

POLICE USE OF DEADLY FORCE: STATE STATUTES 30 YEARS AFTER *GARNER*

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INTRODUCTION

The recent rash of police shootings has raised troubling questions about when, if ever, police are justified in using deadly force against a suspect. Some police shootings may simply represent wanton violence. Others may present close cases. How do we decide when a police officer can not only use force, but shoot at a suspect—even shoot to kill? When is a police killing a justifiable homicide, and when is it just a homicide?

One place to start in drawing the line between justified and unjustified uses of deadly force is the Supreme Court's 1985 opinion in *Tennessee v. Garner*.¹ Reading the majority opinion in *Garner* is a bracing experience. Justice White's extended discussion of the common law standard of police use of force makes clear on many levels that he did not merely want to replace the common law rule: he wanted to bury it.² That police could use *any* amount of force, including deadly force, to "seize"³ a fleeing felon—the common law rule which at issue in *Garner*⁴—was not only constitutionally infirm, it made little sense as a policy matter.⁵ Police departments had long ago abandoned the idea (at least in theory, but also in practice) that deadly force should be the default

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1. *Tennessee v. Garner*, 471 U.S. 1 (1985).

2. *Id.* at 13–16, 18, 19.

3. Killing someone is way of seizing them. *See e.g., id.* at 25 (O'Connor, J., dissenting) (finding that *Garner* was seized by being shot and killed).

4. *See id.* at 23 (O'Connor, J., dissenting) (referring to the "venerable common law rule" that allowed deadly force to be used if necessary against a fleeing felon).

5. *Id.*

option for stopping non-violent offenders.⁶ The common law rule, in fact, was a relic of an age where most crimes were punishable by death and most felonies were violent ones.⁷ However, we were now in an age of due process, where we had trials and did not “shoot first and ask questions later.” More deeply echoing throughout the opinion is the theme that the common law in our day and age is utterly lacking in *humanity*.⁸ The rule at common law seemed to suppose that it was always more important to catch a criminal even if that meant killing him. However, that is not always the case. Sometimes it is better to let the criminal go free than to use force that could kill.⁹ The opinion does not condone the offender in victim but it does, in a way, encourage us to sympathize with him: he may have deserved a trial and punishment, but he did not deserve to die.

As powerful as the *Garner* decision was, it also was an importantly limited one. *Garner* was a case involving a suit under § 1983, the federal civil rights statute.¹⁰ In deciding such a suit, the Court has to announce what the constitutional rule is—and so in *Garner*’s lawsuit, the Court had to say what amount of force counted as “reasonable” under the Fourth Amendment.¹¹ However, deciding the *constitutional* standard for *Garner*’s civil rights suit did not disturb what the standard had to be for *state* criminal law prosecutions.¹² States still have the authority to dictate under what circumstances police could justifiably use deadly force, and so avoid punishment under state law.¹³

In other words, although Tennessee lost the lawsuit in *Garner*, the result in *Garner* did not require that it change its statute that permitted police to shoot at a fleeing felon, nor did it require any other state to abandon the common law rule.¹⁴ States could still hang on to the common law rule—and even after

6. Matt Apuzzo, *Police Rethink Long Tradition on Using Force*, N.Y. TIMES (May 4, 2015), http://www.nytimes.com/2015/05/05/us/police-start-to-reconsider-longstanding-rules-on-using-force.html?_r=0.

7. *Garner*, 471 U.S. at 13.

8. *See id.* at 15 (describing application of the common law rule today as having “harsher consequences” which are “disproportionately severe”).

9. *See id.* at 15, 17.

10. 42 U.S.C. § 1983 (2012).

11. *Garner*, 471 U.S. at 6.

12. *Id.* at 28.

13. As one state court has put it, “[i]n other words, *Garner* was a *civil* case which made no mention of the officer’s criminal responsibility for his ‘unreasonable’ actions. Thus, not only is the United States Supreme Court without authority to require this state to make shooting a non-dangerous fleeing felon a *crime*, it has never even expressed an intent to do so.” *People v. Couch*, 461 N.W.2d 683, 684 (Mich. 1990).

14. As if to punctuate this fact, the Court held the statute unconstitutional only “as applied.” *Garner*, 471 U.S. at 5, 12–13.

