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Tennessee v. Garner: Invoking the Fourth Amendment to Limit Police Use of Deadly Force

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I. Introduction

A burglary call responded to by two Memphis, Tennessee police officers on October 3, 1974, resulted in the death of a young fleeing felon, Eugene Garner. Garner's father initiated suit against the city of Memphis and the officers and their superiors alleging violation of Garner's fourth,[1] fifth,[2] sixth,[3] eighth,[4] and fourteenth[5] amendment constitutional rights. Eleven years later the United States Supreme Court held[6] that, on the facts of this case, the amount of force used against Garner by Officers Hymon and Wright constituted an unreasonable seizure in violation of Garner's fourth amendment rights.[7] More importantly, the Court affirmed the circuit court and held that

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1. U.S. CONST. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. U.S. CONST. amend. V provides in part:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on . . . indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . .

3. U.S. CONST. amend. VI provides in part:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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

5. U.S. CONST. amend. XIV, § 1 provides in part: "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."

6. Tennessee v. Garner, 105 S. Ct. 1694, 1697 (1985).

7. *Id.* at 1706.

the Tennessee statute,[8] which authorized police use of deadly force against fleeing felons, was unconstitutional because it authorized the use of deadly force against an apparently unarmed, nondangerous fleeing suspect.[9] Because there were no restrictions on the scope of the privilege to use deadly force, the Court concluded that the statute gave the police impermissibly broad discretion in the use of deadly force.[10] The law failed to strike a delicate balance between the individual's interest and the state's interest. In addition, the Court did not find the state's interest sufficient to justify the taking of a suspect's life.[11] Finally, the Court rejected a long tradition of case law which validated the common law deadly force rule.[12] Thus, when examined in today's legal and technological context,[13] the Court found that a literal application of the statute was invalid.[14]

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8. TENN. CODE ANN. § 40-7-108 (1982) (recodifying TENN. CODE ANN. § 40-808 (1975)) provides: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

Subsequent to the decision in this case, the Tennessee statute was amended. It now reads as follows:

(a) If, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest.

(b) Notwithstanding subsection (a), deadly force is authorized to effect an arrest only if all other reasonable means of apprehension have been exhausted, and, where feasible, warning has been given the defendant, by identifying himself or herself as such officer, or an oral order to halt, or an oral warning that deadly force might be used, and:

(1) The officer has probable cause to believe defendant has committed a felony involving the infliction or threatened infliction of serious physical harm to the officer or to any person in the presence of the officer; or

(2) The officer has probable cause to believe that the defendant poses a threat of serious physical harm, either to the officer or to others unless he is immediately apprehended.

(c) All law enforcement officers, both state and local, shall be bound by the foregoing provisions and shall receive instruction regarding implementation of same in law enforcement training programs. [Code 1858, § 5040; Shan., § 7000; Code 1932, § 11539; T.C.A. (orig. ed.), § 40-808; Acts 1985, ch. 359, § 1.]

TENN. CODE ANN. § 40-7-108 (Supp. 1986).

9. *Garner*, 105 S. Ct. at 1701.

10. *Id.* at 1698.

11. *Id.* at 1699-1701.

12. *Id. See also infra* notes 72-75 and accompanying text.

13. *Garner*, 105 S. Ct. at 1703-05 (the Court made an examination of the legal and technological changes).

14. *Id.* at 1707.

Tennessee v. Garner,[15] is the first instance in which a state deadly force statute has been held unconstitutional on fourth amendment grounds. It sets a new tone for constitutional challenges to police conduct. For this reason the case provides an important and interesting focus for in depth analysis.

Part II of this Note presents the history and background of both the fourth amendment and deadly force statutes. This section also examines the pertinent constitutional challenges to deadly force statutes. Part III reviews the factual and procedural aspects of *Garner*. Part IV sets forth the majority and dissenting opinions of the Supreme Court. Part V analyzes the majority decision and suggests that the Court improperly assessed the relevant factors in reaching its decision. Finally, Part VI concludes that the majority adopted too restrictive a standard for police use of deadly force.

II. Background

A. *The Fourth Amendment*

1. *Purpose and Scope*

The authorities agree that the basic purpose of the fourth amendment is to protect the personal security,[16] privacy,[17] and dignity[18] of individuals from arbitrary intrusion by government officials.[19] It has been called a concrete expression of a right "ba-

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15. 105 S. Ct. 1694.

16. "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry . . . ." Davis v. Mississippi, 394 U.S. 721, 726 (1969).

17. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

18. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767 (1966).

19. While the fourth amendment is often spoken of as a protection against unreasonable police intrusions, it is important to note that the amendment restrains the activities of more than just the police; its protections extend to the conduct of all government officials. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976) (postal inspector); United States v. United States Dist. Court, 407 U.S. 297 (1972) (government surveillances ordered by the President); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (Federal Bureau of Narcotics agents); *Camara*, 387 U.S. 523 (1967) (municipal code enforcement officer).

sic to [a] free society."[20] Unquestionably, the amendment addresses itself to police activity and functions as a restraint thereon.[21]

The scope of the fourth amendment is limited to searches[22] and seizures.[23] It is said to provide a two-part protection.[24] The language in the first clause of the amendment prohibits unrea-

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20. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

21. Terry v. Ohio, 392 U.S. 1, 11 (1968). The Court stated that "the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment." *Id.* (footnote omitted). *See generally* 2 W.R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 214 (1978). *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). Amsterdam states: "I continue to believe that the limits of American society's effective control over the largest part of the spectrum of police powers and potential abuses depend upon the scope given to the fourth amendment." *Id.* at 377.

Professor Amsterdam considers the fourth amendment the most comprehensive source of constitutional limitation on police activity. He recognizes that the first, fifth, sixth and fourteenth amendments also serve as a restraint on some police activities but explains that because they address the abuse of individual rights within the judicial system as well, those other amendments fall short of providing the scope of protection against police intrusions which the fourth amendment affords to individuals. A result, according to Amsterdam, is that "notwithstanding all of them, an enormous range of police power stands unrestrained and subject to abuse." *Id.* at 378. A review of recent Supreme Court and courts of appeals rulings, which have curtailed the scope of these amendments, illustrates the inadequate protection of the public against abusive police conduct, absent the fourth amendment.

22. A search is defined as a governmental intrusion into an area in which an individual has a reasonable and legitimate expectation of privacy. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Frequently, it is a fine line distinguishing an intrusion from a search. *Compare* Beck v. Ohio, 379 U.S. 89 (1964) (physical touching of body or clothing which causes hidden objects to be revealed constitutes a search) *with* Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971) (request that an individual turn over a hidden object does not constitute a search).

23. A person has been "seized" if, under the totality of the circumstances, a reasonable individual would not believe herself free to go. Thus, when an officer has in some way restrained the liberty of a citizen by a show of authority or use of physical force, the officer has "seized" the person. *Terry*, 392 U.S. at 16. *See, e.g., Watson*, 423 U.S. 411, 428 (1976) (arrest is "quintessentially a seizure"); Cupp v. Murphy, 412 U.S. 291, 294 (1973) (a seizure is any detention of an individual against her will); *Davis*, 394 U.S. 721, 726-27 (1969) ("investigatory detentions" are seizures for fourth amendment purposes).

24. *See* Payton v. New York, 445 U.S. 573, 584 (1980) ("As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from *unreasonable* searches and seizures and the second requiring that *warrants* be particular and supported by probable cause.") (footnote omitted) (emphasis added).

sonable searches and seizures;[25] police searches and seizures infringing on protected interests are violative of the fourth amendment only if they are unreasonable.[26] A necessary corollary of this principle is that there will be justifiable intrusions.[27] The second protection incorporated in the more specific clause of the fourth amendment provides that searches and seizures must be conducted under a warrant based on probable cause.[28] The warrant procedure requires that the warrant be issued by a "detached and neutral" magistrate[29] and state with *particularity* the persons and places to be seized and searched.[30] Deviation

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25. For the full text of the fourth amendment, see *supra* note 1.

26. The Supreme Court has stated that "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.") *Schmerber*, 384 U.S. at 768.

27. Just exactly what is a "justifiable" intrusion is not evident from the literature and case law. However, a balancing test has been adopted as the means for analyzing the constitutionality of conduct under the fourth amendment. According to the *Terry* Court, this test has three parts. First, one must identify the governmental interests that justified the intrusion and the specific facts which, when combined with reasonable inferences, justify the intrusion. Second, one must establish "the nature and quality of the intrusion on the individual's rights." Lastly, the identified interests must be balanced against one another to determine if the need to search or seize justified the intrusion. *Terry*, 392 U.S. at 22-27 (1968). *See infra* notes 57-68 and accompanying text for a more illustrative discussion of the balancing test.

28. *See supra* note 1 for the full text of the fourth amendment.

29. The importance of requiring that a "detached and neutral" magistrate issue a warrant cannot be overstated. The significance of the magistrate requirement has been explained on numerous occasions. *See, e.g.*, Johnson v. United States, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's *disinterested* determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id. at 13-14 (footnotes omitted) (emphasis added). *But see* 2 W.R. LAFAVE, *supra* note 21, at 29-41, 230-31 (LaFave commented that, based on empirical studies, there is reason to question the assumption that judicial authorization beforehand necessarily affords greater protection of fourth amendment rights. He observes that magistrates often act as a "rubber stamp" for police without engaging in meaningful and neutral examination of the complaint.).

30. A statement of the items or persons to be searched or seized is required by the

from this rule is permitted only in a few carefully drawn exceptions.[31]

There are valid reasons why searches and seizures made pursuant to a warrant are the preferred course of action.[32] The determination of probable cause by an impartial judicial officer is considered more likely to maximize fourth amendment protection of the individual's privacy than if judgment was made "by the officer engaged in the often competitive enterprise of ferret-

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express language of the amendment. For the full text of the fourth amendment, see *supra* note 1.

The historical root of this requirement can be traced back to the period when the general warrant or writ of assistance provided state officials with an unrestrained license to invade an individual's property or person. Stanford v. Texas, 379 U.S. 476, 481-86 (1965). Today, warrants not complying with the specificity requirements make a subsequent search or seizure illegal. *See, e.g.*, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 325-27 (1979) (open-ended warrant violated specificity provisions of warrant requirement); *Stanford*, 379 U.S. at 480 (warrant was invalidated on the ground that it was too general when 2000 items, unrelated to the purpose of the warrant, were seized pursuant to the warrant).

31. The routine, general border search is one category of searches excepted from the warrant requirement. Another is the exigent circumstances or emergency situation in which it is impractical to secure a warrant before conducting the search or seizure. *Amsterdam, supra* note 21, at 358-60, nn.102-26. For case law discussing exigent circumstances, see, e.g., Mincey v. Arizona, 437 U.S. 385, 394 (1978) (The Court refused to find exigent circumstances to justify a warrantless search at the scene of a homicide which lasted for four days and resulted in the seizure of 200-300 objects because, "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant."); United States v. Santana, 427 U.S. 38, 42-43 (1976) (The warrantless arrest of a suspect who retreated into the vestibule of her house was upheld where the police not only had probable cause to arrest but there was "a realistic expectation that any delay would result in destruction of evidence."); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (where suspected arrested felon entered house moments before the police arrived, a warrantless search of house was upheld because of the potential danger posed to the officers' lives and the threat that the suspect would escape or resist). *See also* Larkin, *Exigent Circumstances For Warrantless Home Arrests*, 23 ARIZ. L. REV. 1171, 1184 (1981) (identifying four situations where exigent circumstances for home arrests arise: (1) hot pursuit; (2) destruction of evidence; (3) possibility of violence; and (4) possibility of flight).

32. United States v. Leon, 468 U.S. 897, 914 (1984) ("[W]e have expressed a strong preference for warrants and declared that 'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.' ") (citing United States v. Ventresca, 380 U.S. 102, 106 (1965)).

Judicial attitudes expressing the significance of obtaining warrants is clear as possession of a warrant by an officer greatly reduces the perception of unlawful police action. The warrant assures a person of the officer's lawful authority, his need to search, and the limits of that power. *See* United States v. Chadwick, 433 U.S. 1, 9 (1977).

ing out crime."[33] However, the issuance of a warrant does not automatically validate a search or seizure. The Supreme Court has recognized that warrants and the magistrates issuing them are not infallible.[34] The Court will invalidate warrants not comporting with the essential elements of the warrant requirement.[35]

2. *Fourth Amendment Requirements*

As the language of the amendment clearly states,[36] warrants must be supported by a showing of probable cause.[37] However, the probable cause requirement must be met even when a warrant is not secured.[38] Thus, when an officer conducts a search or

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33. Johnson v. United States, 333 U.S. 10, 14 (1948).

