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_Tennessee v. Garner_: Fourth Amendment Limitations on a Peace Officer's Use of Deadly Force to Effect an Arrest

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*Tennessee v. Garner*: Fourth Amendment Limitations on a Peace Officer's Use of Deadly Force to Effect an Arrest

**INTRODUCTION**

The fourth amendment imposes limitations on the government's power to seize people. The amendment requires that all such seizures of persons be reasonable. While the amendment leaves the terms "seizure" and "reasonable" undefined, the United States Supreme Court has held that a person has been seized if his ability to walk away has been restrained. A seizure of the person is reasonable if the state can provide sufficient cause for the seizure to outweigh the interests of the seized person.

At the time of the fourth amendment's adoption, the common law allowed a peace officer to kill a suspected felon and be free from criminal and tort liability if killing the felon proved necessary...
to effect an arrest. This common-law rule remains in effect in almost half the states today. Other states, more restrictive in their justification of homicide by peace officers, usually justify the use of deadly force only in the arrest of dangerous felons. Additionally, police departments today are often more restrictive than state law requires them to be in authorizing their officers to use deadly force to effect arrests.

In Tennessee v. Garner, the United States Supreme Court recently held that a peace officer's ability to use deadly force to effect an arrest is limited by the fourth amendment. In Garner, a divided Court held that the shooting of an unarmed burglar by a peace officer violated the fourth amendment because the officer could not have reasonably believed that the burglar posed a threat to the officer or others. Garner thus imposes constitutional restrictions upon a peace officer's use of deadly force in the arrest process.

This note will begin with a discussion of fourth amendment jurisprudence and a review of the history and scope of the police practice of using deadly force to effect arrests. It will then discuss the Court's decision in Tennessee v. Garner. An analysis of the majority and dissenting opinions will conclude that the majority adopted an unobjectionable rule but applied it incorrectly, achieving a result more restrictive than that required by the fourth amendment. Finally, this note will discuss Garner's foreseeable impact on police department policies, state law, and a peace officer's ability to use any amount of force in effecting an arrest.


This note is concerned with a peace officer's use of deadly force to effect an arrest. A discussion of other situations which might justify homicide by a peace officer (e.g. self-defense or defense of another) is beyond the scope of this note.

6. See infra notes 30-31 and accompanying text.

7. See infra notes 39-40, 44 and accompanying text.

8. See infra notes 46-48 and accompanying text.


10. 105 S. Ct. at 1699.

11. Id. at 1697-1707.
BACKGROUND

The Fourth Amendment and Seizures of the Person

The first clause of the fourth amendment requires that all government conducted seizures be reasonable. The terms "seizure" and "reasonable" are not defined by the amendment. The United States Supreme Court has held, however, that for fourth amendment purposes, a seizure of a person has occurred whenever a government official restrains that person's freedom to walk away. The reasonableness of a seizure of the person is determined by the use of a balancing test which takes into account the nature and intrusiveness of the seizure, as well as the importance of the government interests that allegedly justify the seizure.

12. See supra note 1.
13. Prior to the adoption of the fourteenth amendment in 1868, the United States Supreme Court had held that the Bill of Rights imposed limitations on the federal government only. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). Today, the provisions of the fourth amendment apply to state governments as well because the privacy interest safeguarded by the amendment is encompassed by the due process clause of the fourteenth amendment. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). Additionally, the fourteenth amendment requires that all evidence obtained by searches and seizures made in violation of the fourth amendment be inadmissible in a state criminal trial. Mapp v. Ohio, 367 U.S. 643 (1961). See infra note 17.

For a more complete discussion of fourteenth amendment incorporation of the fourth amendment and other Bill of Rights guarantees, see generally F. GRAHAM, THE SELF-INFLICTED WOUND (1970); 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 55-129 (1984); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567-69 (1978); Israel, Selective Incorporation: Revisited, 71 GEO. L.J. 253 (1982).
14. U.S. CONST. amend. IV. The second clause of the fourth amendment explicitly requires that all warrants be based upon probable cause. See supra note 1. Probable cause to arrest exists "where 'facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Draper v. United States, 358 U.S. 307, 313 (1959) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

The fourth amendment does not, however, require a peace officer to obtain a warrant in order to effect an arrest. United States v. Watson, 423 U.S. 411, 416-17 (1975). Rather, the fourth amendment requires that a warrantless arrest be based upon the same probable cause standard as an arrest made with a warrant.
15. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (a roving Border Patrol stop of a vehicle near the Mexican border, in order to question occupants about citizenship and immigration status, held to be a seizure). The Court has had some difficulty in establishing the point at which minimal police interference becomes sufficiently restrictive to become a seizure for fourth amendment purposes. See, e.g., United States v. Mendenhall, 446 U.S. 544 (1980) (whether conduct by Drug Enforcement Administration agents constituted a seizure debated by a divided court).
16. United States v. Place, 462 U.S. 696, 703 (1983). See, e.g., Delaware v. Prouse, 440 U.S. 648 (1979), wherein the Court, balancing the state's interest in ensuring the safety of its roadways against the physical and psychological intrusion imposed upon occupants of a vehicle stopped at random, held that the state's interests were insufficient to justify random stops to check for a driver's license or a vehicle registration. Id. at 654-
The fourth amendment does not prescribe any means to enforce its terms. However, the United States Supreme Court has held that evidence obtained in violation of the fourth amendment must be excluded from trial in a criminal case. Additionally, an individual seized in violation of the fourth amendment has a cause of action grounded in 42 U.S.C. § 1983, or in a species of constitu-

61; see also United States v. Ortiz, 422 U.S. 891, 895 (1975) (a motorist is less likely to be frightened or annoyed by an intrusion at a traffic checkpoint removed from the border than by a roving stop conducted by Border Patrol officers and this consideration is relevant to fourth amendment analysis); Terry v. Ohio, 392 U.S. 1, 26-27 (1968) (an officer may make an intrusion short of arrest without probable cause to arrest where he has reasonable apprehension of danger). For a more complete discussion of the balancing of interests employed in fourth amendment analysis, see generally Bacigal, The Fourth Amendment in Flux: The Rise and Fall of Probable Cause, 1979 U. ILL. L.F. 763, 776-86.


