# SEIZURE BY GUNSHOT: THE RIDDLE OF THE FLEEING FELON*

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## INTRODUCTION

Imagine if you will, a cop named Charlie. He is a good cop, but reading Supreme Court opinions is not his idea of how to unwind after a busy tour in his high-crime sector. So, often Charlie just does what feels right and hopes it is legal.

When they gave Charlie his badge they also gave him a pair of handcuffs, a stick, and a big, ugly gun to be worn on his belt at all times. The instructions that came with this equipment were less than lucid, but Charlie soon got the idea that the cuffs were used to formalize the collar and to facilitate the transportation of the wearer. The stick, Charlie learned, was mainly for gripping in a strong, meaningful fist. When accompanied by a suitably stern frown, this had a wondrously calming effect upon boisterous patrons and insolent youths. The stick could also be used for poking at the midsections of slow movers. It is unseemly, Charlie gathered, actually to swing the stick at someone. The occasion rarely arises, and besides, cops, as he discovered, make decisive and authoritative moves; they don't brawl.

The heavy, black .38 calibre revolver was more problematical. From what Charlie heard around the barracks, the way to stay out of trouble is to fire it only on the range. There are times, of course, when it is comforting to know the firepower is there if needed, perhaps to hold the gun in hand, fingers gently resting on the trigger guard, the barrel pointed at the ground for caution's sake. But shooting the piece, actually aiming it at some living creature and pulling the trigger, that is something else. At the very least it would be an invitation to a departmental investigation, and very likely a ticket to the grand jury as well. He would be sweating, trying to explain his conduct to all those skeptical people—who needs it? And if he fired the weapon, there was always the chance —God forbid— that he might kill some innocent person. He would lose everything: job, pension, peace of mind. Of course, no cop wants to be killed in the line of duty, flag-draped coffin notwithstanding. As he had heard the veterans say, "Better to be tried by twelve than carried by

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* EDS. NOTE: Normally, it is the policy of the *Review* to use female pronouns for the third person singular when the pronoun is used generically. However, at the time this paper was accepted for publication, this policy was not mandatory. The author has been permitted to adopt his own pronoun policy.

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six." So, if he really had to shoot to save his own life, well, of course he would—anybody would.

Charlie does not like the idea of a mugger or a burglar getting away after Charlie loudly and firmly asserts his authority by telling him to halt, or that he is under arrest. But Charlie also knows he was not as fleet in his heavy black cop boots, with all his cop gear swinging from his belt, as some lean kid in running shoes. To be outrun, outjumped, outdodged by a guy who should be looking back at him through the bars of a holding pen is not only an insult; it is an unmistakable failure of duty. If he is not there to catch perpetrators, Charlie asks himself, what is he there for? The ultimate edge is at hand, securely snapped in its holster. The question Charlie struggles with as he tries to fall asleep at night is: When should he use it?

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It is embarrassing for a law professor to be blindsided in his own territory. But the truth is, I didn't see it coming. It had never occurred to me that a police officer shooting to kill a fleeing felon might be engaging in an unconstitutional search and seizure. Of course, I can see the connection now that it has been explained to me,[1] but I did not spontaneously equate a deadly shot with an arrest. And I have had some prior acquaintance not only with the fourth amendment, but specifically with the issue of the bullet aimed at the back of a retreating felon.

I had put in some time struggling with statutory reform.[2] I had puzzled through the policy questions concerning the appropriate limits on the power of the police, and of private citizens, to repel crime and to prevent escape by the use of force, including deadly force.[3] But I had always thought the issue to be one of justification: when should the use of interpersonal physical force which would otherwise be criminal, be considered justified? To repel imminent injury to oneself by force, scaled in degree to the threat, has traditionally been approved. But how about prevention of physical harm to others, including strangers, or the prevention of threatened harm that is not so imminent? And what about the use of force to repel crimes against property, including such "special" or dangerous property crimes as burglary, arson, or sabotage? Should a different standard be constructed for the use of force to apprehend

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

2. About twenty years ago, New York established a blue ribbon commission to reformulate its penal law and criminal procedure law. The Commission was led by such luminaries as Professor Herbert Wechsler (the draftsman of the famous Model Penal Code), Hon. Whitman Knapp (now a judge of the United States District Court for the Southern District of New York), and Timothy Pfeiffer, and was chaired by Richard Bartlett (then an influential member of the State Assembly, since a judge, and most recently, Dean of the Albany Law School). The Honorable Frank S. Hogan (my superior at the time) was a member, and I frequently had the privilege of sitting in with or for him.