34. Agnello v. United States, 269 U.S. 20, 24 (1925) (The Court recognizes that searches and seizures are not necessarily reasonable when made under warrants because they could have been issued for improper purposes.). Among the reasons for an invalid warrant are the failure of the magistrate to retain her detached and neutral status, failure of the warrant to include a particular statement of the items and persons to be searched or seized, failure to articulate facts and circumstances that establish probable cause, and knowing misstatements of facts. *See infra* note 52 and the case cited therein for an instance where a warrant was improperly issued.

35. These elements, set out in the second clause of the fourth amendment, are probable cause, review of the warrant affidavit by a detached and neutral magistrate, and specific identification of the items and persons to be searched or seized.

36. For the full text of the fourth amendment, see *supra* note 1.

37. Probable cause exists if the facts and circumstances known to the officer lead a prudent person to believe that the offense has been, or is being, committed. *Beck*, 379 U.S. 89, 91 (1964).

The value of the probable cause standard is well stated in Brinegar v. United States, 338 U.S. 160 (1949): "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.* at 176.

The need for the affidavit to contain a statement of *articulated facts and circumstances* in order to establish probable cause is paramount. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept — turning on the assessment of probabilities in particular *factual contexts* — not readily, or even usefully, reduced to a neat set of legal rules.") (emphasis added).

A frequently debated issue in the context of a probable cause discussion centers on whether the same quantum of proof is needed to establish probable cause as is needed to prove criminal guilt. The Court has clearly stated that the two are different and require different levels of proof. Thus, evidence insufficient to establish guilt is not automatically insufficient to establish probable cause. *Brinegar*, 338 U.S. at 172-73.

38. *See generally* Draper v. United States, 358 U.S. 307, 310 (1959) (The crucial question in the warrantless arrest was whether there was probable cause to believe the

seizure in the absence of a warrant, the officer must present to a magistrate the facts and circumstances that constitute probable cause to believe that the suspect was engaging in criminal conduct. The Supreme Court has held that in order for the police officer's conduct to withstand fourth amendment challenges there must be a showing of probable cause made shortly after the search or seizure.[39]

Probable cause is an *objectively* determined standard.[40] It

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petitioners were violating or had violated the narcotics law. If they were, the warrantless arrest was legal); Carroll v. United States, 267 U.S. 132, 156-57 (1925) (Prohibition officers acquired information concerning the transportation of contraband liquor. Based upon this information, the officers conducted a warrantless search of a car on a highway. The highway was frequently used in the illegal transportation of liquor. The Court held that the measure of the legality of the seizure depended on whether the officers had probable cause to believe the automobile had contraband liquor in it and whether the liquor was being illegally transported.); Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955):

> But, if officers can arrest without a warrant and never be required to disclose the facts upon which they based their belief of probable cause — if, in other words, they have an untouchable power to arrest without a warrant, — why would they ever bother to get a warrant? And the same obvious conclusion follows if the courts, when an arrest is attacked as illegal, will assume, without facts, that an arrest without a warrant was for probable cause. To strike down all factual requirements in respect to probable cause for arrests without a warrant, while maintaining them for the issuance of a warrant, would be to blast one of the support columns of justice by law.

Id. at 559-60. For a more in-depth discussion of probable cause, see *infra* notes 40-44.

39. Gerstein v. Pugh, 420 U.S. 103 (1975) (In cases of warrantless arrests, all persons have a right to a judicial hearing for a determination of probable cause when extended restraints on the individual's liberty follow the arrest. The standard needed is that there was probable cause to believe that the suspect committed a crime.). *See generally* 2 W.R. LAFAVE, *supra* note 21, at 244-52 (discussing the need for prompt judicial review of warrantless arrests as provided for in *Gerstein* and questioning whether, in fact, such requirement is conscientiously followed by courts).

40. *Beck*, 379 U.S. at 97 ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."); Henry v. United States, 361 U.S. 98, 102 (1959) ("[G]ood faith on the part of the arresting officers is not enough."). *But see Leon*, 468 U.S. 897, 922-23 (1984) where it was held that an officer's good faith reliance on a warrant based on a magistrate's determination of probable cause may not trigger exclusion of evidence obtained pursuant to the warrant where the warrant is later found invalid, providing the officer's reliance is objectively reasonable and the application for the warrant was supported by more than just a bare bones affidavit. The Court limited the scope of this good faith exception to situations addressing whether or not the exclusionary rule should be applied in unconstitutional searches and seizures. The Court was not intending to suggest a lowering of the probable cause standard. Thus, this decision did not conflict with the cases discussed above which dealt with the good faith belief of officers that there was probable cause to issue the warrant.

exists where the facts and circumstances known by the officer, and of which the officer has reasonably trustworthy information, are sufficient on their own to lead a reasonably prudent person to believe that an offense has been or is being committed.[41] When a search or seizure is conducted without a warrant the officer at the scene determines whether there is probable cause.[42] As previously noted however, searches and seizures are generally performed pursuant to a warrrant,[43] with a "detached and neutral" magistrate determining probable cause.[44]

Notwithstanding the fourth amendment warrant and probable cause requirements, the constitutional minimum for all searches and seizures is "reasonableness."[45] The task of articulating a definition of reasonableness has plagued the courts from the fourth amendment's inception.[46] Due to the magnitude of police activities,[47] the formulation of a comprehensive definition of reasonableness is considered unrealistic and impractical. As a consequence, the reasonableness of police conduct has come to be determined on a case-by-case basis. The facts and circum-

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Id. at 915 n.13. After *Leon*, probable cause was still a minimum constitutional requirement for a legal search or seizure.

41. *See supra* note 37.

42. 2 W.R. LAFAVE, *supra* note 21, at 225.

43. For those unusual circumstances when a warrant is not required for a legal search or seizure, *see supra* note 31. The courts have repeatedly stated that searches and seizures conducted in the absence of a warrant are the exception, not the rule. Unless exigent circumstances are shown, a warrant based on probable cause is needed for a legal search or seizure. *See Coolidge*, 403 U.S. at 474-75 (searches and seizures without a warrant are *per se* unreasonable unless police can show that they fall into one of the carefully defined exceptions based on exigent circumstances).

44. *See supra* note 29. After reviewing a sworn affidavit containing a statement of facts, the magistrate decides whether a reasonably prudent person would believe there was probable cause to arrest or search based on the facts and circumstances of the particular situation. Aguilar v. Texas, 378 U.S. 108, 114 (1964).

45. For the full text of the fourth amendment, the first clause of which requires that all searches and seizures be reasonable, see *supra* note 1.

46. "Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court." *Camara*, 387 U.S. 523, 528 (1967).

This definitional problem has plagued scholars as well as the courts. For a comprehensive review of the fourth amendment and the development of its black letter law, see generally *Amsterdam*, *supra* note 21.

47. For a partal list of activities and duties which comprise a police officer's job, see *Amsterdam*, *supra* note 21, at 381.

stances of each case become the focal point of analysis in determining whether particular police conduct was reasonable.[48]

Despite these definitional problems, certain principles have evolved that give shape to the reasonableness standard. A governing principle, recognized for years, is that warrantless searches and seizures on private property are *per se* unreasonable.[49] That is not to say, however, that absent a warrant, a search or seizure is always unreasonable. In instances when a search or seizure is conducted without a warrant, the reasonableness of the conduct depends upon the scope of the intrusion and the exigencies of the situation.[50] When the degree of the intrusion is tailored to fit the need for the invasion, a reasonable, though warrantless, search or seizure may be permissible.[51]

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48. *See, e.g.*, Scott v. United States, 436 U.S. 128, 140-42 (1978) (Government interception of phone calls made by defendant in a public phone booth was reasonable because invasion was minimized by interception of only defendant's calls. Motives of agents were immaterial to a determination of reasonableness because the degree of the intrusions was limited to meet the needs of the search.); Chimel v. California, 395 U.S. 752, 763 (1969) (A search of the individual and the area under his immediate control, incident to a valid arrest, was reasonable because it was necessary for the officer to protect her own safety.); *Schmerber*, 384 U.S. 757 (Bodily intrusions, because they involve a greater degree of invasion of the person, require a higher level of reasonableness. Here, the taking of a blood sample, after arrest for drunk driving, was reasonable because the alcohol level in the blood decreases soon after drinking stops.).

49. *Payton*, 445 U.S. 573. The Court recognizes a difference between searches and seizures on private property as opposed to those made on public property. The two have come to be treated differently. In *Watson*, 423 U.S. 411, the Court upheld a warrantless seizure in a public place though the officers had time to secure a warrant. The officers, on the basis of an informant's tip, had probable cause to believe the defendant had stolen credit cards in his possession at the time of the arrest. Recognizing that obtaining a warrant was a preferred course of action, the Court, nonetheless, refused to transform the judicial preference into a constitutional standard for searches and seizures on public property. *Id.* at 423. Instead, it relied on the common law rule that a warrantless arrest in a public place was valid if the officer had probable cause to believe the suspect was a felon. Furthermore, the Court took notice of the continued adoption of the common law rule in many states. *Id.* at 421-22. The Court upheld the seizure.

In distinguishing *Watson*, the Court in *Payton* relied on the private character of the property, to wit, the home. Because the intrusion in *Payton* entailed violation of the privacy of the individual *and* the sanctity of the home, the Court held, "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590.

50. *Terry*, 392 U.S. at 17-18 n.15.

51. *Id.* at 29-30. In *Terry*, the Court held that Officer McFadden's temporary detainment and pat-down search of the defendant was reasonable. The defendant's suspicious conduct alerted the officer's attention. The subsequent seizure and search, because they were limited to the need for the officer to protect the safety of the public and him-

Failure to comply with the fourth amendment requirements invalidates the search or seizure,[52] and evidence derived from the illegality may be excluded[53] from the trial regardless of its relevance and trustworthiness.[54] These fourth amendment requirements are made applicable to the states through the fourteenth amendment.[55] Thus, the conduct of state government officials must undergo the same scrutiny for reasonableness as that of federal officials.

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self, were reasonable.

52. *See, e.g., Lo-Ji Sales*, 442 U.S. at 325-27 (warrant invalidated because the justice who issued the warrant did not perform as a detached and neutral magistrate and because the warrant was open-ended, thereby, violating the fourth amendment requirement that warrants state with particularity the persons and places to be searched or seized).

53. The exclusionary rule is a judicially created doctrine that excludes the products of unreasonable searches and seizures from admission to evidence. It is the primary instrument for enforcing the fourth amendment and is intended to deter officers from conducting unreasonable searches and seizures. Weeks v. United States, 232 U.S. 383 (1914). The rule is equally applicable to the states. "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Not all searches and seizures failing to comply with the fourth amendment necessarily result in the exclusion of evidence, however. Recently, the Court, in *Leon*, 468 U.S. 897 (1984), created an exception to the general rule that fruits of an illegal search or seizure are inadmissible at trial. Here, the officers secured a facially valid search warrant from a detached and neutral magistrate. The suspect sought to exclude the evidence as fruits of an illegal search. The court of appeals, affirming the district court, granted the motion to suppress on the grounds that the magistrate improperly issued the warrant because the affidavit did not show probable cause. The lower court criticized the affidavit because it did not establish the credibility of the informant from whom the officers received information, nor did it set forth other facts to establish probable cause.

The Supreme Court reversed the order to suppress, creating an exception to the exclusionary rule based on the officer's good faith belief in the validity of the warrant. The Court reasoned that to exclude the evidence when an officer reasonably believed he was conducting himself legally would not further the objective of the exclusionary rule — to deter officers from violating the fourth amendment proscription against unreasonable searches and seizures. *Id.* at 916-17. *See generally* Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984).

54. *Davis*, 394 U.S. at 724. Here the Court rejected the state's argument that fingerprints are excepted from the exclusionary rule because they are a trustworthy piece of evidence. The fingerprints, obtained in the course of an illegal seizure, were ordered excluded from the evidence and Davis' conviction was reversed. *Id.* at 728.