Garner, many did.¹⁵ States generally have free rein to decide what defenses they can have, and the scope of those defenses.¹⁶ A state can decide to have a “stand your ground” law, or it can decide not to have one, but neither is required—or for that matter, prohibited—by the Constitution.¹⁷ States can say officers are never authorized to use deadly force, or they can say they can use deadly force to shoot a fleeing felon.¹⁸ Again, neither result is dictated by the Constitution.¹⁹

Many states did change their laws after *Garner* due to *Garner*’s compelling reasoning.²⁰ Police could shoot at felons, these new laws articulated, but the felons had to be dangerous, or have committed a dangerous felony (states differed slightly in how they interpreted the holding in *Garner*).²¹ These states that changed their law to fit with *Garner* joined the ranks of those states that had already given up on the common law rule.²² According to the Court’s tally in *Garner*, twenty-three states had the common law rule in 1985, approaching but not quite a majority.²³ The number would diminish in the succeeding decades, as we report below.²⁴

The number has not yet reached zero. As the death of Michael Brown in Ferguson, Missouri brought to light,²⁵ many states still had the common law rule, either as a matter of statutory law or as a matter of their common law.²⁶ In some of these states, the actual status of the law regarding police officer use of

15. ROLANDO V. DEL CARMEN ET AL., CRIMINAL PROCEDURE AND THE SUPREME COURT 291 (Rowan & Littlefield Publishers, Inc., 2010).

16. See Part III, *infra*.

17. See Part III, *infra*.

18. *Garner*, 471 U.S. at 20.

19. We expand on this point in Part III *infra*.

20. It is also possible that some states did change because they believed (erroneously) that they had to change their laws. Many police departments changed their laws seemingly in response to *Garner*. See Samuel Walker & Lori Fridell, *Forces of Change in Police Policy: The Impact of Tennessee v. Garner*, 11 AM. J. POLICE 97 (1992).

21. *Garner*, 471 U.S. at 1.

22. See Part III, *infra*.

23. *Garner*, 471 U.S. at 17. “When in 1985 the Supreme Court in *Tennessee v. Garner* considered the constitutionality of deadly force in arrest, the Court, in summarizing the then current nationwide picture, indicated that about half of the states adhered to the common-law rule, while two others adopted the Model Penal Code verbatim and another 18 had similar provisions (the situation in the remaining states was unclear).” 2 Subst. Crim. L. § 10.7 (2d ed. 2015).

24. See Part III, *infra*.

25. E.g., William Freivogel, *Grand Jury Wrangled with Confusing Instructions*, ST. LOUIS PUB. RADIO (Nov. 26, 2014), <http://news.stlpublicradio.org/post/grand-jury-wrangled-confusing-instructions>.

26. See AMNESTY INT’L, DEADLY FORCE: POLICE USE OF DEADLY FORCE IN THE UNITED STATES (2015), http://www.amnestyusa.org/pdfs/AIUSA_DeadlyForceExecutiveSummaryJune2015.pdf.

force was a matter of considerable confusion.²⁷ In Missouri, police departments by and large followed the *Garner* rule in their training,²⁸ and the jury instructions for police officer use of force (approved by the Missouri Supreme Court) explicitly referenced the *Garner* decision and standard.²⁹ The Missouri statute still followed the common law rule.³⁰ A number of bills were proposed in the spring of 2015 to change the Missouri statute, but none of them made it to a full vote.³¹ All of them, to a greater or lesser extent, sought to make the law in Missouri closer to the *Garner* standard. Presumably, the issue will be up again for debate in the coming legislative session.³²

This essay updates the count of states who still hang on to the common law rule in their statutes, thirty years after *Garner*.³³ The structure of our essay is as follows: after a recapitulation of *Garner*—including a discussion of the

27. *Garner*, 471 U.S. at 17.

28. See *infra* Part IV.

29. The Missouri pattern jury instructions can be found at MAI-CR 3d 306.14.

30. The relevant portion of the statute reads:

3. A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only

(1) When such is authorized under other sections of this chapter; or

(2) When he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

(a) Has committed or attempted to commit a felony; or

(b) Is attempting to escape by use of a deadly weapon; or

(c) May otherwise endanger life or inflict serious physical injury unless arrested without delay.

4. The defendant shall have the burden of injecting the issue of justification under this section.

MO. REV. STAT. § 563.046 (2010).

31. David A. Lieb, *Missouri Lawmakers Quit Early, Failing to Pass Ferguson-Inspired Changes to Deadly Force Law*, U.S. NEWS (May 15, 2015, 8:58 PM), <http://www.usnews.com/news/us/articles/2015/05/15/missouri-legislature-enters-final-day-of-session-in-turmoil>. For a review of those bills, see *infra* Part IV.

32. Rep. Brandon Ellington (D) of Kansas City said, “Well look anytime we end a legislative session we come back and we start looking at what we didn’t get over the finish line the year before, I’m sure we will be back discussing the use of deadly force statue next session.” Press Release, Missouri House of Representatives, *Lawmakers Look Forward to 2016* (June 19, 2015), [http://www.house.mo.gov/pr/Video/6-19-15/Lawmakers Look Forward to 2016.docx](http://www.house.mo.gov/pr/Video/6-19-15/Lawmakers%20Look%20Forward%20to%202016.docx); see also *Push for Policing Reforms Expected In Upcoming Legislative Sessions*, HUFFPOST POLITICS (Dec. 17, 2015, 10:44 AM), http://www.huffingtonpost.com/entry/police-reform_us_5672d668e4b0dfd4bcc0ca5c.

