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Deadly Force in Memphis: Tennessee v. Garner

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DEADLY FORCE IN MEMPHIS: *TENNESSEE v. GARNER**

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I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot order" might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket, or a shoplifter.[1]

I. THE HISTORY OF *TENNESSEE V. GARNER*

A. The Death of Eugene Garner

On October 3, 1974, officers Hymon and Wright of the Memphis Police Department responded to a call about a burglary in progress. When they arrived at the address, a woman standing in the door told the officers that she had heard glass breaking and that someone was breaking into the house next door. Officer Hymon went around the near side of the house. When he reached the backyard, he saw someone run from the back of the house. With his flashlight, he found a person crouched next to a fence at the back of the yard, some thirty to forty feet away. Hymon identified himself as a police officer and ordered the person to halt. The young man ignored the command and attempted to jump the fence. Hymon fired, striking him in the head; the young man fell, draped over the fence. The unarmed suspect, fifteen-year-old Edward Eugene Garner, died shortly thereafter on the operating table.[2]

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* Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983), *cert. granted and prob. juris. noted sub nom.* Tennessee v. Garner, 52 U.S.L.W. 3687 (U.S. Mar. 20, 1984) (consolidating Nos. 83-1035 and 83-1070, allotting one hour for oral argument, and granting motion of Cleamtee Garner for leave to proceed *in forma pauperis*), *argued*, 53 U.S.L.W. 3374 (U.S. Nov. 20, 1984).

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[1] Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 419 (1978) (Burger, C.J., dissenting).

[2] Respondent-Appellee's Brief in Opposition to the Petition for a Writ of Certiorari at

Unfortunately, this is not an isolated event. Officer Hymon was acting pursuant to both the law of Tennessee and the policy of the Memphis Police Department.[3] A Memphis police officer is authorized, and instructed, to use deadly force to apprehend a fleeing felon after other reasonable means to apprehend that person have been exhausted. Police are taught to shoot to kill, rather than merely to wound. Thus, there is little doubt that Garner's death was not an accident.[4] In an eight year period preceding Garner's death, there had been 177 incidents of the use or attempted use of deadly force in Memphis, in which seventeen fleeing burglary suspects had been killed.[5]

B. The Lawsuit

In 1975, Garner's father filed a civil rights action[6] against the Memphis Police Department, the City, the Mayor, the Director of Police, and Officer Hymon. The suit alleged that Hymon violated Eugene Garner's constitutional rights under the fourth, eighth, and fourteenth amendments when he shot and killed Garner.[7] The other defendants were sued on the grounds that their failure to exercise due care in the hiring, training, and supervision of Hymon made them equally responsible for Garner's death. Trial was held in August of 1976. At the close of the plaintiff's case, the district court granted a motion for a di-

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3-5, Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983). Although it was unclear whether Officer Hymon knew that Eugene Garner was a juvenile, Garner was only 5 feet, 4 inches tall and weighed less than 100 pounds. *Id.* When the paramedics arrived at the scene, young Garner was in their words "holding his head and thrashing about on the ground . . . hollering, you know, from the pain." *Id.* He was shot with a hollow-point bullet, standard issue for the Memphis Police Department. A "hollow-point" bullet is designed to produce more injury and to have a more lethal effect than "round nose ammunition." Garner v. Memphis Police Dep't, Civ. Act. No. C-75-145, Mem. Op. (W.D. Tenn. 1976).

[3] *Garner*, Mem. Op. at A9. The Tennessee Code provides: "If after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest." TENN. CODE ANN. § 40-7-108 (1982).

[4] *Garner*, Mem. Op. at A7, A9.

[5] Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV. 361, 362 n.4 (1976). Of the 177 incidents of the use of deadly force in Memphis, nearly two-thirds of these were aimed at non-violent felony suspects. Of those 114 incidents, 96 involved blacks, 16 involved whites, and the race of two victims was unknown. Of the 17 burglary suspects killed, 13 were black. Garner v. Memphis Police Dep't, 710 F.2d 240, 248 (6th Cir. 1983).

[6] The action was filed pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, 1988 (1981).

[7] *Garner*, 710 F.2d at 243. The district court held that, because Garner was shot in the head, the use of hollow-point bullets was not to be considered a factor in determining whether Garner's constitutional rights had been deprived. The court reasoned that even a more conventional bullet would have proved fatal. *Id.*

rected verdict in favor of the City and the Police Department. The court later found for the remaining defendants on all issues.[8] On appeal, the Sixth Circuit affirmed that part of the district court's decision dismissing the case against each of the individual defendants.[9] The court, however, remanded with respect to the City in light of *Monell v. Department of Social Services*,[10] an intervening Supreme Court decision holding that municipalities could be subject to liability under the United States Code, title 42, section 1983. The district court was instructed to consider whether the municipality was entitled to qualified immunity because its policies had been set in accordance with state law, and if not, whether the use of deadly force to capture nondangerous fleeing felons was constitutionally permissible. On remand, the district court found that the Tennessee deadly force statute was neither unconstitutional on its face nor as applied.[11] Because the district court found that Garner had not been deprived of any constitutional right, it did not reach the immunity issue. An appeal again was taken to the Sixth Circuit. The appellate court determined that the Tennessee deadly force statute violated the fourth and fourteenth amendments of the Constitution.[12] The United States Supreme Court granted certiorari in March 1984 and recently heard oral arguments.

II. DEVELOPMENT OF THE FLEEING FELON RULE AND CURRENT STATE OF THE LAW

The common law authorized law enforcement officers, and in many instances private citizens, to use deadly force to prevent the escape of a person who had committed a felony.[13] When this rule was adopted, however, relatively few offenses were con-

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[8] Appellant's Petition for Writ of Certiorari, at 5, *Garner*, 710 F.2d at 240. In accordance with then-existing law, the district court held that a city is not a person under § 1983, Monroe v. Pape, 365 U.S. 167 (1961). As to the individual defendant and his superiors, the district court found that the officer acted in good-faith reliance on existing Tennessee law and thus he, as well as his superiors, were entitled to good-faith immunity. *Garner*, 710 F.2d at 240-48.

[9] Garner v. Memphis Police Dep't, 600 F.2d 52 (6th Cir. 1979).

[10] 436 U.S. 658 (1978), *overruling*, Monroe v. Pape, 365 U.S. 167 (1961).

[11] *Garner*, Mem. Op. at A6.

[12] *Garner*, 710 F.2d at 243-48.

[13] 4 W. BLACKSTONE, COMMENTARIES *292. *See also* 2 HALE, HISTORY OF THE PLEAS OF THE CROWN 85-86 (1788); 3 W. WOLDSWORTH, A HISTORY OF ENGLISH LAW 311-12 (6th ed. 1934).

For American common-law cases, see Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964); Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927); Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1922).

sidered felonies. Those so classified were all violent crimes punishable by death.[14] Therefore, because felonies were classified as extremely dangerous offenses, society's interest in the apprehension of a suspect was deemed to be great enough to justify deadly force.[15] Killing a fleeing felon was perceived as simply accelerating the inevitable punishment.[16] Misdemeanors, on the other hand, were neither punishable by death nor perceived to be particularly dangerous.[17] Society's interest in apprehending the perpetrators was not serious enough to justify taking a fleeing misdemeanant's life.[18] Human life was "too sacred" to allow the use of deadly force for an offense that did not warrant the death penalty.[19]

A majority of the states adopted the common-law fleeing-felon doctrine. Later, in the nineteenth century, many more crimes were made felonies, a large number of which did not involve force or violence.[20] Additionally, few of the "new" felonies were punishable by death.[21] Almost no American jurisdictions, however, changed the fleeing felon rule to draw a distinction between the common-law felonies and the newer,

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[14] The common-law felonies included: arson, sodomy, burglary, robbery, rape, and murder. Comment, *supra* note 5, at 365. As Blackstone noted, "[T]he idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them. . . ." 4 W. BLACKSTONE, *supra* note 13, at *98.

[15] The rationale was that anyone who would risk such terrible consequences by committing a felony must indeed be a desperate character. Comment, *Use of Deadly Force in the Arrest Process*, 31 LA. L. REV. 131, 133 (1970). Any person subject to the death penalty was too dangerous to remain at large. Note, *The Use of Deadly Force in Arizona by Police Officers*, 1973 LAW & SOC'Y ORDER 481, 482. Therefore, greater force was allowed to prevent the suspect from injuring other people or committing more crimes.

[16] *See* Mattis v. Schnarr, 547 F.2d 1007, 1011 n.7 (8th Cir. 1976), *vacated as moot sub nom.*, Ashcroft v. Mattis, 431 U.S. 171 (1977).

It made little difference if the suspected felon was killed in the process of capture, since, in the eyes of the law, he had already forfeited his life by committing the felony. The felon's death was but an extra-judicial and premature execution of a penalty which he had already incurred by his felony. Bohlen & Schulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 495 (1927).

[17] Schumann v. McGinn, 307 Minn. 446, 459, 240 N.W.2d 525, 533 (1976) (security of person and property is not endangered by a misdemeanant being at large).

[18] *See* Mogin, *The Policeman's Privilege to Shoot a Fleeing Suspect: Constitutional Limits on the Use of Deadly Force*, 18 AM. CRIM. L. REV. 533, 533-37 (1981).

[19] *Id.* at 538. "[I]t would ill become the majesty of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender . . . ." Thomas v. Kinkead, 55 Ark. 502, 508, 18 S.W. 854, 856 (1892).

[20] Mogin, *supra* note 18, at 540. *See also* United States v. Watson, 423 U.S. 411, 440-41 n.9 (1976) (Marshall, J., dissenting) (examples of common-law misdemeanors now felonies are: bribery, perjury, forgery, false imprisonment, kidnapping, and assault with intent to rape); Storey v. State, 71 Ala. 329, 341 (1882) (petty larceny made a felony).

[21] Comment, *supra* note 15, at 133. *See also* Furman v. Georgia, 408 U.S. 238, 333-41 (1972) (Marshall, J., concurring).

non-violent ones.[22] Thus, the rule permitting the use of deadly force was, in effect, greatly expanded since it was no longer confined to crimes that carried the death penalty.[23] This development occurred at a time when the English common law already had replaced an absolute right to kill to apprehend felons with a balancing test that considered necessity and proportionality.[24] Although this anomaly did not escape commentators, few American courts either then or now have abandoned the felony/misdemeanor distinction as the sole basis for determining when deadly force could be used.[25]

Nearly half of the states currently have some version of the common-law fleeing felon rule either by statute or judicial construction.[26] Eleven states use some form of the Model Penal Code which restricts the use of deadly force to crimes involving the use, or threatened use, of violence, or for self defense.[27] The

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[22] Note, *Justifiable Use of Deadly Force by the Police, A Statutory Survey*, 12 WM. & MARY L. REV. 67 (1970). With respect to the fleeing felon rule, a 1789 Tennessee court ironically stated: "[I]t may be question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character." Reneau v. State, 70 Tenn. 720, 721-22 (1879).