55. *Mapp*, 367 U.S. at 655.

3. *Constitutional Analysis Under the Fourth Amendment: The Balancing Test*

Any constitutional challenge to a police action requires an analysis of the reasonableness of the conduct. Reasonableness does not readily lend itself to an exacting definition because it must be assessed according to the facts and circumstances of each situation.[56] To determine the reasonableness, the Court balances the interests of the government and those of the individual.[57] Through its balancing, the Court determines whether the need to seize the person or property and the degree of governmental intrusion justify the resulting invasion of the individual's interests.[58]

In the area of constitutional challenges to state deadly force statutes, identifying the state's interests and assigning a weight to them has become a major obstacle in implementing the balancing test.[59] Recognizing the difficulty in delineating state interests, one court has identified protection of the public's personal security and preservation of the criminal justice system's effectiveness and integrity as governmental interests.[60] Protection of police officers from unreasonable risks in an already dangerous profession is another.[61] Further, commentators have iden-

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56. *See supra* note 48 and cases cited therein.

57. *See Terry*, 392 U.S. at 22-27; *Camara*, 387 U.S. at 534-39. For an illustration of this balancing test see *infra* notes 58-68.

58. For an application of this test see, e.g., *Garner*, 105 S. Ct. 1694, 1700 (1985) (state interest in effective law enforcement does not outweigh individual's interest in life); Mattis v. Schnarr, 547 F.2d 1007, 1019 (8th Cir. 1976), *vacated as moot per curiam sub nom.*, Ashcroft v. Mattis, 431 U.S. 171 (1977).

59. Some cases dealing with deadly force in which the balancing test has been implemented show that courts do not always identify the same state interests. *See, e.g., Garner*, 105 S. Ct. 1694, 1700 (1985) (effective law enforcement and securing peaceful submission of felons); Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1252 (6th Cir. 1977) (protect citizens against danger posed by felons), *cert. denied*, 434 U.S. 822 (1978); *Mattis*, 547 F.2d at 1023 (Gibson, C.J., dissenting) (effective law enforcement, apprehension of criminals, prevention of crime and protection of members of general populace). *See generally* Comment, *The Use of Deadly Force to Arrest: Conflicting and Uncertain Standards in the Courts*, 12 CREIGHTON L. REV. 655 (1978) [hereinafter cited as *Use of Deadly Force to Arrest*] (examining the difficulty with identifying state and individual interests). *See also infra* notes 60-68 and accompanying text.

60. *Mattis*, 547 F.2d at 1023 (Gibson, C.J., dissenting).

61. *Terry*, 392 U.S. 1. "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Id.* at 23.

tified the state's interests in maintaining the effectiveness of the arrest process,[62] the protection of personal property,[63] and the negative impact of crime on the individual and the community[64] as legitimate governmental interests. Alternatively, identifying the individual's interests has posed less of a problem. As the Constitution expressly provides[65] and as the case law recognizes, the interests of the individual generally include an interest in life, liberty, and property.[66]

Beyond these identification obstacles there is disagreement among the courts as to the "weight" to be assigned to each of the interests for balancing purposes. One view urges that the state's duty to protect the public's personal security is paramount,[67] while another argues that the individual's right to life is fundamental and should prevail over all other interests.[68] Unavoidably, the problems associated with implementing the balancing test have increased the difficulty in developing a harmonious and consistent constitutional assessment of police conduct.[69]

B. *Deadly Force Statutes*

1. *Common Law Origin*

The privilege to use deadly force, incorporated in present day deadly force statutes, originated in the common law.[70] The cornerstone of the common law rule was a distinction between felonies and misdemeanors.[71] Deadly force could be used against

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62. *See* Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448, 466-67 (1940).

63. *See generally* Bohlen & Burns, *The Privilege to Protect Property By Dangerous Barriers and Mechanical Devices*, 35 YALE L.J. 525 (1926).

64. Comment, *Use of Deadly Force to Arrest*, *supra* note 59, at 680.

65. For the relevant text of the fourteenth amendment see *supra* note 5.

66. *Garner*, 105 S. Ct. at 1700; *Mattis*, 547 F.2d at 1017.

The Supreme Court has often spoken of the rights to life and liberty as fundamental human rights. *See* Screws v. United States, 325 U.S. 91, 123 (1945) (Rutledge, J., concurring); Johnson v. Zerbst, 304 U.S. 458, 462 (1938); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

67. This was the position held by the court in *Wiley*, 548 F.2d at 1252.

68. This position was taken by the Eighth Circuit in *Mattis*, 547 F.2d at 1017.

69. *See* Comment, *Use of Deadly Force to Arrest*, *supra* note 59, at 680.

70. *See infra* notes 71-77 and accompanying text.

71. *See* Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12

any fleeing *felon* if necessary to effect an arrest.[72] At no time, however, could such force be used against a *misdemeanant*.[73]

The rationale behind this rule rested upon the fact that all felonies at common law were punishable by death.[74] When deadly force was used to capture fleeing felons it was merely considered an acceleration of the penal process.[75] The rationale of the rule was further substantiated by the fact that there was no effective police force network.[76] If a felon initially eluded capture, it usually meant there would never be an arrest. In addition, before the development of revolvers and other advanced weaponry, police officers had rudimentary weapons to use for protection. Thus, arrests were usually procured in hand-to-hand combat.[77] These realities accented the need for some means to facilitate capture on the first effort. Deadly force was the tool

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WM. & MARY L. REV. 67, 68 (1970) [hereinafter cited as *Justifiable Use of Deadly Force*].

72. For cases and further commentary interpreting the common law, see, e.g., 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). *See also* 2 HALE, HISTORY OF THE PLEAS OF THE CROWN 85-86 (1788) (deadly force allowed to effect the arrest of a fleeing felon); BLACKSTONE, COMMENTARIES 290-93 (Garland ed. 1978) (reprint of 9th ed. 1783) (announcing the imperative that upon the commission of a felony, hue and cry shall be raised upon the felons and *all means necessary* be used to capture the felons). *See generally* Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71 (1980); Comment, *Deadly Force To Arrest: Triggering Constitutional Review*, 11 HARV. C.R.-C.L. L. REV. 361 (1976) [hereinafter cited as *Deadly Force*].

73. For cases and commentary stating this principle, see United States v. Clark, 31 F. 710, 713 (E.D. Mich. 1887) (dictum); Reneau v. State, 70 Tenn. 720 (1879). *See also* Note, *Legalized Murder Of A Fleeing Felon*, 15 VA. L. REV. 582 (1929) [hereinafter cited as *Legalized Murder*].

74. For sources discussing this rationale see Jones v. Marshall, 528 F.2d 132, 138 (2d Cir. 1975); MODEL PENAL CODE § 3.07 comment 3 (Tent. Draft No. 8, 1958); BLACKSTONE, *supra* note 72, at 94; Sherman, *supra* note 72, at 74; *Deadly Force*, *supra* note 72, at 365; *Justifiable Use of Deadly Force*, *supra* note 71, at 68; *Legalized Murder*, *supra* note 73, at 583.

There is some disagreement about what crimes were felonies at common law. *Compare Jones*, 528 F.2d at 138 (arson, burglary, robbery, rape, murder and manslaughter) *with Mattis*, 547 F.2d at 1011 n.7 (sodomy, larceny, mayhem and prison break also listed). *See also Legalized Murder*, *supra* note 73, at 583 (the test for a felony was the penal consequence of forfeiture of land or goods).

75. "It was considered dangerous to allow a felon to be at large; and in committing a felony, the actor forfeited his right to life. The extirpation was but a premature execution of the inevitable judgment." *Legalized Murder*, *supra* note 73, at 583 (footnote omitted).

76. *See* Sherman, *supra* note 72, at 74.

77. *Id.* at 74-75.

chosen to effectuate immediate apprehension.

In the late nineteenth century, changes in the criminal law and in technology brought the rationale supporting the common law rule into doubt.[78] First, there was an increase in the number of crimes labelled felonies and a corresponding decrease in the use of capital punishment as a sanction.[79] Second, there was a sophistication in the weaponry available to police. In the 1850's, police began to carry revolvers as their standard weapon, so officers no longer had to subdue felony suspects in hand-to-hand combat.[80] Third, an expansive police force network was beginning to take shape. Communication between agencies from city to city was becoming commonplace.[81] The combined effect of these changes led to a deterioration of the common law rationale.[82]

Some courts were sensitive to the deterioration of the common law rationale and expressed an interest in modifying the rule.[83] In *United States v. Clark*,[84] the court hypothesized that an officer would not be justified in using deadly force against an individual suspected of committing the felony of petit larceny; such severe force was disproportionate to the magnitude of the offense.[85] Two years later, in *Reneau v. State*,[86] the issue of deadly force against suspects of lesser felonies was again raised.

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78. *Id.* at 75-76.

79. *Id. See, e.g., Watson*, 423 U.S. at 440-41 n.9 (1976) (Marshall, J., dissenting) (examples of common law misdemeanors which are now felonies: 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); *See also Deadly Force, supra* note 72, at 366; *Justifiable Use of Deadly Force, supra* note 71, at 70-71; *Legalized Murder, supra* note 73, at 584 (new felonies have been created by legislation, many of which are not punishable by death).

80. For a more in depth discussion of the impact that sophistication of weaponry had on the common law rule, see Sherman, *supra* note 72, at 75.

81. *Id.* at 76.

82. Because not all felonies carried the sanction of death, it no longer made sense to perceive deadly force as merely an acceleration of the penal process. Danger to officers was reduced because they could shoot from a distance. Finally, the probability that an escaping felon would never be captured decreased as a consequence of the improved communication system among police agencies and the sophistication of apprehension techniques. *Id.*

83. *See infra* notes 84-87 and accompanying text.

84. 31 F. 710 (E.D. Mich. 1887).

85. *Id.* at 713.

86. 70 Tenn. 720 (1879).

The court in *Reneau* concluded, that in certain felony circumstances, it would be better to allow escape than to take a life.[87] Shortly after these changes in the law, changes in technology emerged, accompanied by a change in judicial perspective on the use of deadly force. In addition, the legislatures of various states began to reconsider the issue of deadly force.[88]

2. *Statutory Response*

Today almost all states have some rule limiting the use of deadly force by police, created either by legislation or judicial interpretation. While there is no uniformity among the states, these rules can be essentially grouped into three categories.[89]

Statutes codifying the common law rule authorize the use of deadly force to effect the arrest of fleeing felony suspects regardless of the felony committed.[90] Presently, twenty-four states adopt this form of a deadly force statute.[91]

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87. *Id.*

88. *See infra* notes 89-98 and accompanying text.

89. These three categories are (1) codification of the common law; (2) Model Penal Code approach; and (3) forcible or dangerous felony approach. *See generally Justifiable Use of Deadly Force, supra* note 71.

90. *Justifiable Use of Deadly Force, supra* note 71, at 72-75.

Tennesssee's deadly force statute is one example of a codification of the common law. For the text of the statute, see *supra* note 8.

91. *See* ALA. CODE § 13A-3-27(b)(1) (1982); ARK. STAT. ANN. § 41-510(2) (1977); CONN. GEN. STAT. ANN. § 53a-22(c)(2) (1958); FLA. STAT. § 776.05 (1981); IDAHO CODE § 19-610 (1979); KAN. STAT. ANN. § 21-3215 (1981); MISS. CODE ANN. § 97-3-15(1) (Supp. 1972-1985); 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(1)(d) (1985); R.I. GEN. LAWS § 12-7-9 (1981); S.D. CODIFIED LAW 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).

California has codified the common law rule but courts have construed it narrowly to include only violent felonies. *See, e.g.*, Kortum v. Alkire, 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (Cal. App. 1977); CAL. PENAL CODE § 196(3) (West 1970). Indiana has also codified the common law rule but an Indiana state court has restricted the common law statute to a standard similar to the one in the Model Penal Code. *See* Rose v. State, 431 N.E.2d 521, 523 (Ind. App. 1982) (deadly force was only justified to prevent injury or threatened use of force but not to prevent an escape); IND. CODE ANN. § 35-41-3-3(b)(2) (Burns 1985).