3. Basic reading on the subject remains the American Law Institute's Model Penal Code and Commentary. Concerning the authority of police to use deadly force, see Section 3.07 and the Commentary at Part I of the Official Draft and Revised Comments beginning at p. 111 (1985).

the perpetrator or to prevent his escape after the crime from that which governs prevention of a threatened crime or repulsion of the crime in progress? And finally, should police officers, who are charged with a more general obligation to preserve public peace and safety, receive broader license for the use of physical force, both in degree and occasion, than that accorded ordinary citizens?[4]

The excellent result of the work in the middle sixties of New York's Law Revision Commission is a fairly long and complex article of the Penal Law, entitled "Justification."[5] Dealing with the police officer's authority to make a forcible arrest, the article is remarkably close to the limitations expressed by the Supreme Court in *Tennessee v. Garner*.[6] The statute provides that the officer may use deadly force only if he reasonably believes that: (1) the offense was a felony involving the use or threat of physical force against a person, or kidnapping, arson, escape or burglary in the first degree,[7] or an attempt to commit such a crime, or (2) in flight from a felony, the suspect is armed with a firearm or other deadly weapon, or (3) regardless of other factors, the use of deadly force is necessary to defend the officer or another from deadly force.[8] The effect of this provision of the Penal Law is to excuse conduct by an officer that would otherwise be criminal.[9] In addition, the careful formulation of the defense of justification stands as a declaration of the limits of socially approved police firepower. It can be, and has been, readily translated into guidelines, regulations, and instructions directed at Charlie and his teammates.[10]

At its narrowest reach, *Garner* took the gunshot arrest only one square beyond its conventional setting in the law of justification. The case arose in an action by the father of the deceased, under Section 1983 of the Civil Rights Act of 1964,[11] who claimed damages for unconstitutional seizure of an escaping flatburglar by shooting him through the head. Reviewing the district court's dismissal of the claim, the High Court agreed with the court that the suit asserted a cause of action under the fourth amendment of the Constitu-

4. Generally, the answer to these and a variety of associated questions has been that a law enforcement officer is justified in using deadly force to capture a fleeing felon. For example, LaFave and Scott say, "It is reasonable to use [deadly] force in the case of a felon if it reasonably appears to the arresting person that the felon will otherwise avoid arrest or escape from custody." W. LAFAVE AND A. SCOTT, HANDBOOK ON CRIMINAL LAW 402-03 (1972).

5. N.Y. PENAL LAW, § 35.30(1) (McKinney 1986).

6. 105 S. Ct. 1694 (1985).

7. Section 140.30 of the New York Penal Law defines burglary in the first degree as a nighttime entry of a dwelling, with intent to commit a crime therein, further aggravated by one of the following: (1) armed with explosives or deadly weapon, (2) physical injury to a nonparticipant, (3) use or threatened imminent use of a "dangerous instrument," or (4) display of an apparent firearm (subject to affirmative defense of unloaded or inoperative). N.Y. PENAL LAW § 140.30 (McKinney 1986).

8. N.Y. PENAL CODE, § 535.05 (McKinney 1986).

9. N.Y. PENAL CODE, § 35.05 (McKinney 1986).

10. For the latest New York City Police Department bulletin on the law of justification, consolidating statutory law, policy, and the Police Department's reading of *Garner*, see Appendix A, *infra*.

11. 42 U.S.C. § 1983 (1982).

tion, and that the permissive Tennessee statute under which the Memphis police officers had defended themselves was unconstitutional as applied because it failed to curtail the use of deadly force within "reasonable" bounds.[12] Thus, strictly speaking, the effect of the decision is civil only, opening the federal courts for Section 1983 suits alleging wrongful use of deadly force by law enforcement officers in pursuit of a fleeing felon. Confined to the civil arena, whatever expansion of the federal docket it may cause, the decision must be evaluated in terms of the civil rights litigation movement, of which it becomes the newest part. However, this appraisal is not my present purpose. The radiations from the *Garner* decision that concern me here are first, its impact on the exclusionary rule in criminal prosecutions, and second, its interaction with the defense of justification.