[23] Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71, 76 (1980). There is nothing in the early cases that suggests that the expansion of the rule was intentional. The two strands of law developed independently with little or no thought to their interrelation.

[24] 11 HALSBURY'S LAWS OF ENGLAND § 1179 (F. Walter 4th ed. 1976). Force must not be "disproportioned to the injury or mischief which it is intended to prevent." Sherman, *supra* note 23, at 77. "It cannot be reasonable to kill another merely to prevent a crime, which is directed only against property." Regina v. McKay, [1957] V.R. 560, 572-73 (Smith, J., dissenting).

[25] Comment, *supra* note 5, at 367. *See also* RESTATEMENT OF TORTS § 131 comment h (1934); Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582 (1929).

[26] *See* ALA. CODE § 13A-3-27(b) (1982); ARK. STAT. ANN. § 41-510(2) (1977); CONN. GEN. STAT. § 53a-22(c)(2) (1983); FLA. STAT. § 776.05 (1981); IDAHO CODE § 19-610 (1979); KAN. STAT. ANN. § 21-3215 (1981); MISS. CODE ANN. § 97-3-15 (Supp. 1983); MO. ANN. STAT. § 563.046(3)(2)(a) (Vernon 1979); NEV. REV. STAT. § 200.140(3) (1981); N.M. STAT. ANN. § 30-2-6(c) (1978); OKLA. STAT. ANN. tit. 21, § 732(3) (West 1983); OR. REV. STAT. § 161.239(l)(d) (1981); R.I. GEN. LAWS § 12-7-9 (1981); S.D. CODIFIED LAWS ANN. § 22-16-32(2) (1979); TENN. CODE ANN. § 40-7-108 (1982); WASH. REV. CODE ANN. § 9A.16.040(3) (1977); WIS. STAT. ANN. § 939.45(4) (West 1982).

South Carolina has no justifiable homicide law but has a statute that allows citizens to use deadly force to apprehend a suspected felon at night. S.C. CODE ANN. § 17-13-20 (Law Co-op 1976). Courts in Maryland, Michigan, Montana, Ohio, Virginia, and West Virginia follow the felony/misdemeanor distinction without a statute. Mogin, *supra* note 18, at 539 n.38. *See also*, Comment, *The Unconstitutional Use of Deadly Force Against Nonviolent Fleeing Felons:* Garner v. City of Memphis Police Department, 18 GA. L. REV. 137, 141 n.24 (1984).

[27] *See* ALASKA STAT. § 11.81.370(a) (1983); COLO. REV. STAT. § 18-1-707(2) (1978); DEL. CODE ANN. tit. 11, § 467(c) (1979); HAWAII REV. STAT. § 703.307(3) (1976); IOWA CODE ANN. § 804.8 (West 1979); KY. REV. STAT. ANN. § 503.090(2) (Baldwin 1975); ME. REV. STAT. ANN. tit. 17-A, § 107(2)(B) (1964); MINN. STAT. ANN. § 609.066 subdivision 2

remainder have statutes that allow deadly force only against those fleeing from the commission of forcible felonies, which include murder, manslaughter, rape, and armed robbery.[28]

In addition to the current statutes, a number of police departments in major urban areas across the country have adopted deadly-force regulations that are more stringent than the state law.[29] The police departments of Washington, D.C., San Francisco, Dallas, Philadelphia, Oakland, Atlanta, New Orleans, Honolulu, and Phoenix, for example, all restrict the shooting of fleeing felons to cases involving murder, robbery, rape, arson, and kidnapping, even though their respective state laws would permit the use of deadly force in other situations.[30] Most police

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(West Supp. 1983); NEB. REV. STAT. § 28-1412(3)(d) (1979); N.C. GEN. STAT. § 15A-401(d)(2) (1978); TEX. PENAL CODE ANN. § 9.51(c) (Vernon 1974).

The Model Penal Code provides that the use of deadly force is not justifiable unless: "the actor believes that: (1) the crime for which the arrest is made involved . . . 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)(iv) (Proposed Official Draft 1962). Arizona's law is more restrictive than the Model Penal Code. *See* ARIZ. REV. STAT. ANN. § 13-401(A) (1978). An Indiana state court, Rose v. State, — Ind. App. —, 431 N.E.2d 521 (1982), has restricted the common-law statute, IND. CODE ANN. § 35-41-3-3(b)(2) (Burns 1979), to a standard similar to the one in the Model Penal Code.

[28] *See* GA. CODE ANN. § 16-3-21(a) (1982); ILL. ANN. STAT. ch. 38, § 7-5 (Smith-Hurd 1972); N.H. REV. STAT. ANN. § 627:5(II)(b)(1) (Supp. 1981); N.J. STAT. ANN. § 2C:3-7(b)(2) (West Supp. 1982); N.Y. PENAL LAW § 35.30(1)(a) (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). California has a common-law statute, CAL. PENAL CODE § 196 (West 1970), but state courts have interpreted it as prohibiting deadly force unless a forcible or atrocious felony has been committed. *See* Kortum v. Alkire, 69 Cal. App. 3d 325, 330, 138 Cal. Rptr. 26, 28 (1977). Some of the forcible statutes, such as New York's, enumerate the crimes that may trigger the use of deadly force. N.Y. PENAL LAW § 35.30(1)(a) (McKinney 1975); Louisiana and Vermont have no laws governing the use of deadly force to capture a fleeing felon. They do have justifiable homicide statutes that allow deadly force to prevent a violent felony. LA. REV. STAT. ANN. § 14:20(2) (West 1974); VT. STAT. ANN. tit. 13, § 2305(2) (1974). One court has used the standard in the Louisiana prevention statute as the basis for limiting the use of deadly force to apprehend a fleeing felon, reasoning that if deadly force can only be used to prevent a violent felony, then it can only be used to apprehend a person who has committed a felony involving violence. Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969).

[29] Comment, *supra* note 5, at 370. For a list of the cities which have adopted a more stringent rule, see Mattis v. Schnarr, 547 F.2d 1007, 1016 n.29 (8th Cir. 1976). *See also* Note, *The Unconstitutional Use of Deadly Force by the Police*, 55 CHI.-KENT L. REV. 539, 545-48 (1978).

[30] Comment, *supra* note 5, at 370. Department regulations limiting the use of deadly force, however, do not necessarily set the standard by which an officer's criminal or civil liability is measured. In *City of St. Petersburg v. Reed*, the court held that statewide rather than local standards must be used to determine whether an officer is liable for wounding a suspect who attempted to flee. 330 So. 2d 256, 258 (Fla. Dist. Ct. App.), *cert. denied*, 341 So.2d 292 (Fla. 1976). *But cf.* Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 371, 132 Cal. Rptr. 348, 353 (1976) (nothing in law or nature of subject

departments, however, have no guidelines other than the existing state law.[31]

III. THE TROUBLED HISTORY OF THE FLEEING FELON RULE IN TENNESSEE

The Tennessee statute, enacted in 1858, was intended merely to codify the common law.[32] The statute simply states: "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."[33] The Tennessee Supreme Court has interpreted this section to justify the use by police officers of all means necessary, including deadly force, to effectuate an arrest for a felony.[34]

In order to understand the significance of the *Garner* decision, one must look at the previous decisions of the Sixth Circuit construing the Tennessee law. The first constitutional challenge to the deadly force rule was the 1971 case of *Cunningham v. Ellington.*[35] In *Cunningham*, the plaintiffs sought damages for the wrongful death of their son who was killed while fleeing a burglary attempt, and a declaration that the statute was unconstitutional.[36] The court found that the statute was constitutional in that it did not violate the eighth amendment's ban against cruel and unusual punishment, nor the due process or equal protection clauses of the fourteenth amendment.[37]

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matter suggests that legislature intended to prevent local agencies from adopting a more cautious policy on use of deadly force).

[31] Comment, *supra* note 5, at 370.

[32] Cunningham v. Ellington, 323 F. Supp. 1072, 1074 (W.D. Tenn. 1971).

[33] TENN. CODE ANN. § 40-7-108 (1982) (recodifying TENN. CODE ANN. § 40-808).

[34] Johnson v. State, 173 Tenn. 134, 114 S.W.2d 819 (1938); Love v. Bass, 145 Tenn. 522, 529, 238 S.W. 94 (1921); Lewis v. State, 40 Tenn. 127 (1859). For the purposes of this Article, deadly force will be defined as force asserted by an actor: (1) with the intent to cause serious bodily harm or, (2) with knowledge that such force could cause serious bodily harm. MODEL PENAL CODE § 3.11(2) (Proposed Official Draft 1962).

[35] 323 F. Supp. 1072, 1074 (W.D. Tenn. 1971). James Ivey was shot and killed by two Memphis police officers while fleeing from a burglary attempt. *Id.*

[36] *Id.* A three judge court was convened, on application of the plaintiffs, to determine the constitutionality of the statute with respect to 28 U.S.C. §§ 2281, 2284. *Id.* at 1074. The declaratory relief claim also was brought as a class action on behalf of all Memphis citizens whose constitutional rights were threatened by the deadly force statute. *Id.* The court denied to certify the class because "[i]t would be impossible now to determine which people in Memphis in the future will allegedly commit felonies and flee from the scene after policemen announce their intent to arrest." *Id. See also* City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983) (chokehold case in which the Court held that the plaintiff was not entitled to injunctive relief because he could not show that he or other identifiable persons would be subjected to chokeholds by the police in the future).

[37] *Cunningham*, 323 F. Supp. at 1075-76.