The following states have no deadly force statute but follow the felony/misdemeanor distinction characteristic of the common law rule: Maryland, Michigan, Montana, Ohio, Virginia, and West Virginia. South Carolina has no justifiable homicide law but it has a statute allowing *citizens* to use deadly force to apprehend a suspected felon at night. S.C. CODE ANN. § 17-13-20 (Law. Co-op. 1976).

In response to concern over the improvident use of deadly force by police, the American Law Institute proposed a second, more restrictive rule limiting the use of deadly force in the Model Penal Code.[92] This rule authorizes the use of deadly force only when the arrest is for a felony and the officer believes that the suspected felon has either committed a crime involving deadly force or presents a threat of substantial bodily harm if not apprehended immediately.[93] Fifteen states presently adopt some version of the Model Penal Code.[94]

The third, most restrictive rule defining the use of deadly force authorizes the privilege to use deadly force only in instances when the felony committed threatens deadly harm.[95] This type of statute lists the felonies under which the privilege is allowed.[96] It is the least popular among state

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92. *See Use of Deadly Force to Arrest, supra* note 59, at 662 (citing MODEL PENAL CODE § 3.07 comment 3 (Tent. Draft No. 8, 1958)). This same concern is again repeated in MODEL PENAL CODE § 3.07 comment 3 (1962).

The MODEL PENAL CODE § 3.07(2) provides in relevant part:

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

93. MODEL PENAL CODE § 3.07(2)(b)(i), (iv)(A) and (B) (1962).

94. *See* ALASKA STAT. § 11.81.370(a) (1985); ARIZ. REV. STAT. ANN. § 13-410(A) (1978) (this provision is more restrictive than the Model Penal Code); COLO. REV. STAT. § 18-1-707(2)(b) (1978); DEL. CODE ANN. tit. 11, § 467(c) (1979); HAW. REV. STAT. § 703-307(3) (1976); IOWA CODE ANN. § 804.8 (West 1979); KY. REV. STAT. ANN. 503.090(2) (Michie/Bobbs-Merrill 1985); N.H. REV. STAT. ANN. § 627:5(II)(b) (1974); N.C. GEN. STAT. § 15A-401(d)(2) (1983); ME. REV. STAT. ANN. tit. 17A, § 107(2)(b) (West 1983); MINN. STAT. ANN. § 609.066 (2) (West Supp. 1986); NEB. REV. STAT. § 28-1412(3)(d) (1979); TEX. PENAL CODE ANN. § 9.51(c) (Vernon 1974). Deadly force is allowed only when the felon uses physical force to flee or has the capacity to use deadly force.

For an example of how an Indiana court has construed the common law statute to a standard similar to the Model Penal Code, see *supra* note 91.

Massachusetts, though once a follower of the common law, seems to have adopted the Model Penal Code limitations with regard to police officers. *See* Julian v. Randazzo, 380 Mass. 391, 403 N.E.2d 931 (1980).

95. These statutes are known as "forcible felony" laws. *See Justifiable Use of Deadly Force, supra* note 71, at 80-81.

96. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 2-8 (Supp. 1986) (adopting the forcible felony approach). " 'Forcible felony' means treason, murder, voluntary manslaughter, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, arson, kidnap-

legislatures.[97]

New York's deadly force statute is illustrative of this "listing" characteristic. It authorizes deadly force only when the felony involves the use of deadly force or the felony is kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime.[98]

3. *Case Law Under State Deadly Force Statutes*

Despite the fact that courts have repeatedly shown a reluctance to strike down deadly force statutes as unconstitutional,[99] cases continue to appear on federal and state court dockets.[100] Typically, these cases are decided on a factual analysis of the reasonableness of the police officer's conduct, rather than on the constitutionality of the statute itself. One case in which the statute was found to be invalid is *Mattis v. Schnarr*.[101] There, the

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ping, aggravated battery and any other felony which involves the use or threat of physical force or violence against an individual." *Id.*

97. *See* GA. CODE ANN. § 16-3-21(a) (1984); ILL. ANN. STAT. ch. 38, § 7-5 (Smith-Hurd 1984); N.J. STAT. ANN. § 2C:3-7(b)(2) (West Supp. 1982); N.Y. PENAL LAW § 35.30(1)(a) (McKinney 1975 & Supp. 1986); N.D. CENT. CODE § 12.1-05-07(2)(d) (1985); 18 PA. CONS. STAT. ANN. § 508(a)(1) (Purdon 1983); UTAH CODE ANN. § 76-2-404(2)(b) (1978).

California, has restricted the use of deadly force to only violent felony situations. *See supra* note 91.

Louisiana has no law governing the use of deadly force to capture a fleeing felon but it does have a justifiable homicide statute that allows deadly force to prevent a violent felony. LA. REV. STAT. ANN. § 14:20(2) (West 1986).

Vermont has no fleeing felon deadly force statute but it does have a justifiable homicide statute that allows deadly force to prevent a homicide. VT. STAT. ANN. tit. 13, § 2305(2) (1974 & Supp. 1984).

98. *See* N.Y. PENAL LAW § 35.30(1)(a)(ii) (McKinney 1975 & Supp. 1986).

99. For a discussion of the cases in which challenges to police use of deadly force under state statutes have been repeatedly dismissed, see *infra* notes 117-44 and accompanying text. *But see infra* notes 101-16, 148-49 and accompanying text (cases where these challenges under state deadly force statutes were successful).

100. For a review of these cases, see *infra* notes 101-44 and accompanying text.

101. 547 F.2d 1007 (8th Cir. 1976). In this case, the suspected felon, eighteen-year old Michael Mattis, and a friend were discovered at a golf driving range office at 1:20 a.m. As police arrived, the two climbed out a back window. Defendant, Officer Schnarr, shouted at the boys to stop. When they did not, he gave a warning, "Halt or I'll shoot." He fired one shot into the air and one toward the boys. Meanwhile, defendant Officer Marek collided with Mattis as he came around the corner of the building. After a slight scuffle, Mattis broke loose and began to escape once again. Marek, believing he needed to do something more to prevent escape, warned Mattis to stop or he would shoot. He shot in Mattis' direction. Mattis was hit and later died.

The father of the suspect brought a suit against the officers and the City of Olivette

Eighth Circuit held that deadly force could not constitutionally be used to effect the arrest of a fleeing burglar who did not threaten life during the commission of the crime and who posed no threat to the pursuing officers.[102] The court reasoned that the Missouri statute created a presumption that all fleeing felons are dangerous to society and officers; the statute was a violation of the suspect's fourteenth amendment due process rights.[103]

Taking notice of the erosion of the common law rationale on the use of deadly force, the court in *Mattis* rejected the rule.[104] The court turned to a balancing of both the suspect's and the state's interests to determine if the use of such severe force was justified. Finding no compelling state interest to justify the taking of Mattis' life, the court invalidated the Missouri statute as a violation of the individual's due process rights under the fourteenth amendment.[105]

Subsequent to *Mattis*,[106] the same court decided *Landrum v. Moats*,[107] a Nebraska case in which the plaintiff's allegation also prevailed; but here the court looked only to the conduct of the officer.[108] The suspect, Landrum, was shot in the back as he fled from the scene of a burglary.[109] The Eighth Circuit found the Nebraska officer's actions to be an unreasonable use of deadly force against the suspect.[110] The court of appeals held that because the officer did not believe that the crime committed involved the use or threatened use of deadly force or that

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alleging deprivation of Michael's eighth, ninth, and fourteenth (due process and equal protection) amendment rights. The father sought monetary damages and a ruling that the Missouri statute was unconstitutional. *Id.* at 1009-10.

102. *Id.* at 1020.

103. *Id.* at 1019. The presumption created by the statute violated the suspect's fourteenth amendment due process rights by depriving him of his right to a trial before he was deprived of his life.

104. *Id.* at 1016.

105. *Compare Mattis* at 1019 *with Wiley*, 548 F.2d 1247 *and Jones*, 528 F.2d 132 (similar statutes upheld under a due process challenge).

Mattis was later vacated as moot *per curium sub nom.*, Ashcroft v. Mattis, 431 U.S. 171 (1977) (decision on jurisdictional power was vacated on procedural grounds). Nonetheless, *Mattis* has continued as persuasive authority in subsequent litigation challenging the constitutionality of deadly force statutes.

106. 547 F.2d 1007 (8th Cir. 1976).

107. 576 F.2d 1320 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978).

108. *Id.* at 1324.

109. *Id.* at 1323.

110. *Id.* at 1327.

Landrum would cause serious harm if not immediately apprehended, the officer did not meet the prerequisites for the use of deadly force, and therefore, his actions were unreasonable.[111] Because the officer's actions were found to be unreasonable, the court never reached the constitutionality of this deadly force statute.

Similarly, in *Clark v. Ziedonis*,[112] a challenge to the officer's use of deadly force was successful wherein the officer's conduct was found unreasonable when he shot and wounded two youths as they fled from the officer.[113] Plaintiffs brought suit against the officer for violations of their civil rights under the eighth, ninth, and fourteenth amendments.[114] It was established that the area was well-lit and that the plaintiffs were a short distance away from the officer at the time of the shooting.[115] On these facts, the court found that the officer could not reasonably have believed that excessive force was needed.[116] Again, the statute's constitutionality was never addressed.

In *Cunningham v. Ellington*,[117] the District Court for the Western District of Tennessee, found Tennessee's deadly force statute constitutional. The decedent was shot and killed as he fled from a burglary attempt.[118] Suit was brought challenging the constitutionality of the statute and alleging violation of de-

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111. *Id.* at 1326. Moats admitted that he did not believe that the crime committed involved the use or threatened use of deadly force or that Landrum would cause dangerous harm if not immediately apprehended, as was required by the Nebraska statute. *Id.*

Because the trial jury failed to find the conduct unreasonable under the circumstances, the verdict was unsupported by the evidence and the court of appeals reversed and remanded for a new trial. *Id.* at 1330-31.

112. 513 F.2d 79 (7th Cir. 1975).

113. The youths were 13 and 14 years old. They had been ringing the front and back doorbells of a house, and the owner called the police. When the boys saw the police they began to run away. Believing they attempted to commit a burglary, the officer pursued them and ordered them to halt. Upon a second halt order, one of the boys turned towards the officer, wielding a 12-inch file which the officer said he believed was a gun. The officer then fired a warning shot over his head. The boy turned towards him again and at that instant the officer fired a second time, wounding both boys. They were about 45 feet away from the officer and in a well-lit area when the officer shot at them. *Id.* at 80.

114. *Id.* at n.1.

115. *Id.* at 82.

116. *Id.* at 81.

117. 323 F. Supp. 1072 (W.D. Tenn. 1971).

118. *Id.* at 1074.

cedent's constitutional rights under the eighth[119] and fourteenth[120] amendments.[121]

The court determined that the deadly force statute, as construed by Tennessee state courts,[122] was constitutional because it limited the use of deadly force by an officer against an escaping suspect to only those instances where three requirements were met. The officer must: (1) reasonably believe a felony was committed, (2) give an arrest warning, and (3) reasonably believe no means less than such force will prevent escape.[123] The court held further that there was no violation of the eighth amendment;[124] that the statute was not unconstitutionally vague; and that it did not violate the fourteenth amendment due process clause.[125]

A few years later, the constitutionality of the same Tennessee statute was again upheld in *Wiley v. Memphis Police Department*.[126] Here the decedent was shot and killed as he ran from the scene of a burglary at a sporting goods store.[127] Wiley's mother instituted suit against both the officer and the police department seeking monetary damages and a determination that the statute violated her son's fourth,[128] fifth, sixth, eighth, thirteenth, and fourteenth amendment rights.[129] Recognizing the threat posed by burglary and the need to leave assessment of state and individual interests to the legislature, the Sixth Circuit refused to follow the decision in *Mattis* and upheld the constitu-

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119. This constitutional provision protects against cruel and unusual punishment.

120. This constitutional provision protects against a violation of due process rights.

121. 323 F. Supp. at 1075-76.

122. The statute was construed as a codification of the common law. *See* Scarbrough v. State, 168 Tenn. 106, 76 S.W.2d 106 (1934); Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1922); Reneau v. State, 70 Tenn. 720 (1879).

123. *Cunningham*, 323 F. Supp. at 1074-75.

124. The court stated that there simply was no punishment issue to address. *Id.* at 1075.

125. *Id.* at 1076.

126. 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977).

127. *Id.* at 1248.