33. There is a useful count made by Amnesty International, but it is incomplete. In particular, it does not count those states that have their use of force provisions as a matter of common law rather than statutory law. AMNESTY INT’L, *supra* note 26, at 2; Oliver Laughland & Jamile Lartey, *All 50 US States Fail to Meet Global Police Use of Force Standards, Report Finds*, THE GUARDIAN (June 18, 2015) <http://www.theguardian.com/us-news/2015/jun/18/us-states-police-use-of-force-standards-amnesty>.

ambiguity of what is ultimately its holding (Part I)—we turn to our updated count of states that still retain the common law rule (Part II). Part III explains why, contrary to the belief of many, the decision in *Garner* did not require states to abandon the common law rule. Part IV looks at the most recent legislative efforts to reform the use of police force statute in Missouri.

I. *TENNESSEE V. GARNER*

A. *The Facts of Garner*

The facts as recounted in *Garner* present a police killing that seems not only unjustified, but almost wanton.³⁴ The bare facts are that an officer shot at a person fleeing a burglary attempt.³⁵ However, this does not do justice to the nature of the shooting, at least in the Court's eyes. The officer who shot the fleeing felon seems to stumble at almost every step.³⁶ The officer, Elton Hymon, thought the victim, Edward Garner was 17 or 18.³⁷ In reality, Garner was 15, an eighth-grader.³⁸ Hymon thought Garner could have been as tall as 5'7".³⁹ He was 5'4".⁴⁰ In explaining why he shot Garner, Hymon says nothing about the threat Garner might have posed—in fact, Hymon was "reasonably sure" Garner had no weapon—only that he was eluding escape.⁴¹

With Garner crouching near a fence, Hymon shouted "police, halt."⁴² Garner then hopped onto the fence.⁴³ This seemed, to Hymon, to point to the necessity of shooting Garner, because at this point all hope of catching Garner was lost.⁴⁴ Hymon could not jump the fence, because he was "carrying a lot of equipment and wearing heavy boots."⁴⁵ Compared to Hymon, Garner was "younger and more energetic."⁴⁶ Although Hymon was accompanied by another police officer, the other officer was "late in coming" to the scene and could not understand Hymon's directions as to where Garner was fleeing.⁴⁷ In the end, Hymon shot the fleeing Garner in the back of the head (Garner had not

34. *Tennessee v. Garner*, 471 U.S. 1, 3–4 (1985).

35. *Id.*

36. *See id.* at 21 (explaining that officer Hymon could not reasonably have believed deadly force was necessary).

37. *Id.* at 3.

38. *Id.* at 4 n.2.

39. *Garner*, 471 U.S. at 3–4.

40. *Id.* at 4 n.2.

41. *Id.* at 3–4.

42. *Id.* at 4.

43. *Id.*

44. *Garner*, 471 U.S. at 4 n.3.

45. *Id.*

46. *Id.*

47. *Id.*

yet made it over the fence).⁴⁸ Garner died on the operating table after he was taken to the hospital. He had, it was later discovered, stolen ten dollars and a coin purse.⁴⁹ For the Court, the shooting of Garner was a matter of mistake, misjudgment, and miscommunication.⁵⁰

The Tennessee statute governing police use of force at the time stated that "if, after notice of the intention to arrest the defendant, he either flee[s] or forcibly resist[s], the officer may use all the necessary means to effect the arrest."⁵¹ Tennessee's police department policy was apparently slightly more restrictive, but still allowed the use of deadly force in the case of a felon fleeing a burglary.⁵² A grand jury declined to indict Hymon.⁵³ He was also cleared by the Memphis Police Firearm's [sic] Review Board.⁵⁴ Garner's father sued under 42 U.S.C. § 1983.⁵⁵ The district court ruled in favor of Hymon, finding he had acted reasonably.⁵⁶ The appeals court also ruled in favor of Hymon—finding he acted in good faith reliance on the statute, and so he was entitled to qualified immunity.⁵⁷ The appeals court sent the case back to the district court to determine whether and to what extent the City of Memphis might be liable.⁵⁸

After the district court found no liability on the City's part because the Tennessee statute was constitutional, the court of appeals reversed: the standard supplied by the Tennessee statute, it said, was not reasonable under the Fourth Amendment.⁵⁹ The appeals court presented its own standard for when deadly force was reasonable. Officers cannot use deadly force, it concluded, unless they had probable cause to believe the suspect had committed a felony *and* he "poses a threat to the safety of the officers or a danger to the community at large."⁶⁰ The State of Tennessee, which had by that time intervened in defense of the statute's constitutionality, appealed.⁶¹

48. *Id.* at 4. The Court would later explicitly reference these facts when explaining its holding: "the fact that the police arrive a little late or are a little slower afoot," the Court wrote, "does not always justify killing the suspect." *Id.* at 11.