The court responded to the plaintiff's eighth amendment claim by stating, "the short answer to this contention is that we simply are not dealing with punishment."[38] The due process challenge, alleging that the statute was unconstitutionally vague, centered on the degree of discretion the statute gave the officer in using deadly force. As to this claim, the court found no vagueness problems because felonies were clearly defined under Tennessee law. The plaintiff's equal protection claim was based on the felony/misdemeanor distinction, but the court determined there was little variance in treatment accorded perpetrators of similar crimes. The court went on to say:

> It may well be, as plaintiffs argue, that as a matter of value judgment it would be better to allow persons thought to be felons to escape than to incur the risk of killing them. . . . This, however, is a policy question for the Tennessee legislature or perhaps the Tennessee courts and not for the federal courts in the guise of constitutional adjudication.[39]

The next challenge to the Tennessee fleeing felon statute, *Beech v. Melancon*,[40] also involved a fleeing burglar in an action for damages. The Sixth Circuit, making short shrift of the plaintiff's claims, did not reach the constitutional issues because it held that the police officers were entitled to assume the constitutionality of the statute and, therefore, were immune from suit.[41] This position was reiterated in *Qualls v. Parrish*,[42] another action against individual police officers for damages.[43] The court stated that if it were writing on a "blank slate" it would adopt a different rule, but in light of the preceding cases it would be unfair to subject the officer to liability.[44]

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[38] *Id.*

[39] *Id.* at 1075.

[40] 465 F.2d 425 (6th Cir. 1972).

[41] *Id.* Judge McCree concurred on the basis that the officers were justified in this particular case because they did not know whether the decedent was armed. However, he expressed reservations about the constitutionality of the use of deadly force if the fleeing felon posed no threat of death or bodily harm to the police or other citizens. *Id.* at 427.

[42] 534 F.2d 690 (6th Cir. 1976). In this case, the person killed by the Memphis police had assaulted the officers with an automobile in his attempt to escape. *Id.*

[43] *Id.* at 694. Notably, the court stated that "federal law determines the adequacy of the defenses" in a § 1983 action. *Id.* But the court, for the fairness reasons, adopted the Tennessee rule as the federal rule.

[44] A different rule would be to limit the use of deadly force to situations when "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 694.

Wiley v. Memphis Police Department[45] was brought by the mother of a boy who was killed while fleeing from a burglary. Both damages for wrongful death and a declaratory judgment that the Tennessee statute was unconstitutional were sought.[46] The *Wiley* court ruled adversely to the plaintiff's due process claim. The court, in balancing the state's interests in protecting its citizens and police officers from felons[47] against the felon's questionable right to flee after committing a felony, stated: "There is no constitutional right to commit felonious offenses and to escape the consequences of those offenses."[48] The plaintiff's second constitutional claim was that the statute, as applied, violated the equal protection clause because a disproportionate number of the fleeing felons killed in Memphis were black.[49] The court ruled, however, that under *Washington v. Davis*,[50] a claim of disproportionate impact on minorities alone was not enough to make out an equal protection violation; a showing of racial animus was required.[51]

The final pre-*Garner* case in Tennessee was *Hayes v. Memphis Police Department*.[52] In that case, the police shot and killed an intoxicated man carrying a .22 caliber rifle. The district court found for the defendant police officer, who claimed he shot in self defense. The Sixth Circuit, however, reversed the decision because the crime of public drunkeness was only a misdemeanor. Thus, the officer would not have been entitled to use deadly force unless the decedent actually pointed the rifle at him.[53] The case was remanded for an evidentiary hearing on

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[45] 548 F.2d 1247 (6th Cir. 1977).

[46] Besides suing the individual officer, the plaintiff named the mayor, the police chief, and the police department. However, the court held that all defendants had the right to rely, and had in good faith relied, on the Tennessee statute and the previous decisions of the Sixth Circuit upholding the statute, and thus were immune from damages judgments. *Id.* at 1254.

[47] *Id.* at 1251-52.

[48] *Id.*

[49] *Id.* at 1254. This equal protection claim is different from the one raised in *Cunningham*. The *Cunningham* equal protection claim was based on the felony/misdemeanor distinction and was not race-related. *Id.*

[50] 426 U.S. 229 (1976).

[51] *Wiley*, 548 F.2d at 1254. Judge McCree again concurred, but only because he believed that the officers had reasonable grounds to believe the decedent was armed. He expressed doubts, however, about the constitutionality of shooting fleeing felons who were unarmed or not dangerous. *Id.* at 1256.

[52] 571 F.2d 357 (6th Cir. 1978).

[53] *Id.* at 358. *But see* Fults v. Pearsall, 408 F. Supp. 1164 (E.D. Tenn. 1975). In *Fults*, the plaintiff actually did prevail. The action did not involve the Memphis Police Department, however, but rather a small town sheriff. A Navy deserter was shot when he ran

that issue.

The Sixth Circuit's rulings before *Garner* illustrate the court's position that the states were free, within broad limits, to adopt their own laws regarding the use of deadly force by the police without fear of a successful constitutional challenge. Moreover, police officers were immune from liability when they relied on those laws. The law that has developed in other circuits and jurisdictions, however, is not so emphatic.

IV. OTHER CONSTITUTIONAL CHALLENGES TO THE FLEEING FELON RULE

Despite the reluctance of courts to invalidate fleeing felon statutes, there have been a number of constitutional challenges to those laws.[54] Virtually all of the challenges have been either under the eighth amendment,[55] the equal protection and due process clauses of the fourteenth amendment,[56] or the fourth amendment as an unreasonable seizure.[57] Several of the more important cases, reaching opposite conclusions, will be discussed in this section.

In *Jones v. Marshall*,[58] the Second Circuit refused to find the Connecticut statute, codifying the common law, to be unconsti-

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from the sheriff after being stopped for a traffic violation. The court found that the use of deadly force was excessive because there were other means of preventing the escape and the sheriff had not announced his intention to arrest the plaintiff. Because the sheriff knew the plaintiff, and knew that all of his family lived in the town, it was not necessary to use deadly force to eventually bring him to justice. *Id.* at 1168.

At least one other case of this type has been decided after *Garner*, McKenna v. City of Memphis, 544 F. Supp. 415 (W.D. Tenn. 1982). In *McKenna*, a police officer sued the city and another police officer. The plaintiff was accidentally shot by his partner who was attempting to shoot a fleeing nonviolent felon. The city had adopted stricter regulations on the use of deadly force in 1980, and the court found that the use of deadly force was unwarranted under these new regulations and entered judgment for the plaintiff. *Id.*

[54] *See, e.g.*, Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977); Jones v. Marshall, 528 F.2d 132 (2nd Cir. 1975); Hilton v. State, 348 A.2d 242 (Me. 1975); Schumann v. McGinn, 307 Minn. 446, 240 N.W.2d 525 (1976).

[55] U.S. CONST. amend. VIII states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

[56] U.S. CONST. amend. XIV, § 1 states: "No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

[57] U.S. CONST. amend. IV states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ." *Id.*

[58] 528 F.2d 132 (2d Cir. 1975). In *Jones*, the decedent was fleeing from an auto-theft felony. The court found that there was no threat that he would cause death or serious bodily harm to anyone if his apprehension had been delayed. *Id.* at 133.

tutional. As in several of the cases discussed above, the court cloaked the individual police officer with immunity by focusing on the fact that the police officer relied on a state statute in his use of deadly force.[59] The court, however, spoke at great length about the history of the use of deadly force and concluded that the original justifications of the fleeing felon rule were no longer accurate:[60]

> Here we are dealing with competing interests of society of the very highest rank—interests in protecting human life against unwarranted invasion, and in promoting peaceable surrender to the exertion of law enforcement authority. The balance that has been struck to date is very likely not the best one that can be.[61]

Despite their misgivings, the court found that the states without constitutional limitations were allowed to place different values on the competing interests.

In several other cases, however, plaintiffs have prevailed.[62] The most important for the purposes of this Article is *Mattis v. Schnarr*, a case involving Missouri's fleeing felon statute.[63] In *Mattis*, a young boy was shot and killed when he fled a burglary. His father brought an action against the individual officers and the city for damages and declaratory relief. The Eighth Circuit described the right of the individual as the right to life. That right, the court held, was a fundamental one for equal protection and due process purposes.[64] Alluding to the Supreme

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[59] *Id.* at 136. The court also stated, however, that they were not bound by the law of the state, but rather that police actions were to be judged by the United States Constitution. Although in the interest of fairness to the individual police officer, the panel determined that the Connecticut rule would be adopted as the applicable federal standard. *Id.*

[60] The court recognized that the scope of felony crimes had expanded wholly away from the concept of violence found in the common law, and that the use of the felony label to justify especially severe police behavior increasingly had become strained. *Id.* at 138-39. *See also supra* notes 11-23 and accompanying text.

[61] *Jones*, 528 F.2d at 142. The court also believed that the preferable rule would limit the privilege to use force to situations when the crime involved violence or threatened someone with death or serious bodily harm, or when there existed a substantial risk that the person to be arrested would cause death or serious bodily harm if his apprehension was delayed. *Id.* at 140.

[62] *See, e.g.*, Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) (court found suspect, who was shot because of gross negligence during arrest, suffered a fourth amendment violation); Commonwealth v. Porter, 480 F. Supp. 686 (W.D. Pa. 1979) (court found officer used excessive force during arrest); Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969) (court construed Louisiana law to forbid deadly force to arrest for a property crime).

[63] 547 F.2d 1007 (8th Cir. 1976), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977). The *Garner* court relied heavily on *Mattis* in invalidating the Tennessee law.

[64] *Id.* at 1017. The boy's father actually asserted that he had been deprived of the right

Court's recent capital punishment decisions,[65] the court conceded that death per se was not a disproportionate penalty. This reliance on the death penalty cases is somewhat puzzling because the Supreme Court had found only that death was not disproportionate for lesser offenses, for example, rape. Because the right to life is fundamental, however, a statute impinging on that right could only be sustained if it protected a compelling state interest and was narrowly drawn to express only the compelling state interests at stake.[66] From that starting point, the court held:

> [T]he statute creates a conclusive presumption that all fleeing felons pose a danger to the bodily security of the arresting officers and of the general public. The presumption is incorrect in its application to the facts of this case and has not otherwise been shown to be factually based. . . . Felonies are infinite in their complexity, ranging from the violent to the victimless. The police officer cannot constitutionally be vested with the power and authority to kill any and all escaping felons. . . . Thus, we have no alternative but to find [the statute] unconstitutional in that [it] permit[s] police officers to use deadly force to apprehend a fleeing felon who has used no violence . . . and who does not threaten the lives of either the arresting officer or others.[67]

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to raise a family. The court found that this right included "the right of the appellant to raise the issue of his son's right to life." *Id.* at 1017 n.22.

The court found the right to life in the due process clauses of the fifth and fourteenth amendments. *Id.* at 1017, 1018, *citing*, Roe v. Wade, 410 U.S. 113 (1973); Johnson v. Zenbst, 304 U.S. 458 (1938); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[65] *See* Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976). *See also* Proffit v. Florida, 428 U.S. 242 (1976) (death penalty can be imposed under a carefully drafted statute that ensures the sentencing authority is given adequate information and guidance).

