fleeing felon rule could have been similarly resolved on due process grounds.[185] There is little doubt that the right to life is a fundamental right[186] which can only be deprived upon a showing of a

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178 *See supra* note 155.

179 *Garner*, 471 U.S. at 25 (O'Connor, J., dissenting).

180 *Id.* at 11; *see also supra* note 34 (deadly force permitted only if reasonable under circumstances).

181 *Garner*, 471 U.S. at 26-27 (O'Connor, J., dissenting).

182 *See id.* (citation omitted).

183 *See id.* at 29 (O'Connor, J., dissenting).

184 *See id.* at 10 n.9. In Tennessee, flight from a crime is not a statutory offense, although a Memphis City ordinance subjects persons who flee to a maximum fine of fifty dollars. *Id.* (citation omitted).

185 This is the method by which the Eighth Circuit invalidated the Missouri fleeing felon statute in *Mattis*. *See Mattis*, 547 F.2d at 1017-20; *see also supra* notes 92-110 and accompanying text (discussing *Mattis*).

186 *See* Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("fundamental human rights of life and liberty").

compelling governmental interest.[187] In determining whether a law violates due process, a court is required to balance the interests of the state against the individual's fundamental interests.[188] In *Garner*, it was clear that the state's interests were not justifiable when weighed against the deprivation of the suspect's fundamental right to life.[189] Thus, by using a due process analysis and corresponding balancing test, the Court could have reached an identical conclusion supported by strong precedent.

Although theoretical problems of the *Garner* opinion have been identified, it is imperative to note that the decision has finally resolved the conflict which existed in the lower federal courts regarding the use of deadly force to apprehend fleeing suspects. The courts now have a workable standard to employ in determining whether an officer's use of deadly force violates the Constitution.[190] This same standard applies to police officers who now have guidance to determine when they may exert deadly force. The most significant difference, however, is that a law enforcement officer must make his decision in a matter of seconds and under intense pressure due to the nature of the circumstances, while a court can make their decision in the comfort of the courthouse.

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187 *See* Roe v. Wade, 410 U.S. 113 (1973). When a fundamental right is impinged upon, the law will be upheld only when a " 'compelling state interest' " is shown and when the law is "narrowly drawn to express only the legitimate interests at stake." *Id.* at 155 (citations omitted).

188 *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

189 *See supra* notes 130-131 and accompanying text.

190 *See supra* notes 174-176 and accompanying text.