49. *Garner*, 471 U.S. at 4.

50. *See id.* at 4 & nn.2-3.

51. *Id.* at 4 (quoting TENN. CODE ANN. § 40-7-108 (1982)).

52. *Id.* at 5.

53. *Id.*

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

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 5-6.

59. *Garner*, 471 U.S. at 6.

60. *Id.*

61. *Id.* at 7.

B. *The Birth of the Garner Standard for Deadly Force*

The Supreme Court, in its opinion, took it upon itself to give a searching investigation of the common law rule of police force, and to reassess that rule in light of modern circumstances.⁶² It notes, early on, that the use of *deadly* force represents something of an anomaly in a system that is structured by trials and proof beyond a reasonable doubt.⁶³ If you kill someone who is fleeing, you dispense with all that. You skip the trial, and go straight to the punishment—a punishment that cannot be reversed on appeal. As the majority opinion states, somewhat dryly but emphatically, “The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice system in motion. If successful, it *guarantees that the mechanism will not be set in motion*.”⁶⁴ There should be a bias against using deadly force, the Court surmises, if only for this reason: we prefer trials to summary executions.⁶⁵

The Court then answers the compelling counter-argument made by the state: the common law rule supports shooting fleeing felon; moreover, the common law rule was the rule at the time of the adoption of the Constitution.⁶⁶ However, to accept the common law rule in interpreting the Constitution, the Court replies, is to be in the grips of a “mistaken literalism” that ignores history.⁶⁷ The common law rule may have made sense when all felonies were punished by death.⁶⁸ Then, there may have been considerable pull to the idea that the police officer was simply accomplishing quickly what the court system would be doing eventually. Further, the common law rule may have been acceptable when nearly all felonies were *dangerous* felonies,⁶⁹ as we could automatically presume dangerousness from the mere fact of a felony having been committed.

Neither of these facts was still true at the time of *Garner*.⁷⁰ The death penalty, slowly, but inexorably, was being limited to the most violent and heinous of crimes.⁷¹ It was not applied to all crimes, even all felonies, across the board. Now not all felonies were violent. In fact, many crimes that were misdemeanors in the world of Blackstone were now being treated as felonies.⁷² Thus, two trends, working in opposite directions, made the common law rule

62. *Id.* at 14.

63. *See id.* at 13–14.

64. *Garner*, 471 U.S. at 10 (emphasis added).

65. *See id.* at 9–11 (“Petitioners and appellant have not persuaded us that shooting non-dangerous fleeing suspects is so vital as to outweigh the suspect’s interest in his own life.”).

66. *Id.* at 13.

67. *Id.*

68. *Id.*

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

70. *Id.*

71. *See id.*

72. *Id.*

otiose: the death penalty was becoming more rare, but more crimes, particularly nonviolent crimes, were becoming felonies.⁷³ To these two trends the Court added a third: it was getting easier to use deadly force.⁷⁴ Before, deadly force was mainly inflicted by hand-to-hand combat, that is, after a fight.⁷⁵ Nowadays, police can kill with one pull of a trigger. There may be, in such a world, a greater need for caution in using force—and for a rule that would discourage the use of force unless and until it was really necessary.⁷⁶

The Tennessee rule, the Court concluded, was “pure” common law, but that common law rule when literally applied made no sense in our changed “legal and technological context.”⁷⁷ Proof that the rule was no longer good could be found in the evolving practices of states (discussed in greater detail in the next Part of this essay) but even more “impressive[ly]” in polices “adopted by police departments themselves.”⁷⁸ “Overwhelmingly” police departments had chosen policies that were more restrictive than the common law rule.⁷⁹ They allowed force when there was a risk of serious harm, or death, and not merely when there was a fleeing felon.⁸⁰ According to the Court, over 85% of departments had rejected the common law rule.⁸¹ The Court found the trend of departments to be especially persuasive, because it demonstrated that sound policing did not *require* the common law rule in order to protect citizens and prevent crime.

The Court’s new standard, which was to replace the common law rule, was that deadly force could “not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”⁸² This is how the Court announces the rule in the opening paragraph of its decision.⁸³ Later, it clarifies, and puts the rule in both positive and negative terms. If the suspect poses no immediate threat to the officers or others, deadly force cannot be used.⁸⁴ However, when “the officer has probable cause to

73. *Id.*

74. *Garner*, 471 U.S. at 14–15.

75. *Id.*

76. In a footnote, the Court also points to better communications technology, which may make it easier to catch felons, but it finds no persuasive evidence on this score. *Id.* at 15 n.13.