[66] Coker v. Georgia, 433 U.S. 584 (1977). *See also Mattis*, 547 F.2d at 1019.

[67] *Mattis*, 547 F.2d at 1019-20. The court did not reach the plaintiff's eighth amendment claim, although it said, "a good argument can be made for a decision on the basis of the eighth amendment." *Id.* at 1020, n.32. It also did not consider the applicability of the fourth amendment. *Id.* Although the Eighth Circuit's decision was vacated as moot by the Supreme Court, the reasoning of that decision was reaffirmed by the Eighth Circuit in Landrum v. Moats, 576 F.2d 1320 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978) (challenge to police killing of fleeing burglary suspect as unreasonable under the Nebraska statute).

Two other recent federal cases are noteworthy. In Ayler v. Hooper, 532 F. Supp. 198, 201 (M.D. Ala. 1981), the court found that deadly force could not be used by a prison official to stop a fleeing felon unless the force was needed to prevent a substantial likelihood of death or bodily harm. *Id.* In Jacobs v. City of Wichita, 531 F. Supp. 129, 130 (D. Kan. 1982), the court found that the Kansas deadly force statute was not applicable in a federal civil rights action. The statute was therefore not unconstitutional because it was not relevant. The court went on to say that the proper inquiry for § 1983 purposes was whether the state's interest in the use of deadly force in the particular case unnecessarily infringed on the plaintiff's fundamental right to life. *Id.* at 132.

The *Garner* court grappled with each of these decisions.

V. THE SIXTH CIRCUIT'S DECISION

In contrast to other cases, in which the courts focused primarily on eighth amendment or fourteenth amendment claims, the Sixth Circuit panel in *Garner v. Memphis Police Department* first considered the fourth amendment question because "the fourth amendment is specifically directed to methods of arrest and seizure of the person."[68] The court focused on the question of whether a state law that authorized the use of deadly force to prevent the escape of a nonviolent fleeing felon constituted an unreasonable seizure of the person. The court first concluded that the taking of life by a police officer was a fourth amendment seizure: "[A] person is 'seized' . . . when, by means of physical force or a show of authority, his freedom of movement is restrained."[69] The court then examined whether such a seizure was reasonable.

In order to determine whether the seizure was reasonable, the panel analyzed the history and origins of the deadly force rule.[70] In that regard, the *Garner* court concluded: "Those states like Tennessee that cite the common law in defense of their rule permitting the killing of any fleeing felony suspect exalt the form of the common law rule over its substance and purpose."[71] The panel then examined the only two instances in which the fourth amendment had been asserted in a suit against the police for use of deadly force.[72] Based upon its reading of the history and precedent, the court concluded that the statute was invalid because it did not place sufficient limits on the use of deadly force. The statute drew no distinctions based on "gravity and need" nor on the magnitude of the offense.[73] In order to use deadly force, the court reasoned, an officer must have probable cause to believe not only that the person committed a felony but also that the suspect, if left at large, posed a threat to the safety of

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68 710 F.2d 240, 243 (6th Cir. 1983).

69 *Id.*

70 *Id.* A historical analysis to determine reasonableness for fourth amendment purposes is a standard fourth amendment test. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (Court used historical analysis to determine whether a search was unconstitutional).

71 *Garner*, 710 F.2d at 244.

72 *Id.* at 245. *See* Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) (court held that reckless use of excessive force when police officer negligently shot plaintiff during an arrest violated the fourth amendment because the fourth amendment covers individual's physical integrity). *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419 (1971).

73 *Garner*, 710 F.2d at 246.

either the officers or the community.[74]

The *Garner* court reached a similar conclusion of invalidity under the due process clause. As in other cases invalidating deadly force statutes, the court first found that the right to life was fundamental.[75] Therefore, the state was required to show a compelling state interest and that the statute was narrowly drawn to encompass only the compelling interests at stake.[76] The court concluded that Tennessee's deadly force statute was not narrowly drawn because it did not distinguish between felonies involving danger to life and those, such as the burglary at issue, that threatened only property interests. Thus, the court did not believe that Tennessee's interest in law enforcement was sufficiently compelling to justify the use of deadly force to protect lesser interests.[77]

The *Garner* court emphasized that its holding was not inconsistent with earlier Sixth Circuit decisions upholding the Tennessee statute.[78] For example, this was the first time the fourth amendment had been addressed in a case such as this.[79] Each of the previous cases, the court said, involved a challenge to the statute under the eighth amendment or as a violation of substantive due process, or both.[80] Additionally, a question in the

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[74] *Id.* Interestingly enough, the plaintiff did not brief the fourth amendment issue. The district court also gave the fourth amendment issue cursory analysis, saying only that no case ever had found the force necessary to effectuate an arrest to be unreasonable.

[75] *Garner*, 710 F.2d at 246-47. The court made no analysis in reaching this conclusion. The panel simply cited four cases and the due process clause. *Id.*

[76] *Id.* at 247, *citing*, Roe v. Wade, 410 U.S. 113 (1973).

[77] *Garner*, 710 F.2d at 247. The court also implicitly encouraged the State of Tennessee to adopt the Model Penal Code. "The principles and distinctions we have enunciated here have been cast in the form of a rule by the American Law Institute in the Model Penal Code, a rule which accurately states fourth amendment limitations on the use of deadly force against fleeing felons." *Id.*

[78] *Id.* There is no clear explanation for this. Possibly the court was embarrassed that a statute that had been before it at least 6 times and challenged in virtually the same manner suddenly was being invalidated. Thus, the court felt it necessary to distinguish its precedents, however unpersuasive the distinctions.

[79] *Id.* at 247-48. In Pruitt v. City of Montgomery, Civ. Act. No. 83-T-903-N, slip op. (M.D. Ala. 1983), the court apparently found that the use of deadly force violated the fourth amendment in relying on *Garner*. The court approvingly cited the fourth amendment rationale of *Garner* and then concluded that the police officer's use of deadly force failed to meet the constitutional standard announced in *Garner*. *Pruitt* is currently on appeal to the Eleventh Circuit and almost certainly will be one of the first post-*Garner* cases decided by a federal court.

[80] *Garner*, 710 F.2d at 247. The court did not reach plaintiff's eighth amendment claim, although much of the district court's opinion and the plaintiff's brief was devoted to that issue. More striking is the court's statement that the other decisions were substantive due process challenges. One may ask what is the court's fourteenth amendment holding if it is not an invalidation on the grounds that it violated substantive due process?

previous cases was whether the police officer was entitled to a good-faith privilege based on his reliance on the statute.[81] In *Garner*, the city was the party before the court and was, therefore, not entitled to the good-faith immunity afforded the individual police officers.[82] The court held that the public policy considerations which justify the individual good-faith immunity simply do not exist for a municipality:[83]

> When a municipality is held liable, whether for actions of its officials, or based upon its own reliance on state law, no single individual or official must bear the cost. The cost is spread among the general public, which is ultimately responsible for the conduct of its officials. There is little danger that individuals will hesitate to carry out their duties or accept public office, when any liability for their reliance on state law will be paid from the public fisc.[84]

The district court's decision, therefore, was reversed and remanded.

VI. AN INCURSION INTO THE WILDERNESS OF SECTION 1983 IMMUNITY

In seeking certiorari, neither the City nor the State asked the Supreme Court to review the Sixth Circuit's *Garner* holding on the immunity issue. Therefore, that issue is not before the Supreme Court. The Sixth Circuit's interpretation of section 1983 immunities, however, seems correct. The Supreme Court's decision in *Pierson v. Ray*[85] lends support to the immunization of Officer Hymon, as he was acting pursuant to official city policy. The City essentially claimed that it stood in the same relation-

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[81] *Id.* This is also not exactly true. In Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971), a three judge court upheld the statute on its face as constitutional. *See supra* notes 33-37 and accompanying text.

[82] *Garner*, 710 F.2d at 242. The Sixth Circuit affirmed the district court's dismissal of the claims against officer Hymon. Hymon was relying on then-existing law and was entitled to a good-faith immunity. *Id. See* Pierson v. Ray, 386 U.S. 547 (1967) (recognized good-faith defense when police officer acts pursuant to existing law).

[83] *Garner*, 710 F.2d at 248. These considerations are: "(1) the injustice of forcing an individual whose position requires him to exercise discretion to bear the cost of his good faith reliance on a law or regulation; and (2) the danger that the threat of liability would deter individuals from executing the duties of their offices or even from seeking public office." *Id.*

[84] *Id.* The court also relied on a Tenth Circuit opinion that held good-faith reliance by a school board on prior law provided no protection from liability for wrongful dismissal of a teacher. *Id. See also* Bertot v. School Dist. No. 1, 613 F.2d 245, 252 (10th Cir. 1979) (en banc). In *Bertot*, the Tenth Circuit reasoned that imposing liability guarantees that if governmental officials err, they do so on the side of protecting constitutional rights. *Id.*

[85] 386 U.S. 547 (1967).

ship to the State as a police officer does to the City. This rationale was based on the City's belief that just as the police officer is granted a good-faith immunity because he relied on City policy, the City should likewise be accorded a similar immunity based on its reliance of a state statute authorizing the use of deadly force.

In *Monell v. Department of Social Services*,[86] the Court held for the first time that cities were not absolutely immune from suit under section 1983. The Court made it clear, however, that a municipality cannot be subjected to liability merely because it employs a tortfeasor.[87] The person who committed the actionable wrong must be acting pursuant to or implementing an official policy, ordinance, or regulation, or there can be no recovery from the city.[88] The *Monell* decision was clarified further in *Owen v. City of Independence*.[89] In *Owen*, the city, even though acting in good faith, was found liable under section 1983 because an official municipal policy resulted in a constitutional tort. The Court based its decision on several grounds. First, because the public is ultimately responsible for governmental actions it was fair to allocate the costs to the people as a whole, rather than to an individual. In the Court's opinion, fault was no longer the key to governmental tort liability; the emphasis more properly was on cost spreading when an injury is inflicted as a result of a city policy or custom.[90] Second, the possibility of liability created a healthy respect for an individual's constitutional rights; government should always err on the side of restraint:

> The knowledge that a municipality will be held liable for all of its injurious conduct, *whether committed in good faith or not*, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.[91]

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86 436 U.S. 658 (1978).
87 *Id.*
88 *Id.*
89 445 U.S. 622 (1980).
90 *Id.* at 657.
91 *Id.* at 651-52.