128. The fourth amendment challenge was dismissed as meritless at the trial level. The appellate court never addressed the issue. *See* Note, *The Unconstitutional Use of Deadly Force Against Nonviolent Fleeing Felons: Garner v. Memphis Police Department*, 18 GA. L. REV. 137, 155 (1983).

129. *Wiley*, 548 F.2d at 1248.

tionality of the statute.[130]

In the years between *Cunningham* and *Wiley*, Connecticut's deadly force statute withstood constitutional challenge in *Jones v. Marshall*.[131] This case involved a high speed car chase following a suspected auto theft.[132] The suspects fled from the car and refused to heed the officer's orders to halt. The officer subsequently shot at the felons which resulted in the death of Jones.[133] Suit was brought alleging violation of the decedent's fourteenth amendment due process rights and seeking declaratory judgment that the Connecticut statute was unconstitutional as it permitted arbitrary imposition of death by officers.[134]

The court refused to accept the Model Penal Code as the constitutional standard by which to judge the statute, believing that to do so would be judicial legislating.[135] Instead, it balanced the interests of the state and of the individual, ultimately finding that the statute was not fundamentally unfair.[136]

Many other challenges to police use of deadly force have failed because the suits were dismissed on the ground that the officers' actions were reasonable. In *Beech v. Melancon*,[137] the officer's use of deadly force against suspected felons fleeing from a gas station burglary was held to be reasonable. In this case the concurring judge expressly reserved decision on the constitutionality of the authorizing statute explaining that the facts did not give rise to such an issue.[138]

Similarly, the Sixth Circuit, in *Qualls v. Parrish*,[139] dismissed constitutional challenges to Tennessee's deadly force statute by finding that the officer had probable cause to believe a felonious assault had occurred.[140] Consequently, his actions

130. *Id.* at 1254.
131. 528 F.2d 132 (2d Cir. 1975).
132. *Id.* at 133-34.
133. *Id.* at 134.
134. *Id.* at 136 n.9.
135. *Id.* at 142.
136. *Id.*
137. 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).
138. 465 F.2d at 426-27 (6th Cir. 1972) (McCree, J., concurring).
139. 534 F.2d 690 (6th Cir. 1976).
140. *Id.* at 693. Just earlier the same night, Sheriff Parrish had gotten a call about a woman being dragged at gunpoint by Wilbur Ellis. *Id.* at 692. Parrish had the call assigned to Officers French and Long, who happened to know Ellis. The officers were sitting in a diner and saw a Dodge they thought Ellis might be driving because Ellis worked

were found reasonable under the circumstances and his use of deadly force justified.[141]

The District Court for the Middle District of Tennessee found the officer's use of deadly force reasonable in *Smith v. Jones*, when the plaintiff's son tried to run the officer down with a car.[142] The plaintiff's suit, alleging deprivation of her son's due process rights, was dismissed.[143] The court found that the defendant had reasonable grounds to believe the deceased committed a felony and that no other means of apprehending the suspect were available.[144] Under Tennessee law, his use of deadly force was reasonable and no judgment on the statute's constitutionality was ever reached.

The fourth amendment is primarily addressed to police conduct. It would logically follow that challenges to the use of deadly force by the police would be made, first and foremost, under the fourth amendment.[145] However, the fourth amendment, in and of itself, has been virtually ineffective when used to challenge the validity of deadly force statutes.[146] In one of the

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at a Chrysler-Dodge dealership. The same car had been reported seen in the vicinity of the abduction. Quick acceleration of the car further strengthened the officers' suspicions. *Id.* The court found these facts to be sufficient to establish that the officers had probable cause to believe criminal activity was occurring. *Id.* at 693.

141. *Id.* at 694-95.

142. 379 F. Supp. 201, 202-03 (M.D. Tenn. 1973). Here, the plaintiff and friends had driven a police car a few blocks from where it was parked. The defendant officer, locating the car, approached it. Beside the police car was parked plaintiff's station wagon. One of the station wagon's occupants fled on foot upon seeing the officer. The officer stood in front of the station wagon and ordered the plaintiff and the other occupant to halt. Having moved into the driver's seat, plaintiff accelerated and drove towards the officer. At this time the officer fired two shots through the windshield and four more after he jumped out of the car's path. Plaintiff was fatally injured. *Id.*

143. *Id.* at 205.

144. *Id.* at 204-05.

145. *See supra* notes 16-35 and accompanying text (discussion of the purpose and scope of the fourth amendment).

146. The fourth amendment has been a successful avenue for challenges to the use of *excessive force*, as distinguished from deadly force, by police. Such force has been found to make the arrest an unreasonable seizure. *See, e.g.*, Davis v. Murphy, 559 F.2d 1098, 1102 (7th Cir. 1977) (police provocation of a fight with citizens gave rise to a cause of action); Carter v. Carlson, 447 F.2d 358, 360-61 (D.C. Cir. 1971) (officer beats suspect with brass knuckles), *rev'd on other grounds sub nom.*, District of Columbia v. Carter, 409 U.S. 418 (1973); Washington Mobilization Comm. v. Cullinane, 400 F. Supp. 186, 213 (D.D.C. 1975) (unreasonable search and seizure found where there were beatings and excited use of riot baton and chemicals).

few instances when a challenge to police use of deadly force was successfully lodged solely on fourth amendment grounds, the court's ruling in favor of the plaintiff was based on the unreasonable use of force by the officer.[147] In *Jenkins v. Averett*,[148] the defendant officer recklessly shot an individual who did not commit a crime. Because this was a seizure, Jenkins was protected from such reckless force under the fourth amendment.[149] Thus, the officer's unreasonable force required a judgment in favor of the plaintiff; the constitutionality of North Carolina's deadly force statute was never adjudicated. There had never been a successful challenge to a state deadly force statute on fourth amendment grounds until *Garner*.

III. The Case

A. *The Facts*

On October 3, 1974, at about 10:45 p.m., Memphis Police Officers Hymon and Wright were dispatched to respond to a burglary call.[150] Upon arrival, a neighbor told the officers she heard glass crashing and that "they" were breaking in next door.[151] While Officer Wright made the usual procedural location call to the dispatcher, Officer Hymon went around to the back of the house.[152]

Officer Hymon next heard a door slam and witnessed someone running across the yard.[153] With the aid of his flashlight Hymon located a figure, Garner, crouched against the fence.[154] The officer testified that he could not be certain whether Garner was armed.[155] Hymon ordered Garner to stop and took a few steps toward the suspect.[156] Garner then climbed the fence in an

147. Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970).

148. 424 F.2d 1228.

149. *Id.* at 1231-32.

150. Tennessee v. Garner, 105 S. Ct. 1694, 1697 (1985).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* Garner was a 15 year-old youth. *Id.*

155. *Id.* However, Officer Hymon is attributed with saying that he was reasonably certain Garner was not armed. *Id.*

156. *Id.*

effort to escape.[157] Believing Garner would escape if he went over the fence, Hymon shot and fatally wounded him.[158] Ten dollars and a purse were found on the felon's body.[159] The suspect's father filed suit against both the city and the officers, seeking damages under 42 U.S.C. § 1983[160] for violation of his son's constitutional rights.[161]

B. *Procedural History*

The District Court for the Western District of Tennessee dismissed the suit against the city, the officers, and their superiors, holding that the city was immune from liability[162] and that the officers were relieved from liability because they relied in good faith on the validity of Tennessee's deadly force statute.[163] The decision giving the city immunity was based on *Monroe v. Pape*,[164] which held that a city is immune from liability for civil rights violations resulting from activities conducted according to a city custom or policy.[165] Under *Monroe* a city was not a person for purposes of civil rights violations. Garner's father appealed.

Before this first appeal, *Monroe* was overruled in part by *Monell v. Department of Social Services*,[166] which held that a city was a person for purposes of a section 1983[167] action. Based on this change in law, the court of appeals in *Garner* reversed

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157. *Id.*

158. *Id.*

159. *Id.* at 1697-98.

160. 42 U.S.C. § 1983 (1981) states in relevant part:

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

161. *Garner*, 105 S. Ct. at 1698. Garner's father alleged that his son's fourth, fifth, sixth, eighth, and fourteenth amendment rights were violated. *See supra* notes 1-5 for the pertinent text of these amendments.

162. Garner v. Memphis Police Dep't, 710 F.2d 240, 242 (6th Cir. 1983).

163. *Id.*

164. 365 U.S. 167 (1961).

165. *Id.* at 187.

166. 436 U.S. 658 (1978). *Monell* is applicable because Garner's father alleged that his son's constitutional rights were violated as a result of policy or custom followed by the *city* police.

167. *See supra* note 160.

and remanded the case against the city for decision by the district court.[168] On remand, the district court heard arguments for reopening but dismissed the case on the grounds that the constitutional issues had been adjudicated in earlier cases[169] which upheld the constitutionality of state statutes authorizing the use of deadly force by police officers. Five months later the district court granted a motion for reconsideration and considered further offerings of proof by the defendant; the case was again dismissed.[170] While it affirmed its decision that the city was not immune from liability, the district court did not resolve the issue of whether the city could claim immunity based on its good faith reliance on previous federal and state interpretations of the Tennessee law.[171]

The case was appealed to the Sixth Circuit Court of Appeals. The three judge panel,[172] on reconsideration, reversed the district court's decision and remanded the case back to the district court for further proceedings.[173] It held: (1) that the city was not immune from liability under the civil rights statute,[174] and (2) that Tennessee's fleeing felon statute was unconstitutional under the fourth,[175] and fourteenth[176] amendments.

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

The court of appeals directed the district court to consider the following issues on remand: (1) whether the city had a qualified immunity or privilege based on good faith; (2) whether the municipality's use of deadly force under state law was permissible; (3) whether use of hollow point bullets was constitutionally permissible; and (4) whether the officer's conduct flowed from policy or custom for which the city could be held liable. *Id.* at 242.

169. *Id.* For a discussion of those cases see *supra* notes 117-44 and accompanying text.

170. Garner v. Memphis Police Dep't, 710 F.2d at 242.

171. *Id.* at 242-43. The district court held that the city was barred from claiming immunity from liability based on the good faith reliance *of its agents* under Owen v. City of Independence, 445 U.S. 622 (1980). However, the court left open the issue of whether the city could claim immunity based on the *city's* good faith reliance on the Tennessee statute as interpreted by federal and state courts.

172. These justices were Chief Judge Edwards, Circuit Judge Keith and Circuit Judge Merritt. Circuit Judge Merritt delivered the opinion of the court.

173. Garner v. Memphis Police Dep't, 710 F.2d at 249.

174. *Id.* at 248.

175. The court said the statute authorized an unreasonable seizure in violation of the fourth amendment.

176. *Id.* The due process clause of the fourteenth amendment was violated.

IV. The Supreme Court Decision

A. *Majority*

The six-member majority[177] addressed the issue of whether the Tennessee statute authorizing the use of deadly force to prevent the escape of an unarmed fleeing felon was constitutional. The Court held that it was unconstitutional insofar as the statute authorized the use of deadly force against a nonviolent fleeing felon.[178]

The Court began its analysis by recognizing that when deadly force is used to apprehend a suspect, it is a seizure subject to the restrictions of the fourth amendment.[179] Applying the fourth amendment reasonableness test, the majority weighed the individual's interest in life against the state's interest in effective law enforcement.[180] The Court sought to determine whether the state's interests were of such a compelling nature to justify the killing of a fleeing felon. It held that they were not.[181]

The Court conceded that the state had an interest in effective law enforcement but concluded that the use of deadly force did not further that interest. It reasoned that the privilege to use deadly force was a self-defeating law enforcement practice.[182] If effectively used, the practice would never put the criminal justice system into motion simply because there would be no suspects to bring to trial. The Court concluded that the threat of deadly force failed to have a positive effect on arrest rates.[183] The fact that police were allowed to use deadly force against fleeing felons under certain circumstances did not deter escape attempts. Lastly, the Court pointed to the trend among police departments to adopt policies forbidding the use of deadly force against nonviolent fleeing felons. Such policies were often similar to the Model Penal Code.[184] The Court interpreted

177. Justice White delivered the opinion of the Court.

178. Tennessee v. Garner, 105 S. Ct. 1694, 1701 (1985).

179. *Id.* at 1699.