## I
## *GARNER* AND THE EXCLUSIONARY RULE

For this discussion we must suppose that, unlike the shot that killed you Garner, the deadly force is administered with less than deadly effect. The wounded suspect cannot assert the unreasonable method of apprehension to defeat the court's jurisdiction to try him on the charge for which he was arrested.[13] However, physical evidence taken from his person at the time of the arrest might be excluded if the arrest was unlawful.[14] So, too, inculpatory words from the suspect, though duly Mirandized[15], might be suppressed as "fruit" of the unlawful arrest.[16] Perhaps even an identification procedure, otherwise fair, might yield a moment of recognition (which normally occurs during line-up procedures) subject to suppression as poisoned by the unlawful arrest that preceded it.[17]

The theory for such secondary exclusions is firmly grounded and generally accepted. An arrest as a "seizure" of the "person" is a fourth amendment event and, as such, is constrained by the "reasonableness" clause generally[18] and by the warrant preference rule[19] when the suspect's home must be entered to effect the apprehension.[20] Most commonly, "reasonable" translates into the predicate of "probable cause" in the context of arrest, but some precedent also applies the fourth amendment to the method by which the search and seizure are accomplished. For example, the Supreme Court has required that

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

13. *See, e.g.*, Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 438 (1886); *see also supra* note 10.

14. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969).

15. 384 U.S. 436 (1966).

16. *See, e.g.*, Taylor v. Alabama, 457 U.S. 687 (1982); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975).

17. United States v. Crews, 445 U.S. 463 (1980).

18. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976).

19. The prevailing interpretation of the fourth amendment prefers the use of a warrant to reliance on exigent circumstances. U.S. v. Lefkowitz, 285 U.S. 452, 464 (1932).

20. Payton v. New York, 445 U.S. 573 (1980).

proper notice of purpose and authority be given and entry refused before police may break into premises to execute a proper search warrant.[21] Just as the "fruit" or direct product of an arrest without probable cause may be suppressed, so the acquisition of physical evidence, an inculpatory statement, or an eyewitness identification obtained by exploitation of an arrest made by unreasonable use of deadly force may meet the same fate.

At the same time, the application of the *Garner* development to enhance the exclusionary rule would add a new and unfamiliar set of issues to that embattled septuagenarian.[22] What has been a jury question, decided on all the trial evidence (i.e., the defense of justification), will become one of a growing host of pretrial issues for the court (perhaps for relitigation before the jury as a defense). And, as a constitutional matter, the familiar issue may require some tailoring to fit its new role.

The thesis of *Garner*, as a new twist on the exclusionary rule, may be stated in terms of major and minor premises and a conclusion—not to create a (false) impression of syllogistic nicety, but to facilitate closer examination of its function in this setting. Thus it may be simply put: Where deadly force is used to apprehend a fleeing felon who is not dangerous, exclusion of the resulting evidence will deter future instances of similar excessive zeal.

### *A. The "Major Premise": (Use of "Deadly" Force)*

At the very top, let us recognize that *Garner* has some frustrating—and probably intentional— imprecision concerning the subject under discussion. Justice White writes throughout his opinion of the use of "deadly force." Indeed, in addition to such words as "lethal," "die," and "kill," he uses the word "deadly" some thirty-three times in the course of the opinion. One might read the case, then, as the development of a special rule regarding the special circumstance of the police decision to kill in order to prevent the fleeing felon's escape. Justice White's parenthetical detour to link the use of deadly force to arrest, sanctioned by common law, with the concurrent prevalence of capital punishment reinforces the view that this case is not about degrees of force, but rather concerns special restrictions on the police officer's license to kill.[23]

At the same time, it is the reasonableness clause of the fourth amendment Justice White is expounding, and it is tempting to read *Garner* as creating a constitutional rule of proportionality to govern the use of any force in effecting an arrest. Under such a rule of reason, with its customary consideration of particular circumstances, a court might find excessively rough handling of a petty pickpocket to be unconstitutional,[24] though no deadly weapon was em-

21. Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958).

22. The exclusionary rule was "invented" in 1914, in Weeks v. United States, 232 U.S. 383 (1914), not (as popularly supposed) in Mapp v. Ohio, 367 U.S. 643 (1961).

23. *Garner*, 105 S. Ct. at 1702-03.

24. I am not here alluding to rough handling that produces an inculpatory declaration; exclusion of that product needs no help from *Garner*. I refer solely to evidence acquired as a result of the illegal seizure by unnecessary roughness.

ployed. Or a court might hold that unnecessary —or unnecessarily lengthy— detention violates the fourth amendment.[25] Such unreasonable seizures would form the predicate for the suppression of any resulting evidence though probable cause to arrest was abundant. While flexible standards of proportionality appear to harmonize with the constitutional precept underlying the *Garner* rule, such circumstantial jurisprudence opens a new wilderness of uncertainty. And if the Court is still in the business of drawing lesson plans for Charlie & Co. through the medium of the exclusionary rule, they are not making the task of instruction any easier (which is probably why Justice White confined his text to a discussion of "deadly force").