The reasoning, as well as the explicit holding of *Owen*, supports the Sixth Circuit's decision regarding the immunity issue. The policies of both cost spreading and official restraint are equally, if not more, applicable in *Garner*. Additionally, the City's argument asks too much. The Tennessee statute does not compel a police officer to use deadly force to effectuate an arrest, it merely permits it. The City of Memphis, at its own discretion, implemented the deadly force policy at issue. If the City's policy was based on a state law requirement, then its claim would carry more weight. Notably, even though the statute had been previously upheld, Judge McCree had on two prior occasions expressed his doubts that the law could be constitutionally applied to a nonviolent fleeing felon,[92] the precise issue before the *Garner* court. The City may not claim that the court's decision struck without warning.

Another argument may also be made regarding the City of Memphis' own wrongdoing. It has been determined that if a municipal police force fails to train, or trains its officers in a reckless or grossly negligent manner, so that future police misconduct is almost inevitable, then the municipality is liable because it has shown a "deliberate indifference" to the resulting violations of a citizen's constitutional rights.[93] The current standard in the Sixth Circuit, as expressed in *Hays v. Jefferson County*,[94] is there must be a complete failure to train, or training so reckless that future police misconduct is almost inevitable.[95] Strong evidence in *Garner* indicated that the Memphis Police Department's training policies actually encouraged the use of deadly force. The training films used at the time of the incident depicted only situations involving armed and violent felons.[96] Recruits were taught to shoot to kill, by aiming at the torso, and were equipped with the most lethal bullets available.[97] The only official restraint was the admonition that, "if you kill someone you have to live with yourself."[98] Furthermore, no police officer had ever been admonished for the manner in which he used a firearm.[99] A potent argument therefore exists that the

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92 *See supra* notes 39, 49.

93 Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978).

94 668 F.2d 869 (6th Cir. 1982).

95 *Id.* at 874.

96 Brief for Appellant at 8, *Garner*, 710 F.2d at 240.

97 *Id.* at 11.

98 *Id.* at 9.

99 *Id.* at 48.

City's training methods not only permitted, but in fact made inevitable the type of police action that took the life of Eugene Garner.

VII. THE CONSTITUTIONAL ISSUES REVISITED

Although the Sixth Circuit's decision is laudable, it failed to carefully articulate the competing interests at stake. Additionally, it failed to address several constitutional issues. This section of the Article will reexamine the relevant constitutional provisions and the issues presented by an application of those provisions to the fleeing felon rule.

A. The Fourth Amendment

The use of deadly force to apprehend fleeing suspects certainly implicates the fourth amendment. The Tennessee statute[100] at issue in *Garner* was an arrest statute. The conduct of the police in effectuating an arrest is certainly within the purview of the fourth amendment,[101] the very language of which speaks to, "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures. . . ."[102] Although the Sixth Circuit was correct in concluding that the Tennessee statute in *Garner* violated the fourth and fourteenth amendments, its opinion would have been strengthened substantially if it had resorted to analogous search and seizure cases.

The Supreme Court in numerous instances has declared that the fourth amendment governs seizures of the person.[103] Additionally, any form of physical arrest is a seizure within the context of that constitutional provision.[104] Nor can there be any doubt that the manner in which a seizure is conducted is a relevant fourth amendment consideration.[105] Therefore, in the context of the fleeing felon statute, the inquiry should focus on the reasonableness of the seizure both as to the general method used

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100 TENN. CODE ANN. § 40-7-108 (1982). *See supra* notes 30-32 and accompanying text.

101 Terry v. Ohio, 392 U.S. 1, 16 (1968).

102 U.S. CONST. amend. IV.

103 *Terry*, 392 U.S. at 16. "It is quite plain that the fourth amendment governs 'seizures' of the person. . . ." *Id. See also* Dunaway v. New York, 442 U.S. 200, 207 (1979); Cuppy v. Murphy, 412 U.S. 291, 294 (1973).

104 Note, *supra* note 29, at 575. *See also*, United States v. Watson, 423 U.S. 411 (1976); Terry v. Ohio, 392 U.S. 1 (1968).

105 United States v. Place, 103 S. Ct. 2637, 2639 (1983); Terry v. Ohio, 392 U.S. 1, 28 (1968); Schmerber v. California, 384 U.S. 757, 768 (1966); Ker v. California, 374 U.S. 23, 38 (1963).

by the police in making a class of seizures and also in regard to the manner in which the specific seizure at issue was made.[106]

Chief Justice Burger, dissenting in *Bivens*,[107] stated that the response of the police in any given situation "must relate to the gravity and need"[108] of that particular situation. This balancing approach has been used by the courts in a number of fourth amendment contexts.[109] For example, the Court has held that beating a suspect during an arrest violates the fourth amendment.[110] To determine "reasonableness," the strength of the state interest must be weighed against the degree of the physical intrusion and the availability of less intrusive alternatives.[111]

The state has several important interests at stake: the apprehension of suspects, the protection of police officers, and the protection of other members of the community.[112] The State of Tennessee maintained:

> [T]he prohibition of unreasonable seizures should stand as a guard to protect the citizen from police use of force against him beyond what is necessary to carry out the arrest. However, the fourth amendment should not be read to prohibit the use of deadly force against a citizen whom police may lawfully arrest for a felony when the citizen himself is responsible for creating the necessity of using such force by refusing to submit to a lawful arrest. . . .[113]

This approach, however, as the *Garner* court indicated, made no distinction based on the underlying offense.[114] It cannot be suggested logically that an individual has waived his right to life simply by fleeing from a nonviolent crime.[115] In a recent case,

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106 Note, *supra*, note 29, at 576.

107 *Bivens*, 403 U.S. at 411.

108 *Id.* at 419.

109 United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roadblock stops for illegal aliens); Camara v. Municipal Court, 387 U.S. 523 (1967) (warrantless house search to determine if residence was being rented illegally).

110 District of Columbia v. Carter, 409 U.S. 418 (1973).

111 United States v. Place, 103 S. Ct. at 2644. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968).

112 The State of Tennessee, in its petition for writ of certiorari, also mentioned an interest in not having police officers forced to make intricate on-the-spot decisions. However, as officers already must distinguish misdemeanors from felonies, that cannot be maintained seriously as an interest in this particular case.

113 Appellant's Petition for Writ of Certiorari at 6, *Garner*, 710 F.2d at 240.

114 *See supra* notes 94-95 and accompanying text.

115 In *Garner*, Tennessee failed to articulate carefully the offense for which the person is being killed—the maximum sentence Garner would have received for burglary was 5 to 15 years; fleeing from a crime is not even a statutory crime in Tennessee if the person is

Welsh v. Wisconsin,[116] the Court held that an important factor to be considered when determining whether exigent circumstances exist for a warrantless arrest is the gravity of the underlying offense.[117] Although its facts may be distinguished, the importance of *Welsh* for the purposes of this analysis is clear. The Court explicitly recognized that the reasonableness calculus for fourth amendment purposes must consider the nature of the underlying offense, something the Tennessee statute manifestly failed to do.

In other fourth amendment cases, both the Supreme Court and lower federal courts have declared that searches and seizures which result in a physical intrusion must be supported by a substantial degree of justification.[118] In *Schmerber v. California*, it was held that the fourth amendment was intended to protect personal dignity and accordingly prohibited unconsented physical intrusions except in cases when a compelling state interest could be shown.[119] This principle was reiterated in *Davis v. Mississippi*,[120] where the Court said that the fourth amendment, in the absence of a compelling state interest, prevents wholesale intrusions by a state upon the personal security of its citizens. This conceptual barrier against unwarranted physical intrusion is applicable in *Garner* in its starkest form. Shooting someone, the ultimate physical intrusion, is different not only in degree but in kind. If swabbing a rape suspect's genitals to obtain evidence is unreasonable,[121] then killing or maiming a nonviolent fleeing felon, which is both an intrusion of harsher character and one with more permanent effect, must be concomitantly unreasonable. The rationale is that the interest in

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apprehended, although the MEMPHIS, TENN., CITY CODE § 1-8, makes fleeing subject to a maximum fine of $50. This anomaly has not gone unnoticed:

> May I ask what we are killing him for when he steals an automobile and runs off with it? Are we killing him for stealing the automobile? . . . If we catch him and try him . . . what do we do to him? Put him before a policeman and have a policeman shoot him? Of course not. We give him three years in the penitentiary . . . . Is it then for fleeing? Fleeing from arrest is also a common law offense and is punishable by a light penalty, a penalty much less than that for stealing an automobile.

Comment by Professor Mikell, 9 A.L.I. PROC. 186-87 (1931). "Is the fleeing felon in fact being killed for the volatile combination of felony and flight, both of which are crimes?" Sherman, *supra* note 23, at 84.

116 104 S. Ct. 2091 (1984).

117 *Welsh*, 104 S. Ct. at 2104.

118 Schmerber v. California, 384 U.S. 757, 770 (1966).

119 *Id.* at 770.

120 394 U.S. 721 (1969).

121 United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957).

personal security outweighs that of general law enforcement. Therefore, any seizure that intrudes upon the personal security in such an explicit, and in many instances irrevocable, fashion must be narrowly tailored to its justification.[122] This argument does not ignore a state's need to protect its citizenry; it simply urges that the use of deadly force be confined to those situations involving suspects known to pose a threat of actual violence.

A deadly force rule applied to apprehension of nonviolent fleeing felons is also unreasonable in light of the common-law rule and the realities of modern police practice. The form of the doctrine is exalted beyond its purpose; the violent and the nonviolent felon are treated alike.[123] The common law did not permit the use of deadly force against those suspected of nonviolent crimes. At a bare minimum, the Memphis Police should be trained to shoot to wound and not to kill. Other urban areas require an officer to aim for an extremity, and have not suffered any adverse law enforcement consequences as a result.[124] Several major police departments do not allow officers to shoot at all to apprehend suspects fleeing after committing nonviolent felonies.[125] Instead, they rely on communication with other officers to effectuate the arrest. The underlying rationale behind this policy is the belief that a nonviolent felon does not pose a great enough danger to the community to warrant the use of deadly force.[126]

Even if one were to accept the idea that crime generally, and the fleeing of suspects more particularly, are deterred by killing the fleeing felon, then other considerations come into play. In

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[122] Florida v. Royer, 103 S. Ct. 1319, 1328 (1983).

[123] *See supra* notes 11-23 and accompanying text. Unlike most modern felonies, the common-law felonies were all violent offenses.

[124] *See* Brief for Appellant at 34, *Garner*, 710 F.2d at 240, which cites Peoria, Illinois as an example. The captain of the Memphis Police Department testified at trial that shooting to kill (at the torso) was not related to police safety, but was suggested to officers solely because the torso is a greater target.