Recently, the scope of the exclusionary rule has been limited significantly by the United States Supreme Court. After United States v. Leon, 104 S. Ct. 3405, 3421 (1984), no exclusion of evidence is required when officers act in good faith reliance on a warrant which is subsequently determined to be invalid.

Brown v. Illinois, 422 U.S. 590 (1975), dealt with the more specific question of whether a confession obtained after an arrest made in violation of the fourth amendment must be excluded. In Brown, the Court held that a confession obtained after an unconstitutional arrest may be admissible, but that the prosecution must first establish the confession to be voluntary. Id. at 600-03. The Court held that four factors are relevant in considering the voluntariness of a confession obtained after an unconstitutional arrest: whether Miranda warnings, see Miranda v. Arizona, 384 U.S. 436, 467-73 (1966), were given; the temporal proximity of the arrest and confession; the presence of intervening circumstances; and the purpose and flagrancy of the police misconduct. Brown, 422 U.S. at 603-04. See generally Comment, The Fourth Amendment and Tainted Confessions: Admissibility As a Policy Decision, 13 HOUS. L. REV. 753 (1976); 25 EMORY L.J. 227 (1976) (discussing the Brown decision).

An analysis similar to that required by the Brown decision would be necessary to determine whether identification evidence (fingerprints, photographs, face-to-face confrontations, etc.) obtained after an unconstitutional arrest must also be excluded. W. LAFAVE & J. ISRAEL, supra note 13, at 752-53.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within
tional tort liability created by the United States Supreme Court. Finally, a willful violation of an individual’s fourth amendment rights may subject the violator to criminal liability.

**Police Use of Deadly Force to Effect an Arrest**

At common law, homicide by a peace officer was justified and privileged if the use of deadly force was necessary to effect the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


19. Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971), allows for the recovery of money damages for injuries suffered as a result of a violation of the fourth amendment by federal officials. Id. at 397. The constitutional tort liability created by the Bivens decision in lieu of 42 U.S.C. § 1983 is necessary in order for a plaintiff complaining of a violation of civil rights to recover damages from the federal government, since 42 U.S.C. § 1983 is not applicable to federal officials.


> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to any imprisonment for any term of years or for life.

In Screws v. United States, 325 U.S. 91 (1945), the Court held that acting “willfully” means acting with a purpose to deprive someone of a constitutional right. Id. at 107. The Court also held that one who acts “under color of law” may be a state or federal officer. Id. at 108.


22. Privilege is a defense to tort liability. Conduct normally tortious and actionable is privileged when existing circumstances allow the avoidance of liability. *Restatement (Second) of Torts* § 10(1) (1965). A person’s conduct is privileged when the person acts to further an interest of such social importance that the conduct is entitled to protection, even at the expense of the plaintiff. See W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser & Keeton on the Law of Torts* 108-10 (5th ed. 1984).
arrest of a person suspected of any felony.\textsuperscript{24} Deadly force was not sanctioned in the arrest of a fleeing misdemeanant, even when necessary to effect arrest.\textsuperscript{25} This “any felony” rule\textsuperscript{26} reflected the social and legal context of the common-law concept of felony.\textsuperscript{27} At common law, virtually all felonies were punishable by death, whereas misdemeanors, in general, were not.\textsuperscript{28} Therefore, a felon was thought to have forfeited his life by committing his crime, and the use of deadly force in effecting a felon’s arrest was seen as a mere acceleration of the penal process.\textsuperscript{29} Nineteen states have codified the “any felony” rule in justification statutes,\textsuperscript{30} and four

\begin{itemize}
\item \textsuperscript{23} For purposes of this note, the term “deadly force” is used as it is defined in the Model Penal Code, i.e., "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm . . . ."
\end{itemize}

\begin{itemize}
\item \textsuperscript{24} 2 M. Hale, Historia Placitorum Coronae 85 (1788) provides, "If persons that are pursued by the officers for felony or for just suspicion thereof . . . shall not yield themselves to these officers, but instead shall either resist or fly before they are apprehended . . . are upon necessity slain therein, it is no felony." \textit{Id.}
\end{itemize}

\begin{itemize}
\item \textsuperscript{25} 2 M. Hale, supra note 24, at 117; see Evans v. Walker, 237 Ala. 385, 187 So. 189 (1939); Stevens v. Adams, 181 Ark. 816, 817, 27 S.W.2d 999, 1000 (1930); Moore v. Foster, 182 Miss. 15, 19, 180 So. 73, 73 (1938); Padilla v. Chavez, 62 N.M. 170, 172, 306 P.2d 1094, 1095 (1957); State ex rel. Harbin v. Dunn, 39 Tenn. App. 190, 197, 282 S.W.2d 203, 206-07 (1943); \textit{see also} Pearson, supra note 5, at 964; Note, supra note 5, at 154-55.
\end{itemize}