77. *Id.*

78. *Id.* at 18.

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

80. *Id.*

81. *Id.* at 19. A study published a few years after *Garner* showed this percentage growing even greater. See Walker & Fridell, *supra* note 20, at 101; see also Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241 (1994).

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

83. See *id.*

84. *Id.* at 11.

believe that the suspect poses a threat of serious physical harm . . . it is not constitutionally unreasonable to prevent escape by using deadly force.”⁸⁵ The next line brings an even more specific statement of the Court’s new standard: “Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”⁸⁶

The line just quoted is ambiguous, because it is not clear whether it is restating the rule or giving a specific application of the rule.⁸⁷ The “thus” would could either be introducing an example of the rule being applied (as in: “for example”) or a further restatement of the rule (as in: “in conclusion”).⁸⁸ This ambiguity is important, because on it hinges the question of whether deadly force is *only* justified when the felon presents an immediate threat or whether it can be used *also* when the felony is a dangerous one.⁸⁹ The later possibility suggests the rule that deadly force is justified even when the felon is not immediately dangerous, but has committed a dangerous felony.⁹⁰ What seems likely, although it is not dictated by the text, is the following allowable inference: a police officer has probable cause to believe a felon poses an immediate threat *either* when he is immediately threatening or he has committed a dangerous felony *which suggests that he is probably a continuing threat*. Again, this is a conclusion not strictly dictated by the text—and explains why state statutes are split on the matter, even when they have been changed after *Garner*.⁹¹

It is hard not to see the Court as being influenced by the Model Penal Code’s (MPC) standard for the use of force.⁹² They nearly reproduce it in

85. *Id.*

86. *Id.* at 11–12.

87. *Garner*, 471 U.S. at 11–12.

88. *See id.*

89. *See id.*

90. Support for this can be found in Justice Scalia’s opinion in *Scott v. Harris*: “‘By way of example only, *Garner* hypothesized that deadly force may be used ‘if necessary to prevent escape’ when the suspect is known to have ‘committed a crime involving the infliction or threatened infliction of serious physical harm,’ *ibid.*, so that his mere being at large poses an inherent danger to society.” *Scott v. Harris*, 550 U.S. 372, 382 n.9 (2007) (emphasis added).

91. “Thus, at least some courts have read *Garner* to permit the use of deadly force by police officers to apprehend suspects fleeing from the commission of violent crimes, even if those persons do not appear to pose an immediate threat to police officers or to the public at large.” Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 7 KAN. J. L. & PUB. POL’Y, 100, 100 (1998). *See generally* R. Paul McCauley & Lawrence N. Claus, *Police Use of Force Statutes: States Inconsistent with Established Constitutional Law*, 43 CRIM. L. BULL. 726 (2007).

92. *See* MODEL PENAL CODE § 3.07 (Proposed Official Draft 1962).

spirit, although the MPC is clearer about which way it reads the ambiguity noted in the previous paragraph.⁹³ The MPC prohibits the use of deadly force except in situations where the person is *either* presently dangerous *or* has committed a crime using deadly force.⁹⁴ It is possible to see the Court as endorsing this type of standard in *Garner*, although it remains unclear whether it believes that using deadly force on someone who has committed a dangerous felony is justified based on the fact that he is likely to be dangerous because of that (i.e., because he has shown himself to be dangerous in the felony he has committed) or whether this is a truly independent ground for the use of deadly force.⁹⁵ The MPC treats them as two distinct grounds.⁹⁶ However, there seems no question that with the MPC, the Court wanted to raise substantially the threshold at which deadly force could be used, far above the common law standard of "any felony."⁹⁷ It wanted to reserve the use of deadly force for only those situations where the felon was posing a risk of causing death or serious physical injury to others, or had at least committed a crime where deadly force had been used.⁹⁸

II. STATE STATUTES BEFORE AND AFTER *GARNER*

A. *Garner's 50 State Survey*

Section C of Part III of *Garner* contains a long and detailed discussion of state laws on the use of force.⁹⁹ At the time, and by the Court's own count, nineteen states had the common law rule as part of their criminal code, but—it notes—in two of those cases, the state courts had limited the reach of the common law rule.¹⁰⁰ In California, the felony had to be a forcible and atrocious one, or the person escaping had to present a substantial risk of causing death.¹⁰¹ In Indiana, the deadly force could not be used simply to prevent escape; you could use deadly force only to prevent injury or an imminent or threatened use of force.¹⁰² However, the Court still leaves this in their count of states that have the "common law" rule still on the books.¹⁰³ Four other states, according to the *Garner* court, had the common law rule as a matter of their common law.¹⁰⁴ So

93. *See id.*

94. MODEL PENAL CODE § 3.07(2)(b).

95. *See Garner*, 471 U.S. at 11–12.