[125] Only four cities in the United States with populations over 250,000 follow the common-law rule. More than half of those cities have stricter policies than the Model Penal Code Proposal cited by the *Garner* court. Approximately 40% limit the use of deadly force to "atrocious" felonies, *e.g.*, rape or murder. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, A BALANCE OF FORCES: A REPORT OF THE INTERNATIONAL ASSOCIATION OF CHIEF OF POLICE 17 (Matulia 1982). This is true even in states that follow the common-law rule. In Michigan, a common-law jurisdiction, more than half of the cities have deadly force policies that restrict the use of deadly force to violent crimes. STAFF REPORT TO THE MICHIGAN CIVIL RIGHTS COMM'N 54 (May 1981).

[126] This is easily seen by an examination of the statutory penalties for nonviolent crimes. If the convicted burglar can only be given 5 to 15 years in prison, then that should be taken as society's collective judgment of the maximum appropriate sanction.

Memphis, for example, less than one-half of one percent of all arrests involved deadly force. On a national level, in order for the police to arrest one percent more of the nonviolent fleeing felons in a single year, they would have to increase the rate at which deadly force is used at least fifty times. That would result in approximately 35,000 fatalities and 70,000 woundings nationally.[127] Are we willing to pay such a high price for more effective law enforcement?

Therefore, the conclusion seems inescapable that a traditional fourth amendment balancing approach leaves the fleeing felon rule, as applied to nonviolent felons, on the wrong side of the constitutional line.

B. The Eighth Amendment

The initial barrier to any claim that the use of deadly force is barred by the eighth amendment is the determination of whether the apprehension of the fleeing felon is within the ambit of the word "punishment."[128] The Court has experienced difficulty determining whether particular government sanctions constitute punishment.[129] However, according to the Court's most recent decision regarding this issue, the determination should focus on whether "the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[130] In essence, there must be an *intent* to punish.[131]

The Court has cited seven criteria as "guideposts" for deciding whether any particular sanction constitutes punishment. Those criteria are:

> 1) whether the sanction involves an affirmative disability or restraint;
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> 2) whether it historically has been regarded as punishment;
>
> 3) whether it comes into play only upon a finding of scienter;
>
> 4) whether its operation will promote the traditional aims of punishment—retribution and deterrence;
>
> 5) whether the behavior to which it applies is already a crime;

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[127] Fyfe, *Observations on Deadly Force*, 27 CRIME & DELINQ. 376, 381 (1981).

[128] Note, *supra* note 29, at 572.

[129] *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-67 (1963).

[130] *Bell*, 441 U.S. at 538.

[131] Sherman, *supra* note 23, at 79.

6) whether there is an alternative purpose to which it may rationally be connected and is assignable to it; and,

7) whether it appears excessive in relation to the alternative purpose assigned.[132]

An examination of these criteria suggests that the use of deadly force by the police against nonviolent fleeing felons indeed constitutes punishment.

Death, as the Court often has recognized, is the ultimate penalty:[133] "It is not only a deprivation of rights but a deprivation of 'the right to have rights.' "[134] Clearly it is an affirmative disability or restraint. The origins of the deadly force rule are equally unambiguous. As the history of the fleeing felon rule indicates, the rationale of the doctrine was that it was merely an acceleration of punishment, "a premature execution of the inevitable judgment."[135] In a more modern context, Chief Bracy of the New York Police Department has said, "from my experience it seems that shooting a fleeing felony suspect is mostly related to an officer's urge to punish a criminal."[136] Scienter, both at common law and at present, was and is a necessary element of every felony.[137] When a police officer, upon determination that a felony has been committed, uses deadly force to

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[132] *See Mendoza-Martinez*, 372 U.S. at 168-69.

[133] Furman v. Georgia, 408 U.S. 238 (1972). "In a society that so strongly affirms the sanctity of life, . . . the common view is that death is the ultimate sanction." *Id.* at 286. *See also* Woodson v. North Carolina, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting); Screws v. United States, 325 U.S. 91, 118 (1945) (Rutledge, J., concurring).

[134] *Furman*, 408 U.S. at 290 (Brennan, J., concurring). In the capital punishment cases, a number of the justices have recognized that death is a different kind of punishment in both its severity and finality. "[F]rom the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Id. See* Garner v. Florida, 430 U.S. 349, 357-58 (1977) (Stevens, J., concurring). The difficulty with relying upon the death penalty cases is that they hold that death is a different kind of punishment. In *Garner* the issue is whether the use of deadly force is punishment at all. In a sense, using those cases as precedent assumes the conclusion.

[135] *See supra* notes 11-24 and accompanying text. "Let all go forth where God may direct them to go, let them do justice on the thief." LAWS OF EDGAR, TENTH CENTURY ENGLAND, *as quoted in*, T. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES (2d ed. 1972). The common law authorized the victims of crimes and attempted crimes to kill the criminal regardless of whether it was necessary to prevent the felony. In the context of the times in which the kill-to-arrest doctrine evolved, it was clearly linked to a philosophy of summary justice that can only be viewed as punishment. Sherman, *supra* note 23, at 81.

[136] Brief for Appellant at 20, *Garner*, 710 F.2d at 240.

[137] Sherman, *supra* note 23, at 82; *see also* United States v. Valent, 258 U.S. 250, 251 (1922).

effectuate an arrest, an argument may be made that such force is asserted as a result of the officer's finding of scienter.

The deadly force rule is also an attempt to promote retribution and deterrence. The court has noted in the death penalty context that death is society's most extreme retributive measure.[138] Killing the fleeing felon implies the notion of "just desserts" as well. The Sixth Circuit panel in *Wiley*, expressed this when it said, "[t]here is no constitutional right to commit felonious offenses and escape the consequences of those offenses."[139] The deterrence question is difficult to answer as an empirical matter. There can be little doubt, however, that police departments that allow the use of deadly force intend for it to deter.[140] This aspect of the rule was implicit in the Second Circuit's opinion in *Jones v. Marshall*,[141] when it found that states have a right to place a higher value on order than on the rights of suspects. Order can only be achieved, in the context of the *Jones* court's theorem, through deterrence. Deterrence, both specific and general, requires apprehension.[142]

The underlying behavior bringing the penalty of deadly force into play is a felonious crime.[143] Police departments certainly have an interest in protecting the public from criminals and crime and in apprehending suspects. The state, therefore, has an alternative justification in addition to punishment. The issue, however, as was expressed by the Court in the *Wolfish* and *Mendoza* opinions is whether the sanction is excessive in relation to the purpose.[144] A majority of states has laws that authorize the so-called "any-felony" policy. This policy essentially allows

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138 Woodson v. North Carolina, 428 U.S. 280, 323 (1976).

139 It is important to note that this line of analysis assumes the guilt of the fleeing felon suspect. Flight, however, does not necessarily indicate guilt. As most of these cases involve minors, and frequently black minors who in many cities think of the police as enemies, there is an increased likelihood that even an innocent youth will run.

The Mayor of Memphis said in 1972, "The black community, speaking generally and in a broad sense, perceives the police department as having consistently brutalized them, almost their enemy instead of their friend. . . ." Brief for Appellant at 41, *Garner*, 710 F.2d at 240.

140 Sherman, *supra*, note 23, at 83. Courts generally have assumed that such force has the same deterrent effect as punishment. The district court in *Wiley*, found that one of the principal purposes of Memphis' policy was to deter criminal conduct. Wiley v. Memphis Police Dep't, Civ. Act. No. C-73-8, Mem. Op. at 13 (W.D. Tenn. June 30, 1975).

141 528 F.2d 132 (2d Cir. 1975).

142 Sherman, *supra*, note 23, at 83.

143 In *Garner*, burglary is prohibited by TENN. CODE ANN. § 39.901 (1975). Flight, however, is not a statutory crime in Tennessee. It is prohibited as a misdemeanor by the MEMPHIS, TENN. CITY CODE § 1-8.

144 *See supra*, notes 103-105 and accompanying text.

a police officer to use firearms or other means of deadly force to arrest a person suspected of committing any felony.[145] In such states, police are permitted by law to shoot fleeing persons suspected of offenses such as check forgery and auto theft. The use of deadly force in these situations seems clearly excessive in regard to the state's interest in protecting the public and the police officer. There simply is no threat of physical danger to either group. The state's interest in the apprehension of suspects does not justify the use of deadly force either. If the officer is successful, the means of apprehension, death, is far more severe than the maximum penalty for the crime.[146] Additionally, most suspects can be captured through other means, such as investigation and police communication with other officers.[147] Finally, killing suspects frustrates the public interest in bringing the individual to justice. The apprehended suspect is turned over to the judicial system and surrounded with procedural protections. He has constitutional rights to bail, counsel, and a fair trial, and is presumed innocent. Even if convicted, the individual is incarcerated not only to punish but also in an attempt to rehabilitate. The dead receive none of these opportunities.

It appears, therefore, that the unnecessary use of deadly force amounts to nothing less than an "on the spot" imposition of punishment. The inquiry then becomes whether it is cruel and unusual. Most of the Court's analyses in this area are found in death penalty cases.[148] Those cases show most clearly a concern with proportionality, *i.e.*, whether the punishment is disproportionate to the offense.[149]

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[145] U.S. DEP'T OF JUSTICE, POLICE USE OF DEADLY FORCE: A CONCILIATION HANDBOOK FOR CITIZENS AND THE POLICE (1982).

[146] Sherman, *supra*, note 23, at 85. That some suspects may be fortunate enough to only be maimed, rather than killed, does not change the excessiveness analysis. The practice is shoot to kill. The officer's attempt to use deadly force, regardless of whether he is successful, is excessive.

[147] New York City, for example, relies on this method instead of deadly force. Brief for Appellant at 26, *Garner*, 710 F.2d at 240. *See also supra* notes 27-29 and accompanying text.

[148] *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 230 (1972).

[149] Sherman, *supra*, note 23, at 89. Besides the death penalty cases there are several cases that show a concern with proportionality. In the 1983 Term, in Solem v. Helm, 103 S. Ct. 3001 (1983), the Court held that life imprisonment without parole for 7 nonviolent felonies was disproportionate to the underlying felonies and in violation of the eighth amendment. The Court stated a general principle of proportionality between the crime and the sentence. *Id.* at 3009.