Even taking the decision at face value, the notion of "deadly" force is far from self-defining, particularly in the context of less-than-lethal consequences. As a term in the justification provision of the New York Penal Law, the definition of deadly force is carefully and precisely spelled out.[26] Of course that is not only local language, but a definition drawn before we realized the word would have constitutional connotations. And in his foray into new ground, Justice White did not pause to construct a constitutional definition for future travellers.

More chased suspects probably die in high speed vehicle pursuits (not to count the innocent bystanders) than are brought down by police gunfire. Is the trooper, stepping on the gas and opening the siren behind a wayward car, using "deadly" means to capture the fleeing driver? A hickory club brought down upon the head of a struggling suspect is quite capable of inflicting a mortal blow. Is the swing controlled by the fourth amendment? Some may even argue that not every gunshot amounts to "deadly force"; an expert police marksman, drawing a clear and careful bead on his target's lower extremities, it could be said, incurs little risk of fatality.

To compound the definitional uncertainty, Justice White in several places couples the phrase "deadly force" with the alternative: "or the threat of it." This would seem to prohibit even the pointed pistol or the raised stick. "Stop or I'll shoot" would offend the fourth amendment to the same extent as a bullet through the head. Can that be the Court's intended meaning?

So, the first thing we need is some light on the major premise of the decision so Charlie and the others who frequently employ physical force of some

25. This would be a nice reprise. Not since Mallory v. United States, 354 U.S. 449 (1957), was written off the books in the District of Columbia by Congress (18 U.S.C. § 3501 (1982)) has a statement been excluded merely because it was obtained during an unreasonably long pre-arraignment delay.

26. Section 10.00 of the New York Penal Law provides: " 'Deadly physical force' means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."

"Physical force" is not defined (unfortunately) but paragraph (10) of the same section defines "serious physical injury" thus: " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

degree—and threaten worse—to stop, calm, and capture their quarry, can have some idea of what and when.

### *B. The "Minor Premise": (Apprehension of a Nondangerous, Fleeing Felon)*

The *Garner* court is quite strict on the matter of dangerousness. By "danger," the Court clearly means risk of serious bodily injury, and strongly suggests the prospect must be imminent. Thus, Justice White frequently refers to an appreciable likelihood that the fleeing felon will inflict serious physical harm upon the pursuing officer or others, and in several places notes that the police in *Garner* had no reason to believe the young burglar was armed. At one point, Justice White also allows that the reasonable apprehension of danger might be derived from probable cause to believe that the crime from which the suspect is fleeing "involved the infliction or threatened infliction of serious physical harm."[27] But, he insists, law enforcement does not benefit from "the killing of non-violent suspects."[28]

Unfortunately, the category of a "dangerous" or "violent" suspect upon which deadly force may be used to foil escape is not a clearly described or readily recognized breed. Apart from the easy cases where the fleeing felon brandishes a firearm in attempting to evade capture or is in flight from a crime, just committed, that included an armed assault, the Court's view on this point is obscure. Indeed, it would not put the opinion under great strain to interpret it as authorizing the use of deadly force in only these easy cases. But, proceeding on the assumption that the Court did not intend to compel the states to allow all other criminals to escape if they were swift enough, we must probe the decision a bit deeper.

For our test, let us start with this cryptic message from the heart of the opinion: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[29] The nature of the "threat" the Court has in mind is clear from the opening paragraph: "a significant threat of death or serious physical injury."[30] Thus, as to his own person, the officer must have a well-grounded fear of immediate and mortal injury before he may fire. In the instance of the fleeing felon, these conditions, one would suppose, cannot be met except by the actual possession of firearms or explosives, coupled with a manifest, aggressive disposition. A knife or bat, for example, cannot pose a grave threat except at close quarters. And even the armed felon who keeps his gun in his belt and runs without looking back poses no real threat of imminent injury. Nor can the police officer use his gun to capture someone because he reasonably fears that otherwise he may be subjected to

27. 105 S. Ct. at 1701.
28. 105 S. Ct. at 1700.
29. 105 S. Ct. at 1701.
30. 105 S. Ct. at 1697.

attack some appreciable time thereafter. The fourth amendment's tolerance for deadly force on this basis is limited, but it's fairly clear.