96. MODEL PENAL CODE § 3.07(2)(b).

97. *See Garner*, 471 U.S. at 11, 14.

98. *Id.* at 11–12.

99. *Id.* at 15–19.

100. *Id.* at 16.

101. *Id.* at 16 n.15.

102. *Garner*, 471 U.S. at 16 n.15.

103. *Id.* at 16.

104. *Id.*

all told, twenty-three states held on to some form of the common law rule when *Garner* was handed down, although again, in two of those states (California and Indiana) the rule had already been watered down by judicial interpretation.¹⁰⁵

The rest of the states, according to the Court, either had more restrictive rules than the common law rule, or else—in the case of four states—the Court could not figure out what rule that state had.¹⁰⁶ Two states adopted verbatim the Model Penal Code's (MPC's) rule on deadly force, which (as noted above) in some ways mirrors the Court's rule in *Garner*, except it is clearer than the Court on the ambiguity between having committed a deadly felony and being presently dangerous.¹⁰⁷ The MPC says that the fleeing felon *either* must have committed a felony involving deadly force or the threat of deadly force *or* present a substantial risk of death or bodily injury if not apprehended without delay.¹⁰⁸ The Court puts Massachusetts in the MPC category as well—although it relies on some extrapolation to do so.¹⁰⁹

Eighteen states, the Court continues, have a statute similar to the MPC, though they use slightly different language: deadly force can be used in cases of felonies that use or threaten physical force, or the fleeing felon is escaping with a deadly weapon or there's a chance the felon is going to "endanger life or inflict serious physical injury" if he is not arrested.¹¹⁰ The Court also groups Louisiana and Vermont with the eighteen, although they have no state statute precisely on point.¹¹¹ The remaining four states (Maryland, Montana, South Carolina, and Wyoming), the Court says, do not have case law or statutes on point, or what they do have is unclear.¹¹²

105. The Court also suggests that Wisconsin's rule may be a watered down version of the common law as well. *Id.* at 16 n.14.

106. *Id.* at 16–17.

107. *Garner*, 471 U.S. at 16–17.

108. MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft 1962). In other words, the MPC is clear, where the Court is not, that deadly force is permissible if the felon has committed a dangerous felony, even if he or she is not *presently* a threat.

109. *Garner*, 471 U.S. at 17 n.17. The Court notes that Massachusetts has accepted the MPC rule with regard to private citizens and "seems to have extended that decision to police officers."

110. *Id.* at 17.

111. *Id.*

112. *Id.*

Common Law Rule Definitely Still in Effect		Common Law Rule Definitely Not Still in Effect		Undetermined	
Codified by Statute	By Case Law	By Statute: MPC Verbatim	By Other Statute	By Case Law	No statute and no case law or otherwise unclear
19 ¹¹³	4	3 ¹¹⁴	18	2	4
Total: 23		23		4	

The Court admits that the data it has does not indicate any clear trend away from the common law rule—which explains why, in part, they find it necessary to rely on police department policies, which it thinks *do* show a clear trend.¹¹⁵ Indeed, the Court points to three states—Alabama, Idaho, and Missouri—which considered changing their rule but rejected it (Alabama and Missouri), or briefly abandoned the common law rule, then returned to it (Idaho).¹¹⁶ What seems undeniable from *Garner*'s count is that there was still substantial support for the common law rule in 1985. Indeed, if we kick out the states where the Court says the rule was ambiguous, we have a twenty-three to twenty-three state split—half one way and half the other.¹¹⁷ If we remove California and Indiana, the count becomes skewed in favor of the non-common law states, but only slightly.¹¹⁸

What about the thirty years after *Garner*? Have things changed or largely stayed the same? Can we find a more consistent and definite trend away from the old common law rule?

B. Updating *Garner*'s Count

The answer seems to be "yes." Although we provide a survey of all state laws in the Appendix,¹¹⁹ here our focus is on those states that retain their common law rule (either in their common law or in statutes), and where the rule has not been substantially modified by state court decisions. Easiest to see

113. The Court counted California and Indiana in the first category, but its description of the "limitations" in the use of force statutes really places them with the other eighteen states that rejected the common law rule by statute. See *Garner*, 471 U.S. at 17 n.15.

114. We include in this category Massachusetts, even though it does not, strictly speaking, have the MPC rule "by statute." See *id.* at 17 n.17.

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

116. *Id.* at 18 n.21.