In Robinson v. California, 370 U.S. 660 (1962), the Court held that criminalizing the status of narcotics addiction and imposing a 90 day sentence was cruel and unusual punishment. *Id.*

The Court has held that it is disproportionate to execute a person for rape of an adult woman[150] or felony murder.[151] Therefore, at first blush it would clearly seem disproportionate to kill most fleeing felons. However, the state still has the ability to incarcerate those convicted of rape or felony murder; its interests in deterrence and protection of the community are still being served even though it cannot invoke the death penalty. The fleeing felon who escapes, on the other hand, will not be incarcerated and thus forced to face the consequences of his actions. In that case, the state's legitimate interests are not being met. In one sense the analogy between the death penalty and the use of deadly force to arrest does not work very well. The Court's holdings in the death penalty cases, however, are more properly read to suggest that life is too valuable to destroy when protecting lesser interests, even interests as great, for example, as deterring rape. Proportionality, as a principle, is not dependent upon alternatives. If the electric chair is more than a convicted burglar deserves, a bullet in the back is more than a suspected burglar deserves.

When one considers the host of eighth amendment procedural protections required before the death penalty may be imposed,[152] it becomes clear that a state cannot impose the ultimate sanction, unless and until similar procedures are followed. The "on the spot" nature of the officer's decision to kill simply does not meet the eighth amendment's standards in this regard.

At times, the Court also has spoken of an "evolving standard of decency" component of the eighth amendment.[153] As was shown in an earlier section of this Article, many major urban police departments, as well as many state legislatures, are moving away from the use of deadly force against nonviolent fleeing felons.[154] In addition, virtually all of the academic literature of the last fifty years has been highly critical of the rule.[155] The

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150 Coker v. Georgia, 433 U.S. 584 (1977).

151 Enmund v. Florida, 458 U.S. 782 (1982).

152 The Court has imposed, out of the eighth amendment, the procedural protections of a bifurcated trial, automatic judicial review, and the necessity of finding aggravating circumstances. *Gregg*, 428 U.S. at 153.

153 *Furman*, 408 U.S. at 269-270. *See also* Trop v. Dulles, 356 U.S. 86 (1958).

154 *See supra* notes 24-29 and accompanying text.

155 Sherman, *supra* note 23; Mogin, *supra* note 18; Comment, *supra* note 5; Note, *supra* note 25; Note, *supra* note 29. *See also* Note, *Legalized Murder of a Fleeing Felon*, 15 VA. L. REV. 582 (1929); Note, *The Use of Deadly Force in Arizona by Police Officers*, 1972 LAW & SOC. ORDER 481.

trend appears to be away from the use of deadly force in situations such as that involved in *Garner*.[156] This fact, in conjunction with the eighth amendment's concern with proportionality and proper procedural protections offers significant substance to the argument that the use of deadly force against the nonviolent fleeing felon is indeed cruel and unusual.

C. Due Process

The *Garner* court also found the Tennessee rule to contravene the due process clause. Although the court said it was not engaging in substantive due process review,[157] it is difficult to ascertain what else the court could have been doing. The *Garner* court first recognized the right to life as fundamental, and then examined the statute to see if it was narrowly tailored to serve only the compelling governmental interests at stake. The analysis turns, then, on whether the court was correct in asserting that there is a fundamental right to life. That life is mentioned in both due process clauses of the Constitution goes far in settling the question.[158] Although the Supreme Court has never explicitly held that there is a fundamental right to life,[159] it has referred to the concept frequently enough[160] to make it certain that such a right would be recognized.

In *San Antonio School District v. Rodriquez*,[161] the Court found that education was not a fundamental right because it was not expressly mentioned in the due process clause. Following this reasoning, the right to life would be fundamental because it is

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156 See Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976); Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978); Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983); and other cases restricting the use of deadly force, cited *supra* notes 62-66 and accompanying text.

157 *Garner*, 710 F.2d at 248. The analysis, as well as the precedents used by the court were of a substantive due process nature, and not similar to a procedural due process inquiry.

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

159 Rights held to be fundamental include, but are not limited to: the right to vote, Kramer v. Union Free School Dist., 395 U.S. 621 (1969); the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942).

160 Note, *supra* note 29, at 564. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 157 (1973) (abortion); Screws v. United States, 325 U.S. 91, 123 (1945) (Rutledge, J., concurring) (life is among the "clear-cut fundamental rights"); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) ("fundamental human rights of life and liberty"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("the fundamental rights of life, liberty and the pursuit of happiness"). *See also* Williams v. Kelly, 624 F.2d 695, 697 (life was found to be of constitutional dimension).

161 411 U.S. 1, 33-35 (1973).

expressly mentioned. This conclusion is supported by the Court's language in *Roe v. Wade*. Justice Blackmun, writing for the Court, said that if a fetus were a person, its right to life would be protected by the fourteenth amendment. The right to life is inherent, he went on to say, in the fourteenth amendment's concept of a person.[162] The reasoning set forth by the Supreme Court suggests that the fleeing felon statute, as it presently stands, impinges on the fourteenth amendment's conceptual right to life and is, therefore, violative of the due process clause.[163]

Even if the Court does not find that the right to life is fundamental, the Tennessee rule still raises several questions of procedural due process. First, the Court said in *Bell v. Wolfish*, that a person may not be punished prior to an adjudication of guilt.[164] One of the functions of the due process clause is to protect citizens against police officers "who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner."[165] The Tennessee deadly force rule is the clearest possible instance of "ultimate" police misconduct. The resolution of this issue, however, like the eighth amendment question, turns on whether the police action is punishment.[166]

Another procedural due process argument is that a mortally

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[162] 410 U.S. 113, 157.

[163] An argument that frequently comes up in this context is that the balancing of the scope of the right should be left to the legislature. *See, e.g., Wiley*, 548 F.2d at 1251-52. This argument, however, ignores the fact that courts already limit the statute. The Tennessee law, for example, makes no felony/misdemeanor distinction. That rule has been imposed by the Tennessee courts. Johnson v. State, 173 Tenn. 134, 137, 114 S.W.2d 819, 820 (1938); Reneau v. State, 70 Tenn. 720, 721 (1879). Additionally, such an argument abdicates judicial review. What if the Tennessee rule allowed the police to kill fleeing misdemeanants? Would that be constitutional as well? The question then becomes, not if a line can be drawn, but where. Judicial review, by its very nature, involves a conflict between judicial and legislative judgment as to what the constitution means or requires. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). Review in the instant case is not so much a substitution of judgment as it is the setting of a constitutional floor. Admittedly, however, the *Garner* court's endorsement of the Model Penal Code may, at least in appearance, move toward a substitution of policy judgment. An argument can also be made that even if the Court finds that the right to life is not fundamental, the fleeing felon rule cannot survive a lesser degree of scrutiny, *i.e.*, minimum rationality. Because the common-law distinctions between the violent and nonviolent nature of the crime are no longer present, it is irrational to kill all fleeing felons without making the types of distinctions made by the common law.

[164] 441 U.S. 520, 535 (1979).

[165] Screws v. United States, 325 U.S. 91, 106 (1945). The due process clause has been used to remedy the mistreatment of pretrial detainees and the use of excessive force in arrest. *Id.*

[166] *See supra* notes 124-42 and accompanying text.

wounded suspect has been deprived of his right to trial.[167] The Court, when faced with other procedural due process claims, has performed a balancing test in order to determine what process is due: the most common formulation weighs the individual's interest, the risk of an erroneous deprivation through the procedures used, the value of additional safeguards, and the state's interest, including the burdens that additional procedures would entail.[168] Placing a restriction on the use of deadly force against nonviolent fleeing felons would not seem to be any more burdensome on the state. The officers already must decide if the crime is a felony or misdemeanor, an additional determination that the felony involved violence would be relatively simple. Even assuming the implementation of such a policy would result in some cost to the state,[169] the Supreme Court has held that constitutional rights cannot be made dependent on a theory that it is less expensive to deny than to afford them.[170] In other procedural due process areas, such as termination of welfare benefits, the Court has condoned deprivations only in situations where a prompt post-termination hearing is provided. With the use of deadly force, however, there can be no post-deprivation hearing when the arresting officer succeeds in seizing the suspect. A person can never be returned to the status quo ante in that case. The procedural restrictions imposed by the Court in capital cases[171] are useful as an analogy to emphasize the need to carefully scrutinize any state acts that endanger life, especially in those instances when there has been no adjudication of guilt.[172]

D. Equal Protection

There is evidence to suggest that the Tennessee fleeing felon rule has been applied in a manner that is racially discrimina-

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[167] *Mogin*, *supra* note 18, at 549.

[168] Mathews v. Eldridge, 424 U.S. 319, 335 (1976). There are other slightly different formulations of the balancing test but all are very similar. For this reason, only the *Mathews* test will be used. *Id.*

[169] Brief for Appellant at 20, *Garner*, 710 F.2d at 240.

[170] Watson v. City of Memphis, 373 U.S. 526, 537 (1963).

[171] *See infra* note 191 and accompanying text. The procedures in capital cases are designed to make sure that the death decision is both accurate and individualized. The decision to use deadly force by a police officer in the heat of the chase obviously is not suitable for either of these purposes.

[172] Another possible argument is that killing a nonviolent fleeing felon so shocks the conscience that it violates due process. *See* Rochin v. California, 342 U.S. 165 (1952) (stomach pumping for narcotis evidence shocked the majority's conscience).

tory. Blacks accounted for 84.2% of suspects shot by the Memphis Police between 1969 and 1976.[173] Generally, blacks were more than twice as likely to be targets,[174] four times more likely to be wounded,[175] and 40% more likely to be killed.[176] Of the blacks shot, 50% were unarmed and posed no threat as compared to 12.5% for whites.[177] These data are even more significant when considered in light of the fact that, pursuant to Memphis Police policy, the decision to shoot is left totally to the discretion of the officer.[178] The Court, in other contexts, has recognized the dangers of such broad discretion.

Recognizing that a finding of disproportionate impact alone is not sufficient to show an equal protection violation, the Court has fashioned an intent standard to determine the presence of such a violation.[179] A disproportionate impact can, however, be used as a starting point in establishing discriminatory intent.[180] Both the City of Memphis and the Memphis Police Department have a history of racial problems.[181] The statistical data, in view of the history of racially motivated problems in Memphis, are difficult to explain on racially neutral grounds.[182] Furthermore, the great degree of discretion given police officers in determining when to shoot also seems to support a finding that the Memphis deadly force policy is applied in a racially dis-

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173 Brief for Plaintiff-Appellant at 39, *Garner*, 710 F.2d at 240.