Did Justice White deliberately omit the critical adjective "immediate" when speaking of the threat to the safety of persons other than the pursuing officer? Unless reason be strained to the fracture point, conscious craft should be assumed. Justice White probably intended to offer a wide window for speculation on the types of harm to "others" that a police officer may shoot to avoid. I think of the automobile speeding in an erratic path toward a town, pulling away from the pursuing patrol car. Shooting to kill a reckless, perhaps even intoxicated, driver may seem extreme, but the potential harm to others is clear. Does the constitutional litmus come up: "reasonable"? Imagine a person wanted for a series of violent crimes, but showing no signs of being armed or violent at the moment; let him get away and he might well strike a future unknown victim in a harmful way. Does the fourth amendment allow the use of deadly force to capture that "dangerous" person?

About halfway into his opinion, Justice White, by way of example, indicates in the following language that the nature of the crime from which the felon flees has some bearing on the degree of force appropriate to apprehend him: "Thus if . . . there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[31] Passing the odd insertion of a requirement of warning (found nowhere else in the decision), several other curiosities appear. The first may be the unstated assumption that only those crimes of substantial physical injury are socially serious enough to risk killing the perpetrator to halt him. One can think of a number of crimes such as sexual abuse of children, extortion, major drug trafficking, racketeering, or treason that on some scales are the equal in social harm to a knifepoint street robbery. Even some "crimes against property" such as arson might qualify as serious. Or for that matter the nighttime flatburglary—Garner's crime—might seem to some so frightening, so volatile, so deeply invasive, that it should be regarded as very serious even if the burglar is unarmed (as most legislatures do when they set up punishment quotients), notwithstanding its FBI classification as a property crime or the statistics showing the relative infrequency of actual physical violence during the commission of the crime. (Both factors were cited by the Court in reaching a contrary conclusion.)[32]

Does the "prevent escape" phrase suggest a requirement of immediacy? Is the use of deadly force reasonable only if the perpetrator is in actual flight from the crime, moments after its commission, when he might still be armed and dangerous? Or is it enough that the officer have probable cause to believe that the person he shoots committed such a violent crime and is trying to evade capture? May execution of a warrant of arrest for rape, for instance, be

31. *Id.* at 1701.
32. *Id.* at 1705.

aided by a gun if the suspect takes off, regardless of when the rape occurred, or the present inclination of the suspect to resist arrest by dangerous aggression?

### C. *The Conclusion: (Suppression Deters Abuse)*

The important, though largely unheralded, case of *Frisbie v. Collins*[33] has shown remarkable durability, at least until now. The case stands for the doctrine that the manner of arrest, whatever its side effects, cannot defeat the jurisdiciton of the trial court in which an otherwise valid indictment is returned. As long as *Frisbie* remains afloat, it is doubtful whether suppression of the incidental and fortuitous byproducts of the arrest will greatly influence Charlie's decision to bring the felon to court by bullet when successful escape is the alternative.

The *Frisbie* rule suffered a brief incursion when the Court of Appeals for the Second Circuit remanded a case to the district court for a hearing on the defendant's claim that because United States officials had conducted extreme physical torture in the apprehension and transportation of the defendant to court, his prosecution was precluded.[34] On this theory, an illicit gunshot employed in the capture of the fugitive, as distinct from other kinds of fourth amendment violations, might preclude prosecution altogether. If more serious violations of the fourth amendment call for more serious efforts at deterrence, perhaps—*Frisbie* notwithstanding—total defeat of the prosecution is the appropriate response. Still, realistically appreciating the ease of error during street pursuit, courts might hesitate to release all who were taken unlawfully, even by bullet wound, and rest content in the less potent lesson of evidentiary exclusion.

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As I ponder these several mysteries, I cannot help but think of Charlie, tossing in bed as fleeing felons dance before his eyes. He is, after all, the person to whom Justice White's advice is ultimately addressed. Can the message be faithfully, usefully transmitted?

If I were to sit down with Charlie and explain to him how the High Court wants him to handle his weapon, I would have to start by excising from the opinion a few bits I am certain Justice White did not mean to be taken literally. No court, I venture, would hold that an arrest violated the fourth amendment because Charlie had pointed his gun at the suspect, or had shouted, "Stop or I'll shoot." I am far less certain about non-ballistic deadly force (such as car chases and billy clubs), or the import of the decision for subdeadly excessive force. So I would probably leave that part out too, at least until we get more guidance from the Court. To the professional ear, my rendition seems somewhat artificial, I confess, but for ease of communication, I

33. 342 U.S. 519 (1952). *See supra* note 13.

34. Toscanino v. United States, 500 F.2d 267 (2d Cir. 1974), *motion denied on remand,* 398 F. Supp. 916 (E.D.N.Y. 1975).

would treat *Garner* as though it were a case about the actual use of police firearms only.