117. See *supra* note 114, tbl. 1.

118. See *supra* note 113, tbl. 1.

119. For a detailed parsing of some state statutes see McCauley & Claus, *supra* note 91.

are the states which have retained the basic common law rule in their statutes. They make no distinction between types of felonies, and do not add any qualification about the present dangerousness of the felon. Most states now have one or the other or both qualifications to their statutes. Eight states still have neither, even thirty years after the *Garner* decision. Alabama says officers may use deadly physical force to “make an arrest for a felony;”¹²⁰ Mississippi’s statute allows that homicide is justifiable when committed to apprehend “any person for any felony committed;”¹²¹ Missouri also refers to “a felony;”¹²² the New Mexico statute governing homicide by police officers states that homicide is justifiable when “necessarily committed in arresting felons fleeing from justice” without qualifying *which* felons;¹²³ Oregon still allows use of deadly force when the crime committed is a felony or attempted felony;¹²⁴ Rhode Island also says officers can use deadly force when pursuing someone who merely has committed “a” felony;¹²⁵ South Dakota has language virtually identical to New Mexico, although it phrases the rule in terms of when an officer is justified in committing “homicide;”¹²⁶ and Washington permits deadly force to arrest a person who has committed simply “a felony.”¹²⁷

By our count, that leaves eleven states post-*Garner* that have changed their statutory law to more closely resemble the *Garner* standard.¹²⁸ Connecticut’s statute now states deadly force in making an arrest is justified only when the officer believes it is necessary to “defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force,” language which echoes *Garner* but arguably goes beyond it in the emphasis on the imminent use of *deadly* physical force, not just force that may result in a serious injury.¹²⁹ The Kansas statute also mirrors *Garner* in requiring that the officer have “probable cause” to believe that the person has committed a felony “involving death or great bodily harm or is attempting to escape by use of a deadly weapon.”¹³⁰ The other states that have

120. ALA. CODE § 113A-3-27(b)(1) (2014).

121. MISS. CODE ANN. § 97-3-15(1)(g) (2010).

122. MO. REV. STAT. § 563.046.3(2)(a) (2010).

123. N.M. STAT. ANN. § 30-2-6A(3) (2006).

124. *Tennessee v. Garner*, 471 U.S. 1, 17 (1985).

125. R.I. GEN. LAWS § 12-7-9 (2014).

126. S.D. CODIFIED LAWS § 22-16-32 (2015).

127. WASH. REV. CODE § 9A.16.040(1)(c)(i) (2015).

128. See e.g. ARK. CODE ANN. § 5-2-610(b)(1) (2010); CONN. GEN. STAT. § 53a-22(c) (2005); FLA. STAT. § 776.05(3) (2015); IDAHO CODE ANN. § 18-4011 (2015); KAN. STAT. ANN. § 21-5227(a) (2014); NEV. REV. STAT. § 200.140 (2010); OKLA. STAT. tit. 21, § 732 (2006); TENN. CODE ANN. § 40-7-108 (2010).

129. CONN. GEN. STAT. § 53a-22(c) (2005).

130. KAN. STAT. ANN. § 21-5227(a) (2014).

departed from the common law rule post-*Garner* follow in this model, adjusting the common law standard in either of these two ways: by requiring an imminent threat or by requiring a belief that the felony committed was “dangerous” in some measure.¹³¹

However, we must also consider the states that had the common law standard, but not as a matter of statutory law. What have they done? Of the four states that the Court said had the common law rule embodied in their common law—Michigan, Ohio, Virginia, and West Virginia—only Michigan has most clearly *not* changed its common law. Indeed, a Michigan state case raised the issue, but for various reasons stuck with the common law rule.¹³² The case *People v. Couch* dealt with a citizen—not an officer—using deadly force to apprehend a suspect.¹³³ There, the Court went out of its way to say it was not going to change the common law rule after *Garner* and even doubted its power to do so.¹³⁴ Ohio seems to have explicitly embraced *Garner*.¹³⁵ Virginia’s case law seems ambiguous,¹³⁶ as does West Virginia’s, with some

131. See *supra* note 128.

132. *People v. Couch*, 461 N.W.2d 683 (1990). A post-*Couch* case (which, like *Couch*, involved a private citizen asserting the fleeing felon defense) recites the common law rule in Michigan:

To justify the use of deadly force to prevent the escape of a fleeing felon: “(1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the use of deadly force must have been ‘necessary’ to ensure the apprehension of the felon.” *Id.* at 596–597. Necessity is a question of fact for the jury to decide. *Id.* at 597. In addition, the private person must apply reasonable care to prevent the felon’s escape without violence. *People v. Couch*, 436 Mich. 414, 421; 461 N.W.2d 683 (1990), quoting *People v. Gonsler*, 251 Mich. 443, 446–447; 232 N.W. 365 (1930).

People v. Spears, 267572, 2007 WL 1203537, at *2 (Mich. Ct. App. Apr. 24, 2007).

133. *Couch*, N.W.2d at 684.

134. *Id.* at 684 n.1.