\begin{itemize}
\item \textsuperscript{26} The common-law rule which made homicide by a peace officer justified and privileged when necessary to effect the arrest of a person suspected of any felony is referred to hereinafter as the "any felony" rule.
\end{itemize}

\begin{itemize}
\item \textsuperscript{27} At common law, a crime was classified as treason, felony or misdemeanor. Wilgus, \textit{Arrest Without a Warrant}, 22 Mich. L. Rev. 541, 568 (1924). Felony was the name given to the worst, utterly "bootless" crimes. 2 F. Pollock & F. Maitland, The History of English Law 464-66 (2d ed. 1959). An explanation of the common-law felony concept can be achieved only by enumeration of the common-law felonies. These felonies included murder, manslaughter, suicide (punishable by forfeiture of land and chattel, as were other felonies), mayhem, rape, arson, burglary, and larceny. \textit{Id.} at 485-500. For a complete discussion of the common law’s classification of crimes, see generally Wilgus, supra, at 568-77. \textit{See also} United States v. Watson, 423 U.S. 411, 438-41 (1975) (Marshall, J., dissenting) (discussing the common-law distinction between felony and misdemeanor).
\end{itemize}

\begin{itemize}
\item \textsuperscript{28} The common-law concept of felony was profoundly linked with capital punishment. \textit{See} 4 W. Blackstone, Commentaries *98. All felonies except petit larceny were punishable by death. 2 F. Pollock & F. Maitland, supra note 27, at 466 n.3. Misdemeanors, with the exception of piracy, were not punishable by death. \textit{Id.}
\end{itemize}

\begin{itemize}
\item \textsuperscript{29} \textit{See} Arrest Process, supra note 5, at 133; \textit{Justification in the Criminal Law}, supra note 21, at 582.
\end{itemize}

\begin{itemize}
others have retained it by court decision.\(^3\)

The first significant attempt to modify the “any felony” rule was made by the American Law Institute (the “A.L.I.”) when it adopted the *Restatement of Torts* in 1934. The original *Restatement* suggested that a peace officer’s privilege\(^3\) to use deadly force to arrest was limited to situations involving only certain, rather than all, felony suspects.\(^3\) However, after several decisions held contrary to the *Restatement*,\(^3\) the A.L.I. in 1948 adopted a replacement section which more closely resembled the “any felony” rule.\(^3\) In 1965, the A.L.I. retained the replacement section in the

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\(^3\) Werner v. Hartfelder, 113 Mich. App. 747, 753, 318 N.W.2d 825, 827 (1982) (upholding judgment of no cause of action where defendant peace officer had used deadly force against fleeing plaintiff, after the officer observed plaintiff unlawfully enter a parked automobile and remove a radio); State v. Foster, 60 Ohio Misc. 46, 62-65, 396 N.E.2d 246, 257-58 (C.P. Franklin County 1979) (listing cases which, taken together, give a general statement of the law); Hendricks v. Commonwealth, 163 Va. 1102, 1109, 178 S.E. 8, 11 (1935) (use of deadly force must be necessary to effect felon’s arrest); Thompson v. Norfolk & W. Ry., 116 W. Va. 705, 711, 182 S.E. 880, 883-84 (1935) (vacating judgment for plaintiff moonshiner, a felon, shot by defendant’s employee while fleeing to avoid arrest).

\(^3\) See supra note 22.

\(^3\) *RESTATEMENT OF TORTS* § 131 (1934) provides:

The use of force against another for the purpose of effecting an arrest of the other by means intended or likely to cause death is privileged, if

(a) the arrest is made for treason or for a felony which normally causes or threatens death or serious bodily harm, or which involves the breaking and entry of a dwelling place, and

(b) the actor reasonably believes that the arrest cannot otherwise be effected.


\(^3\) *RESTATEMENT OF TORTS* § 131 (1948) provides:

The actor’s use of force against another, for the purpose of effecting a privileged arrest of the other, by means intended or likely to cause death is privileged, if

(a) the arrest is made under a warrant which charges the person named therein with the commission of treason or a felony, or if the arrest is made without a warrant for treason or for a felony which has been committed, and
Restatement (Second) of Torts.\textsuperscript{36}

The A.L.I. has had more success with its \textit{Model Penal Code},\textsuperscript{37} which justifies the use of deadly force to arrest only in situations where the immediate apprehension of the fleeing suspect is necessary to prevent death or serious bodily harm to others.\textsuperscript{38} Eight states follow the \textit{Model Penal Code} approach or more stringent

\begin{itemize}
  \item[(b)] the other is the person named in the warrant if the arrest is under a warrant, or the actor reasonably believes the offense was committed by the other if the arrest is made without a warrant, and
  \item[(c)] the actor reasonably believes that the arrest cannot be otherwise effected.
\end{itemize}

The reporter's notes explain "that § 131 as originally worded stated a desirable rule of law but that the change is necessary in a Restatement of existing authorities . . . Every case which actually decides the question agrees that the . . . common law is still the law . . . ." \textit{Id.} at 634.

36. \textit{See Restatement (Second) of Torts} § 131 (1965).