I might divide my sermon into three parts, commencing thus:

"Now Charlie, here's the first thing: Get in shape. The Constitution wants you to chase down this perpetrator if you possibly can. Use your feet first. Run him up a blind alley. Head him off at the pass. No matter what crime he committed or how dangerous you may think he is, there's a principle of necessity operating here; think of your gun as a last resort only.

"If it's quite obvious you can't win a footrace, even with a little help from your friends, and if you have good reason to think he has the firepower and the desire to blast a shot or two at you to get you off his tail, then you may fire at him. While your shots are technically in aid of your powers of arrest, you may think of them as self-protection. It's a kind of self-defense theory, but without the ordinary citizen's duty to retreat if possible.

"In addition to the shot to protect yourself, you may also fire if you have good reason to believe the fleeing felon is a violent person who might inflict serious physical injury on another person. The danger to others does not have to be immediate, like a hostage situation, for example. But it's not enough that you believe that some future harm might possibly come to someone, as where you have reason to believe an automobile is being operated by an intoxicated driver. You must have a definite and foreseeable crime in mind in which intentional injury is very likely to be a part.

"The third situation in which the Constitution allows you to fire your gun to catch the escaping felon is when you have good reason to believe that the crime for which you are trying to arrest him is one involving the use of major physical force, the actual infliction of serious injury, or death. This is the real puzzle. I can't say whether the Constitution will allow you to fire if you are about to lose a suspect on whom you are trying to execute a warrant for a violent crime. It may be that an old assault does not indicate a potential for injuring others in the public at large such that the court will think the risk of killing the suspect is justified by the avoidance of the risk of harm to unknown others. So, if this is your reason for shooting, all I can advise is: do what feels right and let's hope it's legal."

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Perhaps there is ultimately some virtue in a standard that simply instructs police officers to heed their own internal sense of justice. The appropriate balance of compassion and coercion will remain elusive, to the everlasting dismay of the codifiers, and instruction in the dictates of humanity has its limits. Even the most elaborately structured code of justification, such as the Model Penal Code formulation, must suffer from the cruel limitations inherent in the genre. Like the gun itself, a standard of restraint is useless unless it is readily grasped in moments of stress. A complex social idea, fully articulated, becomes incapable of intelligible transmission and sensible application. To avoid the perils of precision, it must rely largely on the assimilated tenets of

the unarticulated code of decency that cops learn long before they put on the badge. Careful formulation is often more useful for social scientists seeking measurements of the expressed values a culture places upon human life than for the solitary cop confronting the escaping burglar in the dark back yard. At least with respect to the mortal stroke,[35] it is not altogether unreasonable to assume that the young people who put on the badge and sling the .38 from their belts have assimilated the cultural lessons of respect for life and restraint of power just as the rest of us have learned these basic values of our common civilized society. Of course, this is not to say that the bad character and bad judgement behind the badge should not be swiftly identified and severely punished. I only suggest that in some areas it might be largely illusory to expect too much from meticulous proscription, and the eternal hope of modelmakers to shape behavior by intricate proclamation may have little advantage over the ordinary processes of conscience and the acculturated sense of duty.

## II
## *GARNER* AND THE DEFENSE OF JUSTIFICATION

Another problem with *Garner* deserves some thought: its effect on the law of justification and, more particularly, on carefully crafted statutes such as New York's. New York law, recall, specifically provides that a police officer is justified in the use of deadly physical force to capture a person fleeing from the commission of the crime of arson (*inter alia*).[36] The Supreme Court has found that such force against a non-violent suspect is a violation of constitutionally protected rights of security, so how can it be "justified" by local law? Was the Court, in enlarging the civil remedies under Section 1983, necessarily

35. Far beyond the scope of the present essay lies the alluring idea that the various applications of the fourth amendment, being significantly distinctive, call for different levels of articulation. Thus, when it comes to whether it is unreasonable for a police officer to open a briefcase in the opened trunk of a stopped car, cultural norms offer little instruction; but in the matter of intentionally killing a juvenile shoplifter to foil his escape, a highly articulated statutory directive does little more than reiterate the obvious. Justice White, then, in his customary casual regard for the proscriptive niceties, may be more realistic here, where "reasonable" resonates in the gut, than in the more common areas of "technical" security of person, property, and effects.