180. For a discussion and illustration of this balancing test, see *supra* notes 56-68 and accompanying text.

181. *Garner* at 1700-01.

182. *Id.*

183. *Id.*

184. For the relevant text of the Model Penal Code, see *supra* note 92.

this trend as an indication that the use of deadly force was not an essential element of the arrest power in all felony situations.[185] These more restrictive policies convinced the majority that its decision would not require police to make "impossible, split-second evaluations of unknowable facts," as was urged by the dissent. Weighing the evidentiary considerations, the Court stated: "Petitioners and appellants have not persuaded us that shooting non-dangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life."[186]

The Court turned to an examination of the police procedures used in various jurisdictions in order to determine the reasonableness of the use of deadly force. The Court surveyed the status of state deadly force statutes and concluded that there was a trend away from the common law rule on deadly force.[187] Many states and their corresponding police units were putting greater restrictions on the privilege to use deadly force.[188] This strengthened the Court's refusal to find the use of such severe force against a burglary felon to be reasonable.

The Court recognized the importance of the common law in the development of the privilege to use deadly force but refused to construe the fourth amendment in light of the common law rule. It took notice of the legal and technological changes that have occurred since the emergence of the common law rule[189] and concluded that the "changes in the legal and technological context mean [that] the rule is distorted almost beyond recognition when literally applied."[190]

Finally, the majority affirmed the court of appeals' conclusion that under the facts it was unreasonable for Hymon to be-

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185. *Garner* at 1701.

186. *Id.*

187. *Id.* at 1703-05. For a discussion of the common law rule see *supra* notes 70-87.

188. *Id.* at 1704-05. This greater restriction was accomplished by adoption of the Model Penal Code as the rule for the use of deadly force. For a discussion of the Model Penal Code, see *supra* notes 92-99 and accompanying text.

189. *Id.* at 1702-03. For a discussion of these changes since the common law rule was first instituted, see *supra* notes 76-82 and accompanying text. Although the Court noted that the sophistication of weaponry eroded the rationale behind the common law rule, it failed to consider the increased availability of handguns and other weapons to criminals. This increased use of guns by criminals (violent and nonviolent) has created a great risk of danger to the police and the public. *See* Jones v. Marshall, 528 F.2d 132, 140 (2d Cir. 1975).

190. *Garner*, 105 S. Ct. at 1703.

lieve that deadly force was necessary to prevent Garner's escape.[191] Garner's physical characteristics such as his small size[192] and young age,[193] combined with the fact that he was unarmed, made it unreasonable for the officer to perceive him as threatening. The majority admitted that burglary was a serious crime but refused to characterize it as so serious that it would automatically justify the use of deadly force.[194] Absent any other circumstances, the majority held that Hymon did not have probable cause to believe that Garner posed a threat to him or others, thereby making the use of deadly force unreasonable.[195] The Court held Tennessee's deadly force statute unconstitutional and remanded the issue of the city's and the police department's liability for further proceedings consistent with the opinion.[196]

B. Dissent

The dissent, written by Justice O'Connor,[197] held that Officer Hymon's conduct was reasonable and that the Tennessee deadly force statute should not be held unconstitutional. The dissent addressed a narrower issue than the one decided by the majority. It considered whether the use of deadly force to apprehend a suspect was constitutional when the suspect resisted arrest by attempting to flee the scene of a *nighttime* burglary.[198] Justice O'Connor criticized the generality of the majority's framing of the issue, arguing that it led to a decision not tailored to the facts of the case.[199] Emphasizing that a ruling on the statute's constitutionality could not be made on the facts as they appeared through hindsight,[200] the dissent turned to the facts in

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191. *Id.* at 1706.

192. That Officer Hymon knew Garner was small in size is in controversy. He claimed Garner was 5'5" or 5'7" tall. *Id.* at 1697.

193. Officer Hymon's perception of Garner's age also contradicts the fact that the suspect was only 15 years old. The officer claimed he thought Garner was an adult. *Id.* at 1708.

194. *Id.* at 1706. *But see infra* notes 251-55 and accompanying text (persuasive evidence contradicting this characterization of burglary).

195. *Garner* at 1706.

196. *Id.* at 1707.

197. Justice O'Connor was joined by Chief Justice Burger and Justice Rehnquist.

198. *Id.* at 1709 (emphasis added).

199. *Id.* at 1708.

200. *Id.* at 1709, 1711. In Justice O'Connor's opinion, the importance of this pro-

order to recreate the context in which Hymon acted.[201] Justice O'Connor concluded that Hymon's conduct was not clearly unreasonable.[202]

Critically important to the dissent's position was its finding that burglary[203] was a much more violent felony than the majority was willing to concede.[204] The mere potentiality of violence resulting from burglary was enough to persuade the dissent that the crime was far from "innocuous, inconsequential, minor, or 'nonviolent.' "[205]

The dissent believed that Hymon had probable cause to believe Garner committed a felony.[206] Realizing that police must often make split-second decisions,[207] and that burglary is a violent crime, the dissent concluded that Hymon's use of deadly force was not unreasonable on the facts of this case.[208]

Notwithstanding its conclusion that Hymon's actions were reasonable, the dissent conducted its own interest-balancing test to assess the constitutionality of the statute under the fourth amendment. Justice O'Connor recognized the suspect's funda-

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scription cannot be overstated. In a constitutional analysis the focus must be on the facts and circumstances as they existed at the time of the officer's actions and on the reasonableness of the officer's *actual* conduct. *Id.*

201. *Id.* at 1708. It was a late night burglary call at a residence. The neighbor said that "they" were breaking in. Upon arrival, and after seeing signs of forcible entry, the officer went around the back. He heard a door slam and saw Garner run across the yard. With only the aid of his flashlight, Hymon located Garner crouched along the fence. The suspect refused to heed the halt warnings and climbed the fence in an effort to flee. Believing the suspect would escape, Hymon shot at Garner. The suspect later died. At trial, Hymon testified that he thought Garner was an adult and could not be certain whether Garner was armed. Additionally, Hymon had no way of knowing if there were people in the house or accomplices still around. The dissent based its argument on these facts. *Id.*

202. *Id.* at 1711.

203. *Id.* at 1709-10.

204. *Id.* at 1709. The dissent noted that " '[t]hree-fifths of all rapes in the home, three-fifths of all robberies, and about a third of home aggravated and simple assaults are committed by burglars.' " (quoting Bureau of Justice Statistics, *Household Burglary* 1 (1985) (providing statistical data that in 1973-1982, 2.8 million violent crimes were committed in the course of burglaries)).

205. *Id.* at 1709 (quoting Solem v. Helm, 463 U.S. 277, 316 (1983) (Burger, C.J., dissenting)). *See also* Jones v. Marshall, 528 F.2d 132, 140 (2d Cir. 1975) (commenting on the increased availability of guns to both violent and nonviolent criminals today).

206. *Id.* at 1712.

207. *Id. See also* Terry v. Ohio, 392 U.S. 1, 20 (1968) (entire rubric of police conduct requires many on-the-spot decisions by the officer).

208. *Garner,* 105 S. Ct. at 1712.

mental interest in life.[209] Against this the Justice balanced the state's interest in protecting the public from dangerous burglary felons.[210] The dissent found a compelling state interest in facilitating the detection and apprehension of burglary felons.[211] Justice O'Connor concluded that this imperative state interest justified the corresponding intrusion into the suspect's life.[212]

The dissent criticized the majority opinion as being vague on two critical factors.[213] First, the majority failed to give guidance as to which of a myriad of potentially lethal weapons would justify the use of deadly force. Its provision that an officer may use deadly force only when a suspect threatens him with a deadly weapon requires the officer to make *another* judgment as to whether an object is a weapon.[214] Considering that the objects could range from bats to guns, the majority's failure to indicate what objects qualify as deadly weapons made the restriction ambiguous.[215] Second, the dissent criticized the majority's conclusion that probable cause to arrest and the suspect's refusal to halt in the course of a potentially violent crime were insufficient for believing the suspect threatened harm. The dissent read the conclusion as mandating a higher level of probable cause and criticized the majority for neglecting to enumerate the additional factors necessary to establish the elevated conception of "probable cause" that the majority obviously required.[216] Justice O'Connor argued that the majority's vagueness on these two conclusions made the police officer's decision of whether to use deadly force even more difficult. Based on these reasons, the dissenters would have found the officer's conduct reasonable.

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209. *Id.* at 1710.

210. *Id.*

211. *Id.* For a discussion of the seriousness of burglary, see *infra* notes 251-55 and accompanying text.

212. *Garner*, 105 S. Ct. at 1710.

213. *Id.* at 1712.

214. *Id.*

215. *Id.*

216. *Id.*

V. Analysis

A. *Limitations on Police Discretion*

The Supreme Court concluded that Tennessee's deadly force statute gave police unfettered discretion in the use of deadly force and that it authorized the use of deadly force against nonviolent fleeing felons.[217] The Court correctly observed that the statute failed to distinguish between violent and nonviolent felonies. It appears that the Court believed this broadness and vagueness transformed the privilege to use deadly force into a license to kill.[218]

Although the language of the statute itself does not restrict the discretion of police,[219] other factors did impose restraints on the use of deadly force.[220] For example, because Tennessee's statute was a codification of the common law rule,[221] the use of deadly force was restricted by the same limitations existing at common law. Thus, deadly force could be resorted to only when necessary and when no other means for apprehension were available.[222] The Tennessee courts have imposed the "necessary" and "last resort" requirements in deciding the lawfulness of police conduct.[223]

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217. Tennessee v. Garner, 105 S. Ct. 1694, 1701, 1707 (1985).

218. While the Court refrained from labelling the statute as a license for law enforcement officers to kill, this perception can be inferred. The Court reasoned that the statute permitted "the use of deadly force to prevent the escape of *all* felony suspects, *whatever* the circumstances. . . ." *Garner*, 105 S. Ct. at 1701 (emphasis added).

219. For the full text of the statute, see *supra* note 8. The statute did not incorporate defined instances for the use of deadly force which would necessarily reduce the scope of police discretion.

220. *See infra* notes 221-43 and accompanying text.

221. Tennessee courts have continuously construed the statute in this manner. *See infra* note 223 and cases cited therein.

222. *See Justifiable Use of Deadly Force*, *supra* note 71, at 69-70.

223. *See, e.g.*, Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976): "However, an 'officer has no absolute right to kill either to take, or prevent the escape of, a prisoner. If with diligence and caution the prisoner might otherwise be taken or held, the officer will not be justified for the killing, even though the prisoner may have committed a felony.' " *Id.* at 693 (quoting Love v. Bass, 145 Tenn. 522, 529-30, 238 S.W. 94, 96 (1922)); Scarbrough v. State, 168 Tenn. 106, 76 S.W.2d 106 (1934) (Applying the common law limitations, the court held that the officer's use of deadly force violated Tennessee's statute in the absence of a showing that such force was necessary to capture the felon. The court stated: "but the law does not clothe an officer or private person with authority to arbitrarily judge the necessity of killing, and such a course must be the *last resort*. . . ." *Id.* at 110, 76 S.W.2d at 107 (emphasis added)).

The Memphis police shooting policy[224] is another source of limitation on the officer's discretion to use deadly force. The majority reviewed the policy and recognized that it was more restrictive than the statute in limiting the instances in which deadly force could be used against fleeing felons.[225] The Court also recognized the trend among police departments[226] to adopt similarly more restrictive shooting policies.[227] The Court relied on this trend as an indication that limiting the use of deadly force did not impede effective law enforcement.[228] However, the Court failed to consider the effect of these policies in limiting the scope of the discretion exercised by the officer.

Many courts have been asked to apply police department regulations as the standard to assess the reasonableness of an officer's conduct. Although some courts refuse to use the regulations as the standard to determine the criminal or civil liability of the officer,[229] others find them to be an appropriate considera-

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224. The Memphis Police Department Shooting Policy reads:

Deadly Force: DEADLY FORCE may be used in the following circumstances only after all other reasonable means to apprehend or otherwise prevent the offense have been exhausted:

(a) Self-Defense. An officer may use DEADLY FORCE when it is in the defense of himself or another from serious bodily injury or death and the threat of serious bodily injury or death is real and immediate.

(b) Felonies Involving the Use or Threatened Use of Physical Force. An officer may use DEADLY FORCE when the offense involves a felony and the suspect uses or attempts to use or threatens the use of physical force against any person.