37. \textit{Model Penal Code} § 3.07(2)(b) (Proposed Official Draft 1962) provides in pertinent part:

\begin{quote}
  The use of deadly force is not justifiable . . . unless:
  \begin{itemize}
    \item[(i)] the arrest is for a felony; and . . .
    \item[(iv)] the actor believes that:
      \begin{itemize}
        \item[(1)] the crime for which the arrest is made involved the use or threatened use of deadly force; or
        \item[(2)] there is substantial risk that the person to be arrested will cause death or serious bodily harm if apprehension is delayed.
      \end{itemize}
  \end{itemize}
\end{quote}

The A.L.I. refrained from enumerating felonies which necessarily involve the use or threatened use of deadly force, see \textit{infra} notes 40-43 and accompanying text, because of a fear that the list would be insufficiently comprehensive. \textit{See Model Penal Code} § 3.07 comment 3, at 59 (Tent. Draft No. 8, 1958). Additionally, the A.L.I. desired that the particular conduct of an offender be considered, rather than the general category of crime into which the the conduct falls. \textit{Id.} at 60.

For a complete discussion of the \textit{Model Penal Code} approach as an alternative to the "any felony" rule, see generally Day, \textit{supra} note 5, at 302-04; \textit{Impact of the Model Penal Code, supra} note 21, at 947-53.

38. \textit{The Model Penal Code} approach proceeds upon the principle that the only situation where the need for immediate apprehension of a suspect outweighs the suspect's interest in his own life is where apprehension is necessary to prevent death or great bodily harm to someone other than the suspect. \textit{Model Penal Code} § 3.07 comment 3, at 58-59 (Tent. Draft No. 8, 1958). The \textit{Code} approach disdains any theory that the use of deadly force can be justified as a deterrent to crime. \textit{See Mattis v. Schnarr}, 547 F.2d 1007, 1015 (8th Cir. 1976), in which the court quoted a statement made by Judge Learned Hand at the 1958 A.L.I. proceedings: "'It has been constantly supposed here that if you are able to shoot a robber you are less likely to have a robber. I question that. I challenge it altogether. I don't believe that possibility figures at all in the commission of crime . . . .'

The \textit{Model Penal Code} approach, though widely praised by commentators, see Day, \textit{supra} note 5, at 303 n.99, has been criticized as encouraging flight by criminals. \textit{See Shuman v. McGinn}, 307 Minn. 446, 466, 240 N.W.2d 525, 536-37 (1976), in which the court quoted Professor John Barker Waite, "'[W]e say to the criminal . . . [t]he officer dare not take the risk of shooting at you. If you can outrun him, outrun him . . . . If you are faster than he is, you are free, and God bless you.'"

The \textit{Model Penal Code} approach has also been criticized as requiring peace officers to make difficult predictions of future conduct. Mattis v. Schnarr, 547 F.2d 1007, 1023 (8th
Six states have adopted rules which enumerate a type of violent, dangerous, or "forcible" felony. These "forcible felony" statutes justify homicide by a peace officer if the use of deadly force is necessary to effect the arrest of one suspected of an enumerated felony. "Forcible felony" statutes attempt to limit the use of deadly force to the arrest of dangerous felons, but some statutes are anomalous, enumerating felonies which are not necessarily forceful or dangerous.

California probably belongs in this category. In Kortum v. Alkire, 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (1977), the court held that a peace officer may use deadly force to arrest a suspect only if the crime for which the suspect is sought was a "forcible and atrocious one which threatens death or serious bodily harm," or if there is substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed. Id. at 333, 138 Cal. Rptr. at 30-31; see also People v. Ceballos, 12 Cal. 3d 470, 476-84, 116 Cal. Rptr. 233, 237-42, 526 P.2d 241, 243-49 (1974); Long Beach Police Officers Ass'n v. City of Long Beach, 61 Cal. App. 3d 364, 373-74, 132 Cal. Rptr. 348, 353-54 (1976).


Vermont forbids the use of deadly force except when needed to prevent certain violent felonies. VT. STAT. ANN. tit. 13, § 2805(2) (Supp. 1985).

See, e.g., ILL. REV. STAT. ch. 38, ¶¶ 2-8 (Supp. 1984), which provides in part, "‗Forcible felony‘ . . . means treason, murder, voluntary manslaughter, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, arson, kidnaping, aggravated battery, and any other felony which involves the use or threatened use of physical force against any individual."

"To authorize the killing of an offender who is not likely to harm anyone if he successfully resists arrest simply on the ground that his offense is designated as a felony instead of a misdemeanor, seems indefensible." ILL. ANN. STAT. ch. 38, ¶ 7-5 Comm. Comments - 1961 (Smith-Hurd 1972).

See supra note 41. In Illinois, spitting on a police officer would constitute the forcible felony of aggravated battery, see ILL. REV. STAT. ch. 38, ¶ 12-4(b)(6) (1983);
Ten other states, using varying language, allow the use of deadly force to effect arrest only if the suspect has committed a violent felony, is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not immediately apprehended. The three remaining states either have no relevant statute or case law, or have positions that are unclear.

Many police departments have established guidelines regarding the use of deadly force. While these policies vary, most departmental guidelines do not authorize the use of deadly force to arrest every felon. Many police department policies are more restrictive than state law requires them to be. Department policies are important in light of the United States Supreme Court’s ruling in Monell v. Department of Social Services, which held that a municipality may be liable for damages under 42 U.S.C. § 1983.


45. These are Maryland, Montana, and South Carolina. A Maryland court has indicated, however, that deadly force may not be used against a fleeing felon who poses no immediate danger to anyone. See Giant Food, Inc. v. Scherry, 51 Md. App. 586, 589, 444 A.2d 483, 486 (Cl. Spec. App. 1982). In Montana, a peace officer will be criminally liable for an unnecessary assault of a suspect. See State v. Prlja, 57 Mont. 461, 465, 189 P. 64, 66 (1920). In South Carolina, an officer who uses deadly force to arrest a misde-meanant is guilty of manslaughter. State v. Sudduth, 74 S.C. 498, 502, 54 S.E. 1013, 1014 (1906).