36. Garner's crime, had it been committed in New York, probably would not have allowed the use of deadly force to effect his capture. Deadly force is justified to arrest for first degree burglary, and that crime is defined by section 140.30 as more aggravated than a nocturnal intrusion into a dwelling. *See supra* note 7. Other jurisdictions may permit the use of deadly force where the burglary is (1) of a dwelling (2) in the nighttime and (3) occupied by a human being at the time (a fact that did not appear in the *Garner* recital). At common law these elements characterize the most serious degree of the crime, and insofar as deadly force is authorized to apprehend any burglar, it may be justified for a case like Garner's. For purposes of the effect of the decision on New York law, however, we should confine our consideration to the category of arson, designated without limitation of degree in section 35.30. In Article 150, the New York Penal Law divides the crime of arson into four degrees and (unlike the statute's description of first degree burglary) defines it in a way clearly broader than the Court's limitation of the use of deadly force to the capture of felons fleeing from crimes "enforcing the infliction or threatened infliction of serious physical harm." 105 S. Ct. at 1701. *See* Appendix B, *infra*.

striking down as unconstitutional a state choice to exempt certain behavior from criminal culpability?

The question raises fundamental issues regarding the correspondence of civil action, evidentiary sanction, and criminal responsibility. It would be neat if they coincided. And in many instances they do. Certainly, violations of the fourth amendment necessitating the exclusion of evidence against the aggrieved party and that person's cause of action for the recovery of damages under the Civil Rights Act are very close, perhaps precisely coterminous. It might not be amiss to suppose that civil remedies for damages suffered by reason of any constitutional violation track the evidentiary rules of exclusion very closely. But it would probably be unwise to leap to a principle of three-way symmetry. For, notwithstanding a shared policy of deterrence, the criminal penalties and the constitutionally fashioned rules of evidentiary exclusion are not cut from the same bolt.

The judicial branch cannot command the legislative branch to enact a law penalizing those who violate the constitutional rights of others. The Constitution does not require a criminal sanction, in addition to the evidentiary rule of exclusion, for the offense of "Unlawful Interrogation." The state offends no constitutional principle by failing to punish as a crime "Holding an Uncounselled Lineup After Accusation." Just as the state may allow many bad things to go unpunished under its criminal law, so violations of constitutionally secured rights do not necessarily call for a penal response.

The state has made killing a human being a crime, but has justified the act in described circumstances. The question then becomes whether the state's delineation of the category excused must follow the line of constitutional "reasonableness" drawn by the Court for a different purpose. The guide here must be the "rational basis" test of equal protection.

It is difficult—and more than somewhat strained—to imagine an individual with both standing and grounds to raise the equal protection claim (if that is what it is). The police officer exempted by law from criminal penalty for shooting the fleeing arsonist surely could not complain that the exemption by which he benefits is "irrational" under *Garner*'s test of "reasonableness." So too, the cop sued under the Civil Rights Act for the same shot could not assert the inconsistency of *Garner*'s construction of the fourth amendment with New York culpability law. One might have to conjure up a jurisdiction with a narrower compass of exculpability than the Court allows as reasonable use of deadly force for arrest purposes. Let us unrealistically suppose a state that has so thoroughly rejected the common law rule that it tolerates police use of deadly force only where it is necessary to meet force of the same character. *Garner*, remember, allows deadly force to arrest a person who poses a risk of "serious physical injury" as well as homicide. Thus, in our Erewhon, the cop indicted for fatally shooting a person who threatens physical injury but not death might claim that the legislative line had no rational basis because the distinction does not comport with described fourth amendment reasonable-

ness. Without being too cute, the issue might therefore be phrased: can a category of conduct be at once rational and unreasonable? That is, can it be rational from the standpoint of equal protection to excuse from criminal penalty a police officer who shoots someone under circumstances that violate the individual's fourth amendment right to be secure against unreasonable seizure? As it stands, the New York statute provides that a police officer commits no crime when he shoots a fleeing torch even though the shot offends the reasonableness provision of the fourth amendment.

Our paradox is more than a linguistic puzzle. From a policy standpoint, the problem of classification suffers from the same contradictions. Choosing to excuse certain conduct from criminal sanction, the legislature makes a complex judgment, at least one significant component of which is based in part upon the social utility of deterrence in the pertinent circumstances. Thus, in New York, the legislature has determined that the risk of death to the suspect is acceptable in order to frustrate the escape of certain criminals, or at least that the criminal conviction of the shooting officer is not necessary to deter future gunshots in such cases. Yet, the Court-ordered exclusion of evidence derived from the arrest reflects the conflicting judgment of the Constitution in the identical case and for the same purpose: deterrance. It is an inescapable, head-on collision of contradictory policy objectives. Two outcomes are possible: the federal, constitutionally derived policy will rule the state political judgment, or both will survive the impact undented. So put, most of us—well-schooled in federal, not to say constitutional supremacy—would probably put our money on the former result.