174 *Id.* (4.33 per 1000 blacks; 1.81 per 1000 whites). Controlling for differential involvement in property crimes is a way of discounting the fact that more blacks than whites are involved in and arrested for crimes. In Memphis, blacks constitute 70.5% of those arrested for property crimes and 84.2% of the property crime suspects shot at by the Police. *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 40.

178 Castenada v. Partida, 430 U.S. 482 (1977). "A selection procedure that is susecptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." *Id.* at 494.

179 Washington v. Davis, 426 U.S. 229 (1976).

180 Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265-67 (1977).

181 In addition to the racial claims in virtually all of the Memphis fleeing felon cases, the Department was repeatedly charged with racial abuse in the 1960s. Brief for Plaintiff-Appellant at 4, *Garner*, 710 F.2d at 240. There have also been a number of suits against the City and the Department for employment discrimination. *See, e.g.*, United States v. City of Memphis, Civ. Action C-74-286 (W.D. Tenn. 1974) (consent decree entered in suit by United States against the police department).

182 This is an important criterion in determining what effect to give evidence of adverse racial impact. *See Washington*, 426 U.S. at 242.

criminatory manner.[183]

The disadvantage of a judicial decision on this ground is that the law is left in place if the policies can be applied in a nondiscriminatory manner. While a racial claim does have substantial merit, a decision on the racial issue alone, without further distinguishing violent and nonviolent felonies, would regrettably miss the point. The problem is not that black fleeing felons are killed and white ones are not. Rather, the problem is that *nonviolent* fleeing felons, black and white, are being killed.

VIII. A MODEST PROPOSAL

The preceding analysis of the deadly force rule in the context of the mandates of the fourth, eighth, and fourteenth amendments clearly indicates that the use of deadly force against a nonviolent fleeing felon is unconstitutional. In the event, however, the Court finds that the fleeing felon rule does not violate the fourth or fourteenth amendments and reverses the Sixth Circuit, opponents of deadly force will be left with two options: to accept the Court's ruling or find a new constitutional theory with which to attack the laws. The eighth amendment, as discussed above, remains a possibility.[184] The Supreme Court's definition of what constitutes punishment, however, has resulted in a lower court's reluctance to find that killing a fleeing felon is punishment.[185]

In addition to violating the fourth, eighth, and fourteenth amendments, an argument may be made that killing the fleeing felon who has not committed a crime of violence, and does not pose a threat of violence, violates the ninth amendment. The ninth amendment provides that the enumeration of certain rights is not to be deemed a denial of those held by the people. Although this constitutional provision has rested virtually dormant since its ratification, the Framers certainly believed that at least some rights were to be protected by it. If not, it becomes a part of the Constitution with no meaning[186]—a useless

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[183] Even though the law is neutral on its face, administration of a law in a racially discriminatory manner violates the equal protection clause. *Yick Wo*, 118 U.S. at 373-74.

[184] *See supra* notes 124-51 and accompanying text.

[185] *Id.*

[186] As Chief Justice Marshall stated: "It cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 5 U.S. (1 Cranch) 127, 174 (1803).

Many scholars, however, feel that the ninth amendment is useless. These arguments fit into four basic categories. First, the ninth amendment is merely a policy statement. *See, e.g.*, Note, *The Ninth Amendment: Guidepost to Fundamental Rights*, 8 WM. & MARY L. REV.

appendage.

The language of the ninth amendment makes it clear that certain rights exist even though they are not enumerated in the Constitution, and these rights should be treated as being on an equal footing with the enumerated rights. The difficulty, however, is articulating a rational methodology for the discovery of those rights, as well as the proper identification of their boundaries and content.[187]

The structure and language of the ninth amendment indicates that the class of rights protected is not closed[188] but rather evolves along with the law and society. If the class of rights were closed at the time of the ratification of the ninth amendment, then our Constitution would protect two kinds of enumerated rights: those enumerated explicitly in the Constitution and those demarcated but unnamed in the ninth amendment.[189] Such an interpretation does not make sense either linguistically or as a matter of constitutional interpretation. Therefore, as a first principle, ninth amendment rights must be considered as constantly evolving.

But where do we look for these evolving rights? Courts engaged in constitutional adjudication frequently recognize various concerns created by the explicit guarantees of the Constitution as they come in contact with changing situations. Sometimes these concerns have created new constitutional guar-

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101 (1966). This argument suggests that the ninth amendment is just a statement of constitutional policy. This, however, seems to ignore the plain wording of the amendment. Second, the ninth amendment is solely a restriction on federal power. *See, e.g.*, Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). In other words, the unenumerated rights are those not granted to the federal government. This theory seems to make the ninth amendment synonomous with the tenth. Third, the ninth amendment is a rule of construction for the rest of the constitution. *See, e.g.*, E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 63-64 (1957). However, it seems that the use of the term "others" in the ninth amendment must refer to rights other than those found in rest of the Bill of Rights. Fourth, the ninth amendment is not needed because of the expansion of the due process clauses in the fifth and fourteenth amendments. *See, e.g.*, Comment, *Unenumerated Rights—Substantive Due Process, the Ninth Amendment and John Stuart Mill*, 1971 WIS. L. REV. 922. This argument denies the expressed concept of the ninth amendment, *i.e.*, that rights are not to be denied merely because they cannot be located in another part of the constitution.

For an expanded description and critique of these arguments, see Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 237-254 (1975).

187 Paust, *supra* note 186, at 237.

188 C. BLACK, ON READING AND USING THE NINTH AMENDMENT (1981).

189 *Id.* at 7.

antees,[190] or new dimensions to existing ones.[191] At other times, courts, because of precedential shackles or the confining language of a particular constitutional provision, can only recognize a concern as being implicated, but not realized, in a particular case.[192] These implied concerns taken as a whole, however, can be used to identify constitutional values that prove to be useful in structuring ninth amendment rights. That is the second principle.[193]

The Court has grappled with this problem before. In *Griswold v. Connecticut*,[194] Justice Douglas, after examining the first, third, fourth, and fifth amendments, found a right of privacy that protected against governmental intrusion: "[the] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that helps give them life and substance." Justice Goldberg found a right of privacy, with the assistance of the ninth amendment, in the concept of liberty.[195] The rationale of either of these opinions, if adopted by a court, would support a ninth amendment guarantee prohibiting the use of deadly force to apprehend a nonviolent felon.

All of the constitutional provisions discussed in the previous sections of this Article, even if not separately protecting the individual in circumstances such as those in the instant case,[196] have been expounded by the Court in such a way that the limitations which these amendments place on government are relevant to the inquiry herein. The fourth amendment's limitations on unreasonable police conduct, the eighth amendment's concepts of proportionality and evolving standards of decency, the fourteenth amendment's fundamental rights and proper procedural safeguards all suggest applicable concerns, which, if

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[190] *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963) (freedom of association recognized as a right protected by the first amendment).

[191] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1968) (fourth amendment extended to protect against warrantless wiretapping).

[192] San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1973) (no constitutional right to a public education).

[193] Black, *supra* note 188, at 9. Professor Black does not formulate his theory of the ninth amendment in these terms but the approach is similar. Black's argument is that the Constitution should be treated in "the common law method," *i.e.*, "arguing from the established to the not yet established, weighing similarities and differences, and deciding where the balance lies." *Id.*

[194] 381 U.S. 479 (1965).

[195] *Id.* at 485.

[196] It is my opinion that the deadly force rule does run afoul of the fourth, eighth and fourteenth amendments. However, if the Court decides otherwise, the concerns expressed in those constitutional provisions would still be relevant in a ninth amendment inquiry.

looked at together and applied in conjunction with the ninth amendment argument above, would certainly provide a nonviolent felon with sufficient constitutional protection against the use of deadly force. The fourth amendment generally has operated as a restraint on police conduct and subjected police actions to a standard of reasonableness in light of both the state's interest in law enforcement, the individual's interest in personal security, and the gravity of the underlying offense. The sixth amendment guarantees an accused the right to a fair trial. The eighth amendment has subjugated government sanctions to standards of proportionality and made unconstitutional those state criminal penalties that are grossly excessive to the crime committed by the individual. That amendment also has, at times, used an evolving standard of decency test to test a particular punishment. The language of the fourteenth amendment, whether it creates fundamental rights or not, indicates a concern that life not be taken without proper justification and proper procedures. The penumbras and values expressed by these amendments, as applied in this context, give substance to an individual's right not to be deprived of life before an adjudication of guilt, unless the individual has endangered the lives of other members of the community or of the police officers seeking to apprehend him.

This is not a novel idea, rather it is a right recognized by the common law.[197] The ninth amendment, by its terms, seems to incorporate a historical approach to the discovery of rights, rights which can be found in the nation's "experience with the requirements of a free society."[198] That being so, then the trend away from the use of deadly force, as well as the historical dimensions of the rule, are highly relevant to a ninth amendment analysis. The ninth amendment, as part of the dynamic instrument of the people, must be utilized to meet contemporary needs and expectancies of fundamental rights.[199] That the common law did not permit deadly force to be used against a nonviolent fleeing felon is an indication that the rule in its current form is unconstitutional. The refusal to recognize this, in light of the origins of the rule and the constitutional values pre-

[197] See *supra* notes 11-23 and accompanying text (rule limited to felonies, which were by definition violent). The *Goldberg* approach could find the same right, with the help of the ninth amendment in the constitutional concept of life.

[198] Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Warren, C.J., Goldberg, and Brennan, JJ., concurring); Poe v. Ullman, 367 U.S. 497, 517 (1961).

[199] Paust, *supra* note 186, at 257.

viously examined, is to conclude that the unenumerated rights are not expanding and evolving, but rather to lament that they are shrinking and regressing.

The advantages, from the Court's perspective, of fashioning the constitutional right in the ninth amendment, as opposed to locating it solely in any one of the other constitutional provisions are twofold: the Court is less constrained by its precedents in shaping the nature and extent of the right; and, the right can be recognized without the danger of creating precedent that may have an adverse, or at least unexpected, effect on an already established body of law.

Once the right is established, courts must determine whether it has been infringed. If the right constructs a prohibition against the use of deadly force on a nonviolent felon who poses no threat to the police officer or the community, then the conclusion is certain. The definition of the right clearly invalidates the use of deadly force in situations such as those now before the Court in *Garner.*

As Professor Black said about *Griswold,*

> [It was] not so much a case that the law tests as a case that tests the law. . . . If our constitutional law could permit such a thing to happen, then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble. . . .[200]

The same may, and should, be said about *Garner.*

[200] Black, *The Unfinished Business of the Warren Court,* 16 WASH. L. REV. 3, 32 (1970).