46. For a limited survey of police department policies, see generally W. GELLER & K. KARALEs, SPLIT-SECOND DECISIONS: SHOOTINGS OF AND BY CHICAGO POLICE 33-42 (1981); Triggering Constitutional Review, supra note 5, at 370 nn.42-43.

47. See W. GELLER & K. KARALEs, supra note 46, at 33-42.

48. Id.


The Monell and Monroe Courts based their holdings on differing interpretations of the intent of the Forty-Second Congress, which had enacted Section 1983’s forerunner, Ch. 22, 17 Stat. 13 (1871) (more popularly known as the K.K.K. Act or the Civil Rights Act
After *Monell*, a police department may be liable under the statute if an execution of department policy causes a deprivation of federal rights.\(^{51}\) Prior to *Monell*, a department could authorize its peace officers to use any amount of force justified by state law without risking liability in federal court.\(^{52}\)

**DISCUSSION**

On October 3, 1974, Officer Elton Hymon of the Memphis, Tennessee Police Department shot and killed Edward Garner as Garner, unarmed, attempted to flee the scene of a nighttime residential burglary.\(^{53}\) Hymon was not prosecuted because his actions were

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*Monell* left open the question of whether or not a municipality could plead the good faith of its officers, see infra note 59, as a defense to 42 U.S.C. § 1983 liability. However, Owen v. City of Independence, 445 U.S. 622 (1980), settled the question by holding that a municipality may not assert the good faith of its officers as a defense to liability under the section. *Id.* at 638.


51. *Monell*, 436 U.S. at 694. After *Monell*, a municipality is to be treated as any other person for purposes of 42 U.S.C. § 1983 with an important exception. A municipality may not be sued under the section solely because it employs a tortfeasor. Only when it is the execution of city policy that causes the injury may a municipality be liable under 42 U.S.C. §1983. *Id.*

52. Prior to *Monell*, there was no jurisdictional basis for challenging the constitutionality of a city’s policy in federal court. Money damages were unavailable from local governments because of the eleventh amendment. See generally C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972); Baker, *Federalism and the Eleventh Amendment*, 48 U. Colo. L. Rev. 139 (1977); Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963). Money damages were unavailable from an officer because of the qualified immunity defense of good faith reliance on existing law. See infra note 59. Furthermore, a plaintiff was without standing to request equitable relief because he could not allege the future harm necessary to invoke federal equity jurisdiction, if defendant had already killed plaintiff’s decedent. See, e.g., Ashcroft v. Mattis, 431 U.S. 171, 173 (1977), wherein the Court held that emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement.

53. According to Officer Hymon’s testimony at trial, he believed the suspect to be seventeen or eighteen years old and 5'5" or 5'7". In fact, Garner was a 5'4" fifteen-year-old. In addition, Officer Hymon saw no weapon, and was “reasonably sure” that the suspect was unarmed. However, Officer Hymon was sure that “there was no way” he could have caught Garner if the suspect climbed over a six-foot high cyclone fence. Although Officer Hymon called out “police, halt!,” Garner attempted to scale the fence. Officer Hymon then shot the suspect. Tennessee v. Garner, 105 S. Ct. 1694, 1697 (1985).
clearly justified by Tennessee law in that Garner was a suspected felon. Garner's father brought an action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U.S.C. § 1983. The complaint alleged that the shooting violated Garner's fourth amendment rights, and named as defendants Hymon, the Memphis Police Department and its director, and the City of Memphis and its mayor.

Following a bench trial, judgment was entered for all of the defendants. The claims against the mayor and the director were dismissed for lack of evidence. The trial judge concluded that Hymon's actions were justified by Tennessee law and that Hymon was therefore entitled to the defense of good faith reliance on existing law.

The Court of Appeals for the Sixth Circuit affirmed with regard to Hymon, but remanded for consideration of the possible liability of the city and police department in light of the United States Supreme Court's recent decision in Monell v. Department of Social Services. On remand, the district court determined that Monell

54. Id. at 1698. Tennessee subscribes to the "any felony" rule. See supra notes 21-31 and accompanying text. Tenn. Code Ann. § 40-7-108 (1982) provides, "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary force to effect the arrest."

While the statute implies otherwise, deadly force to arrest a misdemeanant is not justified in Tennessee. Johnson v. State, 173 Tenn. 134, 137, 114 S.W. 819, 820-21 (1938).

55. See supra note 18 and accompanying text.

56. See supra notes 1-4, 12-20 and accompanying text for a discussion of the fourth amendment.

The complaint also alleged violations of the fifth, sixth, eighth, and fourteenth amendments, discussion of which is beyond the scope of this note.


58. Id.

59. Id. Law enforcement officials may avoid liability for damages under 42 U.S.C. § 1983 by interposing the qualified immunity defense of good faith reliance on existing law. Pierson v. Ray, 386 U.S. 547, 557 (1967). An official is immune from liability for damages under 42 U.S.C. § 1983 if the legal standard controlling his conduct was not clearly established at the time of his action, or if the standard was unknown to him and could not reasonably be expected to have been known by him. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).


For a more complete discussion of the good faith immunity defense, see generally Penland & Boardman, supra note 18, at 684-92; Note, supra note 50, at 1045-48.