(c) Other Felonies Where DEADLY FORCE is Authorized. After all reasonable means of preventing or apprehending a suspect have been exhausted, DEADLY FORCE is authorized in the following crimes: (a) kidnapping, (b) murder in the first or second degree, (c) manslaughter, (d) arson (including the use of fire bombs), (e) rape, (f) assault and battery with intent to carnally know a child under 12 years of age, (g) assault and battery with intent to commit rape, (h) burglary in the first, second or third degree, (i) assault to commit murder in the first or second degree, (j) assault to commit voluntary manslaughter, (k) armed and simple robbery. . . .

Reply Brief Of Petitioners at 3-5, Memphis Police Dep't v. Garner, 710 F.2d 240 (6th Cir. 1983).

225. *Garner*, 105 S. Ct. at 1705.

226. *Id. See also* Wukitsch, *Survey of the Law Governing Police Use of Deadly Force*, N.Y. ST. B.J., Jan. 1983, at 12, 15 (survey of police department shooting regulations).

227. *Garner*, 105 S. Ct. at 1705-06.

228. *Id.*

229. *See, e.g.*, Taylor v. Mayone, 599 F. Supp. 148, 153 (S.D.N.Y. 1984) (police regulations do not define what is excessive force for purposes of constitutional analysis be-

tion in evaluating the reasonableness of an officer's actions.[230] In either case, the courts have continuously stated that violation of the police procedures subjects the officer to disciplinary action within the department, which could be as severe as dismissal.[231] Arguably, the threat of disciplinary sanctions curbs the free use of deadly force. The risk of losing one's job or blemishing one's record has the potential to make an officer hesitate before violating a departmental shooting policy.[232]

As previously noted, the Memphis Police Department Shooting Policy[233] restricted the use of deadly force more than the Tennessee statute did. It permitted deadly force in self-defense, when the officer reasonably believed the felony committed involved a threat of serious bodily harm, or in other particular

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cause the Constitution could require more or less than such administrative regulations); City of St. Petersburg v. Reed, 330 So. 2d 256, 258 (Fla. Dist. Ct. App.), *cert. denied,* Reed v. St. Petersburg, 341 So. 2d 292 (Fla. 1976) (police regulations are not the standard to test reasonableness of actions); Chastain v. Civil Service Board, 327 So. 2d 230, 232 (Fla. Dist. Ct. App. 1976) (police department rules on the use of deadly force are not the appropriate standards for deciding criminal or civil liability).

230. *See, e.g.,* Guyton v. Phillips, 532 F. Supp. 1154, 1162-63 (N.D. Cal. 1981); Grudt v. City of Los Angeles, 2 Cal. 3d 575, 587-88, 86 Cal. Rptr. 465, 480, 468 P.2d 825, 831 (1970) (The courts stated that police regulations on deadly force, especially if more restrictive than the state's statute, are appropriate to consider when determining the reasonableness of the officer's conduct.). *See also* Wukitsch, *Survey of the Law Governing Police Use of Deadly Force,* N.Y. ST. B.J., JAN. 1983 at 12, 15 (more restrictive police policies could open officer up to additional liability).

231. Chastain v. Civil Service Board, 327 So. 2d 230, 230 (Fla. Dist. Ct. App. 1976) (police officer who shot and wounded escaping prisoner in violation of department shooting policy and without first exhausting all other means of apprehension was dismissed from the police force).

232. The deterrent effect of shooting policies has been commented on a number of times. *See, e.g.,* State v. Sundberg, 611 P.2d 44, n.22 (Alaska 1980) (mentioning that police department proceedings are an alternative source of deterrence of illegal police conduct besides the exclusionary rule; however, the effectiveness of these proceedings as a deterrent is in debate). *See also* Wukitsch, *Survey of the Law Governing Police Use of Deadly Force,* N.Y. ST. B.J., Jan. 1983, at 12, 15 ("Notwithstanding the possible conflict between state law and departmental regulations, departmental regulations may be the most desirable means for controlling the use of deadly force."); Bouza, *Myths And Hard Truths About Police Shootings,* 13 TOLEDO L. REV. 337, 341 (1982) (Institution of more restrictive departmental regulations has shown a significant impact on the incidence of police shootings. The policies are very effective in reducing indiscriminate and frequent use of firearms by police.); Amsterdam, *supra* note 21, at 416-29 (argument is made that constitutional protection against the use of deadly force lies most effectively in a formulation of police shooting policies and administrative regulations rather than more restrictive statutes).

233. For the full text of the policy, see *supra* note 224.

felony situations.[234] In each instance, all other means of apprehending the felon must have been exhausted.[235] The restrictive effect of this policy warranted a closer inspection by the Court in order to ascertain a more realistic picture of the discretion police *actually* had.

Clearly, the Court's major concern was that the statute gave police unlimited discretion because it granted the police permission to "use all the necessary means to effect the arrest."[236] The Court interpreted this clause to permit any amount of force under any circumstances and for this reason held the statute unconstitutional.[237] However, the Court neglected to consider that the conduct authorized by the Tennessee statute,[238] was limited by the reasonableness requirement of the fourth amendment.[239] The Tennessee court had continuously construed the statute to allow only that force which was reasonable under the circumstances.[240] Thus, one court found deadly force against a fleeing misdemeanant unreasonable.[241] When an officer's use of force was excessive, and therefore unreasonable, the officer would be penalized.[242] In effect, the reasonableness requirement functioned as a further limitation on the degree of force an officer

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234. These include: (a) kidnapping, (b) murder in the first or second degree, (c) manslaughter, (d) arson (including the use of fire bombs), (e) rape, (f) assault and battery with intent to carnally know a child under 12 years of age, (g) assault and battery with intent to commit rape, (h) burglary in the first, second, or third degree, (i) assault to commit murder in the first or second degree, (j) assault to commit voluntary manslaughter, (k) armed and simple robbery. (J.A. 140).

235. For the pertinent section, see *supra* note 224.

236. TENN. CODE ANN. § 40-7-108 (1982). For the text of the statute, see *supra* note 8.

237. *Garner*, 105 S. Ct. at 1701.

238. The Tennessee statute addressed the use of force to effect an arrest. Arrests are seizures subject to the fourth amendment. Therefore, the seizure addressed in the statute must meet the requirements of the fourth amendment.

239. For a discussion of the reasonableness requirement of the fourth amendment, see *supra* notes 45-51 and accompanying text.

240. For cases holding that reasonableness is an essential element of constitutional police conduct, see *supra* note 48.

241. Johnson v. State, 173 Tenn. 134, 137, 114 S.W.2d 819, 820 (1938); Reneau v. State, 70 Tenn. 720 (1879).

242. Ford v. Wells, 347 F. Supp. 1026, 1031 (E.D. Tenn. 1972). Here, the constable tried to arrest plaintiff for public drunkenness. In his efforts to effectuate the arrest, the constable knocked the plaintiff down with a black-jack and dragged him with a choker chain. The court held this to be unreasonable. *Id.* at 1029-30.

could legally employ.[243] The Court's impression that the Tennessee statute permitted any force whatsoever, under any circumstances, was thus clearly erroneous.

B. *The Balancing of Interests*

The Court balanced the competing interests of the state and those of the individual in order to determine whether the degree of intrusion into the suspect's life could be justified.[244] The Court stated that the suspect's fundamental interest in his own life was self-evident.[245] The Court also considered the interest of the individual and society in a *judicial* determination of guilt and of punishment.[246] On the other side of the scale, a single and general governmental interest in "effective law enforcement" was posited.[247] The Court concluded that shooting a nondangerous fleeing felon was not "so vital as to outweigh the suspect's interest in his own life."[248]

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243. This principle is not at all new to the area of police use of deadly force. Whenever police conduct is challenged, the first issue to be addressed is whether or not it was reasonable under the circumstances. If the degree of force is unreasonable, the conduct is illegal. This is why many challenges to state deadly force statutes are settled before the constitutionality of the statute is ever reached. For illustrative cases where the constitutionality of the statute was never reached because the reasonableness requirement settled the dispute, see *supra* notes 106-16, 137-49 and accompanying text.

Based on dictum in Schmerber v. California, 384 U.S. 757, 769-70 (1966) (which stated that the more serious the intrusion the more stringent the protections of the fourth amendment must become), an argument has been made that the fourth amendment reasonableness requirement is an insufficient limitation on the use of deadly force. The proponent of this argument suggests that because the use of deadly force is the most intrusive conduct into the individual's life, more than the standard fourth amendment reasonableness requirement is needed. *See also* Mogin, *The Policeman's Privilege to Shoot a Fleeing Suspect: Constitutional Limits on the Use of Deadly Force*, 18 AM. CRIM. L. REV. 533, 537, 543-44 (1981).

244. *Garner*, 105 S. Ct. at 1700. The balancing test is the fourth amendment constitutionality test. For a discussion of the test and the recurrent problems faced as a consequence of its implementation, see *supra* notes 56-69 and accompanying text.

245. *Garner*, 105 S. Ct. at 1700. The individual's fundamental right to life is rooted in the history of the due process and equal protection clauses. For cases holding that the right to life is fundamental, see *supra* note 66.

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

247. *Id.* An articulation of "effective law enforcement" was not found anywhere in the Court's opinion. Because the concept is so broad it is difficult to ascertain just exactly what the majority considered to be the essential elements of "effective law enforcement."

248. *Id.* at 1701.

The state's interest in effective law enforcement is arguably equivalent to the individual's fundamental interest in his own life but not as evident. Certainly, this interest is more complex than simply collaring criminals, and, therefore, necessitates a detailed examination. Courts and scholars have been more proficient in specifically articulating the composition of "effective law enforcement" than was the Supreme Court in *Garner*.[249] In fact, the Court never addressed what it actually considered "effective law enforcement" to mean.[250] By failing to conduct a more adequate analysis of this governmental interest, it is therefore unclear whether the identification and balancing of the state's and individual's interests were effectively achieved.

A significant flaw in the majority's analysis was its failure to significantly address the propensity of violence associated with burglary. Statistics indicate that many violent crimes result in the course of burglaries. Burglary felons are responsible for three-fifths of all rapes in the home, for three-fifths of all home robberies, and for one-third of all home aggravated and simple assaults.[251] The majority responded that these statistics only showed that when there was violence in the home, often a burglar was also present.[252] However, it refused to view these numbers as an indication of the degree of violence associated with the felony.[253] Although different conclusions can be drawn from these statistics, it is clear that there is a cognizable degree of violence accompanying burglary. In addition, case law dealing with grossly violent crimes supports the proposition that burglary often results in violence.[254]

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249. Among the legitimate governmental interests that have been identified are the public safety and security, protection of the criminal justice system, protection of the officer's own life and the impact of crime on society and the individual. For a discussion of governmental interests that have been defined by courts and scholars, see *supra* notes 60-64 and accompanying text.

250. *See supra* note 247.

251. *See supra* note 204.

252. *Garner*, 105 S. Ct. at 1707 n.23.

253. *Id.*

254. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 316 (1983) (Burger, C. J., dissenting) (burglary possesses a harsh potentiality for violence such that it can hardly be described as "innocuous, inconsequential, minor, or 'non-violent' "); California v. Prysock, 453 U.S. 355, 358 (1981); Bullington v. Missouri, 451 U.S. 430, 435 (1981); Proffitt v. Florida, 428 U.S. 242, 245 (1976) (all involving criminals convicted of burglary that resulted in murder); Griffin v. Warden, 517 F.2d 756, 757 (4th Cir.), *cert. denied*, 423 U.S. 990 (1975)

Many state statutes adopting the most restrictive rule on the use of deadly force include burglary among those felonies against which deadly force can be used.[255] Clearly, the legislatures of those states concluded that burglary is a violent felony involving the threat of harm.

In the balancing test, the weight assigned to each interest is inextricably linked to the nature and dangerousness of the offense. The characterization of the nature of burglary was, therefore, critical to a fair balancing of interests.[256] When viewed generally as a nonviolent felony, the use of deadly force in a burglary setting is obviously too severe an intrusion on the individual's fundamental interest in life. However, when the violent propensities associated with burglary are recognized, the state's interest in "effective law enforcement" takes on a new meaning. Burglars put the public and police officers in great danger and the state's interest in protecting both from dangerous burglary felons is compelling. Therefore, authorization of the use of deadly force, as a means of protecting both the public and police, could reasonably be found to justify the intrusion into the suspect's life.