I am not so sure. The long and strong perogative of state political bodies to describe criminal offenses for themselves is still firmly embedded in the design of our system. Without the state's accord by reinforcing penal sanctions, the Constitution may rest content with the deterrent effect of the exclusionary remedy, even where the offensive official excess entails the employment of lethal force. Of course, the legislature may, and has determined that some actions in the course of law enforcement work are so egregious that they are punishable offenses, and thus doubly deterred. Not every use of firepower by police in New York is justified by statute. Far from it. On the other hand, some conduct contravenes judicially perceived public policy more clearly than legislative policy, and thus receive only the weaker deterrent effect of evidentiary limitation. In short, we have, and need have no federally-founded rule of penal conformity. Consequentially, statutory rules of justification, like those in New York, may emerge miraculously unscathed from the implications of *Tennessee v. Garner*.

But let us not undervalue the sense of uneasiness this conclusion generates. That which is unjustified for fourth amendment purposes should not be justified for penal purposes. The exclusionary rule is a special form of criminal code guided by the same principles of social utility and the license of office as the penal law. The discontinuity I suggest is troubling because, as it stands,

it calls in question the claim of moral rectitude for one or the other of these expressions of fundamental social policy. Thus, whether or not I put Charlie's mind at ease with my reductionist instructions, the *Garner* case leaves the rest of us in a state of some confusion, if not distress.

## APPENDIX A

**PATROL GUIDE** PROCEDURE NO 104-1

**GENERAL REGULATIONS**

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USE OF FIREARMS

These guidelines have been prepared to reduce shooting incidents and consequently protect life and property. In addition, these guidelines incorporate the U.S. Supreme Court ruling that deadly physical force may not be used to effect the arrest of an unarmed, non-dangerous, fleeing felon. Accordingly, Article 35 of the Penal Law, with respect to the use of deadly physical force by police officers, to effect arrests or prevent escapes shall be interpreted in accordance with the restrictions imposed by the U.S. Constitution and in accordance with the following department guidelines:

a. In all cases, only the minimum amount of force will be used which is consistent with the accomplishment of a mission.
b. The firearm shall be viewed as a defensive weapon, not a tool of apprehension.
c. Every other reasonable alternative means will be utilized before a police officer resorts to the use of his firearm.
d. Deadly physical force shall not be used to effect the arrest of a fleeing felon unless the officer has probable cause to believe that:
   (1) Deadly physical force was used or threatened by the perpetrator, OR
   (2) The perpetrator caused serious physical injury, OR
   (3) The perpetrator is armed with a deadly weapon.

In addition, department policy would prohibit the use of deadly physical force unless ALL of the following factors are present:

   (4) The police officer must have probable cause based upon knowledge of the crime involved and the surrounding circumstances, AND
   (5) The police officer has probable cause to believe the fleeing felon poses an immediate threat of serious physical injury to the officer, or has probable cause to believe that failure to apprehend the fleeing felon poses a threat of serious physical injury to others, AND
   (6) Reasonable means to apprehend the perpetrator, other than use of firearm are not available.

e. Deadly physical force shall not be used to effect an arrest or prevent or terminate a felony unless the officer has probable cause to believe that the victim may be killed or seriously injured and there is no other reasonable means to effect the arrest or prevent or terminate the felony other than by deadly physical force.
f. A police officer may use deadly physical force upon another person when he reasonably believes that such other person is using or about to use deadly physical force against the officer or a third person.

NOTE

Where feasible, and consistent with personal safety, some warning (other than a warning shot) must be given.
DEADLY PHYSICAL FORCE SHOULD ONLY BE USED AS A LAST RESORT.

g. The firing of warning shots is prohibited.
h. Discharging a firearm to summon assistance is prohibited, except where someone's safety is endangered.
i. Discharging a firearm from or at a moving vehicle is prohibited, unless the occupants of the other vehicle are using deadly physical force against the officer or another BY MEANS OTHER THAN THE VEHICLE.
j. The discharge of a firearm at dogs or other animals should be an action employed ONLY when no other means to bring the animal under control exists.
k. To minimize the possibility of accidentally discharging a weapon, firearms shall not be cocked and should be fired double action.

## APPENDIX B

§ 35.30 Justification; use of physical force in making an arrest or in preventing an escape.

1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

2. The fact that a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.