60. Garner v. Memphis Police Dep't, 600 F.2d 52, 54 (6th Cir. 1979).

61. Id. at 54-55.

did not affect its earlier decision. The court of appeals, however, found that the shooting of Garner was a violation of the fourth amendment, and remanded for reconsideration of the city's liability. The State of Tennessee, intervening to save its statute, appealed to the United States Supreme Court, and the City of Memphis filed a petition for certiorari. After noting probable jurisdiction in the appeal and granting the petition, the United States Supreme Court affirmed the appellate court decision in Tennessee v. Garner.

Tennessee v. Garner

In Tennessee v. Garner, the Court held that a peace officer's ability to use deadly force to effect an arrest is limited by the reasonableness requirement of the fourth amendment. Noting that lesser intrusions have been determined to be seizures, the Court concluded that apprehension of a suspect by the use of a firearm is a seizure for purposes of the fourth amendment.

64. Garner v. Memphis Police Dep't, 710 F.2d 240, 243-48 (6th Cir. 1983), aff'd sub nom. Tennessee v. Garner, 105 S. Ct. 1694 (1985). The court of appeals held that the Tennessee statute conflicted with the fourth amendment because it did not adequately distinguish between felonies of differing magnitudes or limit the use of deadly force to situations involving dangerous felons. Id. at 246. The Sixth Circuit held that the rule set forth in the Model Penal Code, see supra notes 37-38 and accompanying text, accurately reflected fourth amendment limitations on the use of deadly force to effect an arrest. 710 F.2d at 247. Furthermore, the court held that the fourteenth amendment required the same result, because the Tennessee statute was not narrowly drawn to further a compelling state interest. Id. at 246-47.

68. 105 S. Ct. 1694 (1985). Justice White wrote the opinion of the Court, and was joined by Justices Blackmun, Brennan, Marshall, Powell, and Stevens.
69. Id. at 1699. Prior to the Garner litigation, there had been only one recorded appellate decision discussing the fourth amendment as a limitation on the use of deadly force to effect an arrest. Jenkins v. Averett, 424 F.2d 1228, 1231 (4th Cir. 1970) (appellee peace officer, negligent in shooting appellant, violated appellant's fourth amendment right "to be free from unreasonable interference by police officers"). However, Chief Justice Burger, in fourth amendment analysis, had predicted judicial hostility to the use of deadly force against car thieves, pickpockets, or shoplifters. Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting). See also Triggering Constitutional Review, supra note 5, at 384-85 (suggesting police use of deadly force is subject to the reasonableness requirement of the fourth amendment).
70. 105 S. Ct. at 1699. See supra note 15 and accompanying text for the Supreme Court's definition of a seizure for fourth amendment purposes.
71. 105 S. Ct. at 1699.
A majority of the Court then determined that the seizure of Garner was unreasonable. The Court applied a balancing test by weighing the interests of the suspect against the state’s interests in apprehending him. The Court determined that the state’s interest in apprehending a nonviolent felony suspect cannot be sufficient to outweigh the suspect’s interest in his life. The Court established two conditions which must be satisfied before a police officer may use deadly force to effect an arrest: first, the deadly force must be necessary to the arrest and second, the officer must have probable cause to believe that the person to be arrested poses a significant threat of death or serious bodily injury to the officer or others. Citing changes in “legal and technological context,” the Court refused to look to the common law in evaluating the reasonableness of the Garner seizure. Instead, the Court examined the justification statutes and case law in other jurisdictions, and determined that there had been a long-term movement away from the “any felony” rule. The majority was most persuaded, however, by the tendency of police departments to adopt policies more restrictive than the “any felony” rule.

Finally, the majority held that, for fourth amendment purposes,

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72. Id. at 1700-01. See supra note 16 and accompanying text for a discussion of the balancing of interests required in fourth amendment analysis.

73. 105 S. Ct. at 1700.

74. Id. at 1697. The Court in dicta provided some guidelines for establishing probable cause to believe the suspect will cause death or serious bodily injury to the officer or others. Following the approach of the Model Penal Code, see supra notes 37-38 and accompanying text, the Court stated that where there is probable cause to believe the suspect “has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” 105 S. Ct. at 1701.

75. 105 S. Ct. at 1703. The majority noted that no longer are most felonies punishable by death, see supra note 28, that the distinction between felonies and misdemeanors today is often minor and arbitrary, that felons are not necessarily more dangerous than misdemeanants, and that the common-law “any felony” rule preceded the widespread use of firearms by peace officers, which now necessarily gives the rule a different meaning and attaches to it harsher consequences. 105 S. Ct. at 1703.


77. 105 S. Ct. at 1704. See supra notes 30-31, 39-40, 44-45 and accompanying text for a limited survey of state justification law regarding the use of deadly force to effect an arrest.

78. 105 S. Ct. at 1705.

79. Id. at 1705-06. See supra notes 46-48 and accompanying text.
a burglar is not inherently dangerous.\textsuperscript{80} The Court concluded, therefore, that Garner did not pose a sufficient threat to the safety of Officer Hymon or others to justify the shooting.\textsuperscript{81}

Having concluded that the shooting of Garner was a violation of the fourth amendment, the Court affirmed the judgment of the court of appeals and remanded for a determination of the liability of the city and the police department.\textsuperscript{82}

\textbf{Dissent}

The dissent\textsuperscript{83} disagreed that the shooting of Edward Garner by Officer Hymon was a violation of the fourth amendment.\textsuperscript{84} The dissent accused the majority of obscuring the issue, which should have been whether Garner's rights were violated, not whether the Tennessee statute was constitutional.\textsuperscript{85} The dissent agreed that the use of deadly force is a "seizure" subject to the reasonableness requirement of the fourth amendment.\textsuperscript{86} However the dissent, unlike the majority, concluded that a balancing test can support the use of deadly force against a residential burglar.\textsuperscript{87} The dissent argued that residential burglary is a dangerous crime,\textsuperscript{88} and that the use of deadly force to effect an arrest is a police practice which serves the state's interest in protecting the public from the burglar at large while also accommodating the interests of the suspect.\textsuperscript{89}