The majority's failure to examine comprehensively the substance of "effective law enforcement" and to recognize the high rate of violence associated with burglary impeded an adequate

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(burglary, breaking and entering and grand larceny are serious offenses that involve the potentiality of violence and danger to life as well as property); Clark v. Ziedonis, 513 F.2d 79, 82-83 n.10 (7th Cir. 1975) (In discussing the status of deadly force in other states, this court observes "that burglary is one of the 'serious' or 'dangerous' felonies which give rise to the privilege to use deadly force under the modified rule."); State v. Nyland, 47 Wash. 2d 240, 242, 287 P.2d 345, 347 (1955) (Burglary is among those felonies committed by violence and surprise which warrant the use of deadly force if necessary to repel them.). *See also* R. PERKINS & R. BOYCE, CRIMINAL LAW 1110 (3d ed. 1982) (Burglary is a dangerous felony that creates an unreasonable risk of great personal harm.).

255. *See supra* note 97 (states adopting the forcible felony rule on the use of deadly force).

256. *Garner*, 105 S. Ct. at 1701. The Court's divided decision illustrates this. The majority considered burglary generally a nonviolent felony. Consequently, the only state interest it considered to have any weight at all was police enforcement. The Court hardly thought the public's or officer's personal safety was relevant. This was because burglary was believed to pose no danger. *Id.* On the other hand, the dissent interpreted burglary as involving a high propensity of violence. From there it examined and assigned a weight to the state's interest in protecting the personal safety of the public and officers. The dissent argued that the state exhibited a compelling interest that justified the use of deadly force against fleeing burglary felons. *Id.* at 1709.

assessment and balancing of interests. Thus, the majority's holding that a statute authorizing the use of deadly force against burglary felons is unconstitutional on the grounds that an individual's interest in life *clearly outweighs* the state's interest in "effective law enforcement," is itself infirm.

C. *The Unreasonableness of the Officer's Actions*

The Court held that "Officer Hymon could not reasonably have believed that Garner . . . posed any threat."[257] The majority relied on the fact that Garner was slight, unarmed and had committed only a petty theft.[258] Determination of the reasonableness of conduct under the fourth amendment requires a complete evaluation of the facts and circumstances as they existed *at the time of the incident.*[259] An after-the-fact interpretation of the circumstances plays no part in this evaluation. The incident at issue did not occur in the controlled setting of the courtroom; rather, it happened in the course of an officer's "night on the beat." The actions of Officer Hymon must be examined in this context with the caveat that police officers must make sudden on-the-spot decisions, many of which are a matter of life and death.[260]

The material facts at issue in this case were Garner's exact size and age and whether he was armed.[261] Officer Hymon testified that he could not be sure if Garner had any weapon.[262] He said he thought Garner was larger and older than in fact he actually was.[263] In addition, Hymon had probable cause to believe that Garner had committed a felony;[264] it was a *nighttime* burglary, there were broken windows, the neighbor said that "they" were breaking in, and Garner was running away. These were the

257. *Garner*, 105 S. Ct. at 1706.

258. *Id.*

259. The Supreme Court has consistently recognized this principle. *See supra* note 48.

260. Courts and commentators alike recognize that officers are forced to make quick decisions in the course of carrying out their duties. *See supra* note 207. *See also* Bouza, *Myths and Hard Truths About Police Shootings*, 13 TOLEDO L. REV. 337, 338 (1982).

261. *See supra* notes 192-93.

262. *Garner*, 105 S. Ct. at 1697.

263. *Id.*

264. *Id.* at 1712 (O'Connor, J., dissenting). For a discussion of probable cause, see *supra* notes 36-44 and accompanying text.

facts upon which Hymon made the split-second decision to use deadly force. He fulfilled all the procedural requirements before he determined that deadly force was necessary.[265] In light of these facts and circumstances, this author concludes that Hymon's conduct was reasonable.

D. The Alternative Rule

The Court of Appeals for the Sixth Circuit concluded that the rule set out in the Model Penal Code[266] accurately stated fourth amendment limitations on the use of deadly force against fleeing felons.[267] The majority implicitly adopts this rule.[268]

The Model Penal Code allows the use of deadly force only when the officer or another is threatened with serious bodily harm or when the officer reasonably believes the crime committed is a felony involving the use or threatened use of deadly harm.[269] While the Model Penal Code has been praised for its ability to strike an effective balance between the state's and the individual's interests,[270] as applied to this case, it fails to remedy the infirmities charged against the Tennessee statute.

Although the Supreme Court is correct in its observation that the Model Penal Code approach is growing in popularity,[271] there has not been an abandonment of other rules on deadly force. The courts of many states have refused to adopt the Model Penal Code as the constitutional minimum for the use of

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265. *Garner*, 105 S. Ct. at 1712 (O'Connor, J., dissenting). These procedures were ordering the suspect to halt and using deadly force only as a last resort. *Id.*

266. *See supra* note 92 (pertinent text of the Model Penal Code).

267. Garner v. Memphis Police Dep't, 710 F.2d 240, 247 (6th Cir. 1983).

268. *Garner*, 105 S. Ct. at 1701.

269. *See supra* note 92-93 and accompanying text.

270. *See* Hilton v. State, 348 A.2d 242, 244 (Me. 1975). At the lower level, the panel of judges rejected the common law rule on deadly force existing in the state and adopted the Model Penal Code version because it struck "the appropriate balance between the legitimate needs of law enforcement and the sanctity of human life." The appellate court, in reversing the panel's decision, stated that the panel went beyond the appropriate bounds of its judicial function when it abrogated the existing common law rule on the use of deadly force and adopted the Model Penal Code standard. *Id.* Finding that there was an issue of fact to be determined by the jury when the common law rule was applied, the appellate court remanded the case. *Id.* at 242.

271. This is a common observation usually based on a comparison of the number of states following a common law or forcible felony rule. For a list of the states' deadly force rules, see *supra* notes 91, 94, and 97.

deadly force.[272] Likewise, many state legislatures, having had years to consider the Model Penal Code have explicitly rejected the rule adopting instead the more restrictive forcible felony rule[273] or retaining the common law rule.[274]

Although supporters of the Code criticize the common law rule as authorizing a quick disposition of rights absent all constitutional protection which may result in the death of the defendant,[275] others oppose adoption of the Code on the grounds that it encourages the felon to escape:

> If we pass [Subsection (d)] we say to the criminal, 'You are foolish. No matter what you have done you are foolish if you submit to arrest. The 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.'[276]

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272. *See* Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1252 (6th Cir. 1977), *cert. denied*, 434 U.S. 822 (1978); Qualls v. Parrish, 534 F.2d 690, 694-95 (6th Cir. 1976); Jones v. Marshall, 528 F.2d 132, 140-42 (2d Cir. 1975); Schumann v. McGinn, 307 Minn. 446, 466-67, 240 N.W.2d 525, 537 (1976); Hilton v. State, 348 A.2d 242, 244 (Me. 1975). These courts recognize the serious policy issues behind adoption of a particular deadly force rule and the corresponding necessity to evaluate the public needs in light of the intrusion on the individual's life. As one court stated:

> It is in the legislative forum that the deterrent effect of the traditional rule may be evaluated and the law-enforcement policies of this state may be fully debated and determined. The issues upon which the decision turns are more moral and sociological than they are legal. The legislature, and not this court, is the proper decision maker.

Schumann v. McGinn, 307 Minn. 446, 466-67, 240 N.W.2d 525, 537 (1976). *But see* Jacobs v. City of Wichita, 531 F. Supp. 129, 131-32 (D. Kan. 1982) (dictum) (The court denied a request for declaration that the Kansas deadly force statute was unconstitutional on the grounds that state law did not control the merits of the case. Nonetheless, the court commented that it would hesitate to adopt the common law deadly force rule because of technological and legal changes in society which no longer support the rationale behind the rule.).

273. New York adopted the Model Penal Code rule in 1965 but repealed it in 1967 with a statute listing the specific felonies for which deadly force may be used. *See* N.Y. Penal Law § 35.30(1)(a) (McKinney 1975 & Supp. 1986).

274. *See supra* note 272 and cases cited therein. *But see* Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot per curiam sub nom.*, Ashcroft v. Mattis, 431 U.S. 171 (1977). The Missouri legislature had considered a bill in 1975 that could modify the common law rule in light of the Model Penal Code. The legislature rejected the modification. *Id.* at 1022 (Gibson, J., dissenting). Nonetheless, the Court of Appeals for the Eighth Circuit ruled that the existing Missouri statute was unconstitutional and adopted the Model Penal Code as the constitutional standard. *Id.* at 1020.

275. Schumann v. McGinn, 307 Minn. 446, 465, 240 N.W.2d 525, 536 (1976) (quoting Professor Jerome Mikell, supporter of the Model Penal Code).

276. MODEL PENAL CODE § 307 comment 3 (Tent. Draft No. 8, 1958). Another reason

The Court purportedly examined the procedures adopted in other jurisdictions in order to determine the reasonableness of the deadly force procedure.[277] The majority found the supposed trend to adopt a more restrictive deadly force policy, such as the Model Penal Code, most persuasive.

The Court's expressed concern over the unrestricted scope of the privilege to use deadly force as permitted by the statute, was the original impetus behind the Court's preference toward the rule in the Model Penal Code. The Court desired to establish a more definable set of situations for the use of deadly force.[278] In effect, however, the Code itself does little to remedy the discretionary problem the *Garner* Court found so offensive.

Even under the Model Penal Code the decision of whether to use deadly force still turns on the actor's interpretation of the situation. The difficult question of whether the officer had a *reasonable belief* that deadly force was needed still remains. Must the suspect shoot at the officer? Must the officer witness violence? The answer to these questions is hardly a burdensome one to reach when the felony is clearly either violent or nonviolent. Thus, if the crime were murder or, alternatively, tax evasion, determining the reasonableness of the belief would pose little difficulty. But most felonies fall somewhere in between. More particularly, what about burglary? While it is not conclusively a violent crime, neither can it generally be classified as a nonviolent crime. In situations like this, the Model Penal Code provides little if any aid to the officer in her determination of whether to use deadly force. The Court seems to be searching for a rule that reduces the officer's discretion. Adopting the

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frequently cited for refusing to adopt the Model Penal Code is that the American Law Institute still appears to be groping for a uniform standard. As stated by one court: "The American Law Institute's almost 50 years of consideration of the problem demonstrates that the area in which we are treading is one still characterized by shifting sands and obscured pathways." Jones v. Marshall, 528 F.2d 132, 141 (2d Cir. 1975).

277. *Garner*, 105 S. Ct. at 1703-06. Here, the Court looked at the number of states adopting the various rules on deadly force and the trend among police departments to limit the use of deadly force in a more restrictive manner than did the common law.

278. The court held that to allow the use of deadly force in effectuating the arrest of all felony suspects, whatever the circumstances, was constitutionally unreasonable. Meanwhile, this holding suggests that a more clearly defined set of situations describing when deadly force could be used would protect the statute from constitutional challenge. *Garner*, 105 S. Ct. at 1701. Reading the dictum in light of the holding, it seems as if the Court is searching for a more clearly defined statute.

Model Penal Code under these circumstances can hardly be relied upon to effectuate this goal.

VI. Conclusion

In *Tennessee v. Garner*, the Supreme Court, for the first time, invalidated a state deadly force statute on fourth amendment grounds. The decision rejected a long line of case law tradition which accepted codification of the common law rule. In its place, the Court adopted a new standard, set forth in the Model Penal Code, for the use of deadly force by police.

The Court's holding is disturbing. The Court neglected to recognize a variety of legal operatives that limited police discretion on the use of deadly force. It failed to identify fully the state's interests and to implement fairly the fourth amendment balancing test. It minimized the violent propensities inherent in burglary. As a result, the Court improperly assessed the material facts and held that an officer's use of deadly force against a fleeing burglary suspect was unreasonable. Finally, the Court struck down Tennessee's deadly force statute substituting a new constitutional standard which failed to cure the deficiencies charged against the Tennessee statute. It is clear that the Court has discarded a constitutionally sound deadly force statute without sufficient evidentiary support for its holding.

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