\textbf{ANALYSIS}

In \textit{Tennessee v. Garner},\textsuperscript{90} the majority incorrectly focused on the
constitutionality of the Tennessee statute rather than on the constitutionality of a given use of deadly force by a peace officer. The majority's analysis in *Garner* should have been limited to the question of whether Garner's fourth amendment rights had been violated. Properly focused, the majority would have more carefully considered the state's interest in immediately apprehending a nighttime residential burglar and would have considered the prevailing trend away from the "any felony" rule only in its proper context.

A fourth amendment balancing approach weighs the interests of the state against the interests of the individual. The majority achieved the proper balance by establishing a rule that deadly force may not be used to arrest nonviolent suspects. The majority's rule is unobjectionable, and might have been embraced by a unanimous Court in litigation involving a lesser felon. However the majority, by failing to make a distinction between residential and nonresidential burglary, and by refusing to adopt a presumption that a nighttime residential burglar is dangerous, applied its rule incorrectly, and achieved a result more restrictive than that required by the fourth amendment.

The majority dismissed burglary as a crime which "rarely in-

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91. *Id.* at 1702-06. The existence (or nonexistence) of a state rule of criminal procedure purporting to authorize the taking of a life is not relevant to consideration of whether or not the taking of that life violates the federal constitution. The existence of the Tennessee statute, TENN. CODE ANN. § 40-7-108 (1982), see *supra* note 54, was relevant only to consideration of the immunity, see *supra* note 59, of the actor asserting the statute as a defense. The actor in the Garner litigation, Officer Hymon, had been dismissed from the suit, and was no longer a party. All that is relevant for purposes of the fourth amendment and 42 U.S.C. § 1983 is the balancing of the interests of the state and of the individual. *See supra* note 16 and accompanying text. Thus, the majority's assertion that TENN. CODE ANN. § 40-7-108 (1982) was unconstitutional as applied, 105 S. Ct. at 1701, is of little value.

92. While a survey of the state of the law and police procedure is certainly helpful in an intuitive analysis of what is reasonable, a perceived trend should not be constitutionally controlling. *Cf.* Spaziano v. Florida, 104 S. Ct. 3154 (1984). "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." *Id.* at 3165.

93. *See supra* note 16 and accompanying text.

94. The majority grounded its rule in the persuasive principle that the need for immediate apprehension of a suspect can outweigh the suspect's interest in his life only when immediate apprehension of the suspect is necessary to prevent serious harm to another. 105 S. Ct. at 1701. This principle was embraced by the A.L.I. in adopting the Model Penal Code. *See supra* note 38.

95. Chief Justice Burger had already shown his hostility to the idea of the shooting of a car thief, a pickpocket, or a shoplifter in *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).
volve[s] physical violence,"\textsuperscript{96} despite the Court's awareness that 2.8 million violent burglaries were committed between 1973 and 1982.\textsuperscript{97} The majority was apparently persuaded by the fact that this number comprises only 3.8\% of all burglaries reported in that period.\textsuperscript{98} However, this percentage is misleading and is not helpful in considering the dangerousness of the nighttime, residential burglar. Consideration of the percentage of nighttime residential burglaries which involve violence would have been more appropriate. Such a percentage, if available, would have placed the home burglar's potential for violence in a more proper perspective.

The majority also found persuasive the fact that the Federal Bureau of Investigation, in its \textit{Uniform Crime Reports}, classifies burglary as a "crime against property," rather than as a "crime against person."\textsuperscript{99} This too is a misleading fact. The Federal Bureau of Investigation classifies most burglaries involving physical force against an individual as either "criminal homicide," "forcible rape," "robbery," or "aggravated assault"; all of these crimes are "crimes against persons."\textsuperscript{100} Thus, for purposes of the \textit{Uniform Crime Reports}, an incident classified as a burglary almost never can include violence, because the incident would then be classified as a more serious crime.\textsuperscript{101}

A presumption that a nighttime home burglar is dangerous is justified by the potential for violence that exists in every residential burglary.\textsuperscript{102} The need for such a presumption becomes even more apparent when one considers the on-the-spot evaluations required of peace officers investigating a burglary in progress or pursuing a suspected burglar.\textsuperscript{103} Had the \textit{Garner} majority adopted such a pre-

\textsuperscript{96} 105 S. Ct. at 1706-07.
\textsuperscript{97}  Id. at 1707 n.23.
\textsuperscript{98}  Id. at 1707.
\textsuperscript{99}  Id. at 1706.
\textsuperscript{100} \textit{See Federal Bureau of Investigation, Uniform Crime Reporting Handbook} (1980).
\textsuperscript{101}  Id. at 33.
\textsuperscript{102} \textit{See Solem v. Helm}, 463 U.S. 277, 316 (1983) (Burger, C.J., dissenting) (harsh potentialities for violence are inherent in the forced entry of a home); \textit{see also Bureau of Just. Statistics Bull., Household Burglary} 1 (Jan. 1985), \textit{cited in Tennessee v. Garner}, 105 S. Ct. 1694, 1709 (1985) (O'Connor, J., dissenting), noting that three-fifths of rapes and robberies perpetrated in the home between the years 1973-1982 were committed by burglars, and that there were 2.8 million such violent burglaries during that ten year span.
\textsuperscript{103} Neither Officer Hymon, nor any other peace officer, could have known whether Edward Garner had committed an aggravating violent crime while inside the dwelling from which he fled. Nor could anyone have predicted whether Garner would use force in the future. All any peace officer could have concluded about Garner is that the suspect had just committed a nighttime residential burglary. Presuming the residence to be occu-
sumption, it would have achieved the correct result: the shooting of a nighttime residential burglar, when necessary to effect his arrest, is not an unreasonable seizure of the person for purposes of the fourth amendment.

IMPACT

_Tennessee v. Garner_ is an important case because it forces police departments to reexamine their policies regarding the use of force in order to avoid liability under 42 U.S.C. § 1983. After _Garner_, police departments have little choice but to adopt a policy similar to the _Model Penal Code_ approach which, as a practical matter, has been constitutionally endorsed by the United States Supreme Court. Police departments that want to adhere as much as possible to a “forcible felony” approach may still enumerate felonies. However, such departments should note the Supreme Court’s refusal to presume that a nighttime home burglar is dangerous, and should enumerate only felonies which necessarily involve the infliction or threatened infliction of serious physical harm. Such a hybrid of the _Model Penal Code_ and “forcible felony” approaches

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104. Following Monell v. Department of Social Services, see _supra_ notes 50-51, a police department would be subject to liability under 42 U.S.C. § 1983 for a given use of deadly force which violated the fourth amendment, but only if the officer involved was following department policy. Therefore, a police department adopting a policy which literally embodies the _Garner_ holding would be safe from liability under 42 U.S.C. § 1983, even if its employee violates the rule established in _Garner_.

105. See _supra_ notes 37-38 and accompanying text.

106. The _Garner_ majority, unlike the Sixth Circuit, did not explicitly hold that the fourth amendment limitations on the use of deadly force to effect arrest are accurately reflected in the provisions of the _Model Penal Code_. See _Garner_ v. Memphis Police Dep’t, 710 F.2d 240, 247 (1983). However, the _Garner_ rule that deadly force may be used to arrest only if necessary to effect the arrest and only if there is probable cause to believe that the person to be arrested poses a significant threat of death or serious bodily injury is, as a practical matter, identical to the _Model Penal Code_ approach. See _supra_ note 37. This conclusion is supported by Court dicta stating that the use of deadly force against a person would not be unconstitutional if an officer had probable cause to believe that the person had committed a crime involving the infliction of serious physical harm, and if the use of deadly force was necessary to effect the arrest. 105 S. Ct. at 1701. See _supra_ note 74.

107. See _supra_ notes 40-43 and accompanying text.

108. 105 S. Ct. at 1706-07.

109. For example, a police department in Illinois could amend its policy accordingly:
would accurately reflect fourth amendment limitations on the use of deadly force after *Garner*.

*Garner* is also important because of its inevitable effect on state justification statutes. *Garner* forces state legislatures to adopt the provisions of the *Model Penal Code*, or a hybrid based in part thereon, in order to avoid the prospect of federal intervention in the prosecution of peace officers who shoot nondangerous felons.

Finally, *Garner* is important because it expands the scope of the fourth amendment. In *Garner*, the United States Supreme Court held for the first time that an arrest may be unconstitutional because of the amount of force used to effect it. After *Garner*, any person subjected to a forcible arrest may complain that the force used in his arrest violated the fourth amendment because the state's interest in apprehending him or in preventing his escape was constitutionally insufficient. *Garner*, taken to its logical extreme, makes every person arrested by the use of handcuffs a potential 42 U.S.C. § 1983 plaintiff, and subjects to potential suppression evidence obtained after any forcible arrest.

**CONCLUSION**

*Tennessee v. Garner* held that the fourth amendment limits a peace officer's ability to use deadly force to effect an arrest. *Garner*

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A department member is authorized to use force likely to cause death or great bodily injury in effecting arrest when:

1. such force is necessary to effect the arrest, and
2. the member has probable cause to believe that the person to be arrested:
   1. has committed or attempted any of the following offenses as defined in the Illinois Criminal Code:
      1. murder,
      2. voluntary manslaughter,
      3. robbery,
      4. armed robbery, or
   2. has committed any other offense involving the use or threatened use of force against a person, or
   3. will endanger human life or inflict serious physical harm unless arrested without delay.

A department in Illinois is limited in the number of felonies that it may safely enumerate because of the broad manner by which offenses normally thought to be forceful or dangerous are defined. For example, in Illinois, a person could commit aggravated battery or arson without causing serious physical harm or endangering human life. See supra note 43.

110. See supra notes 37-38 and accompanying text.
111. See supra note 109.
113. See supra note 18.
114. See supra note 17.
requires that before an officer may use deadly force, he must have probable cause to believe that the suspect to be arrested poses a significant threat of death or serious physical injury to the officer or others; additionally, deadly force must be necessary to effect the arrest.

While the rule adopted by the court is unobjectionable, the Court applied the rule incorrectly. A proper application of the rule would have included a presumption that a nighttime residential burglar is dangerous.

After *Garner*, police departments must adopt policies limiting the use of deadly force or face potential liability under 42 U.S.C. § 1983. States also need to redraft their justification statutes in order to preclude intervention of the federal government in the prosecution of peace officers who violate the *Garner* holding. As a practical matter, *Garner* forces states and police departments to adopt a rule similar to that prescribed by the *Model Penal Code*.

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