135. *State v. White*, 29 N.E.3d 939, 947 (Ohio 2015). Courts therefore apply *Garner* and *Graham* in reviewing criminal convictions arising from a police officer’s use of deadly force. See, e.g., *United States v. Ramos*, 537 F.3d 439, 457 (5th Cir. 2008) (“there is no question but that a police officer’s unjustifiable shooting of a victim qualifies as a crime of violence; there is no question but that a police officer’s shooting a victim who poses no physical threat to the safety of the officer or the public is unjustifiable”); *State v. Pagotto*, 555, 762 A.2d 97 (Md. 2000) (prosecution of police officer for involuntary manslaughter and reckless endangerment); *State v. Smith*, 807 A.2d 500 (Conn. 2002) (prosecution of police officer for first-degree manslaughter); *State v. Mantelli*, 42 P.3d 272, 279 (N.M. 2002) (prosecution of police officer for voluntary manslaughter, aggravated assault with a deadly weapon, and shooting at a motor vehicle resulting in injury); *People v. Martin*, *People v. Martin*, 214 Cal. Rptr. 873 (Cal. Ct. App. 1985) (noting that *Garner* “limits the scope of justification for homicide”). See also *State v. White*, 988 N.E.2d 595, 612 (Ohio Ct. App. 2015) (stating that “it would seem logical” that *Garner* would apply in a criminal prosecution).

136. Virginia states the common law rule in its cases, but also seems to use a broad notion of “necessity” that encompasses aspects of the *Garner* rule (heinousness of the crime,

favorable citations to *Garner* in various places (in the case of West Virginia, only one)¹³⁷ but stopping short of adopting *Garner* as the state rule. We are inclined to leave them in the “common law” camp, absent further developments or further clarification.

The Court had also said that the law in some states was simply ambiguous, and we can update and perhaps correct their count. Some of those states, namely Maryland¹³⁸ and Wyoming,¹³⁹ we can now put in the *Garner* camp, which have cases roughly on point and which cite the *Garner* rule and other relevant parts of *Garner* favorably. South Carolina’s law—in the news recently¹⁴⁰—still seems to remain a mystery. In an almost completely baffling case, *Shepard v. State*, the South Carolina Supreme Court stated the common law rule, viz., that “an officer may use whatever force is necessary to effect the arrest of a felon including deadly force to effect that arrest” but then adds a *see* citation to the *Garner* case!¹⁴¹ The standing rule still seems to be any amount of force can be used to apprehend a fleeing felon, which means that South Carolina should be moved from the “ambiguous” camp into the “common law”

proportionality of the force to the circumstances), and generally just gives the question to the jury. *See, e.g., Hendricks v. Com.*, 178 S.E. 8, 12 (Va. 1935); *Couture v. Com.*, 656 S.E.2d 425, 431 (Va. Ct. App. 2008).

137. One West Virginia court cited *Garner* in support of the broad proposition that “[c]ourts have recognized that the use of excessive force by a police officer constitutes an abuse of authority.” *State ex rel. Billy Ray C. v. Skaff*, 438 S.E.2d 847, 850 (1993).

138. *See, e.g., Reid v. State*, 51 A.3d 597, 611 (2012) (“Additionally, the Supreme Court defines the outer boundary of reasonable force based on the danger that the officer believed himself or herself to be facing at the time the force in question is used. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (holding that when a suspect is believed to be unarmed, the use of deadly force to prevent fleeing is unreasonable).

139. *Roose v. State*, 759 P.2d 478, 484 (Wyo. 1988) (“As stated in *Tennessee v. Garner*, *id.* at 11–12, 105 S.Ct. at 1701: ‘Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given’. . . Looking at the totality of the circumstances in this case and recognizing that a police officer must make split second decisions regarding such grave matters, we hold that the police officer was justified in using the force he used in this instance.”)

140. *See Dana Ford, South Carolina Ex Police Officer Indicted in Walter Scott Killing*, CNN (June 8, 2015, 5:30 PM), <http://www.cnn.com/2015/06/08/us/south-carolina-slayer-indictment-walter-scott/>.

141. *Sheppard v. State*, 594 S.E.2d 462, 473 (2004) (“The trial court correctly stated that an exercise of a legal right is never deemed a provocation sufficient to justify or to mitigate an act of violence. The trial court also properly charged that an officer may use whatever force is necessary to effect the arrest of a felon including deadly force to effect that arrest.”). *See also Tennessee v. Garner*, 471 U.S. 1 (1985) (during felony arrest, if arresting officer has probable cause to believe suspect poses threat of serious physical harm, officer may prevent escape by using deadly force).

camp.¹⁴² No cases in Montana post-*Garner* cite *Garner*, so Montana's law remains ambiguous—it does not have a law specifically regarding police officer's use of force.¹⁴³

In our updated chart, we dispense with the *Garner* Court's division of the states that have rejected the common law rule. The *Garner* Court went out of its way to identify those states that seemed to adopt a version of the MPC rule.¹⁴⁴ However, what is salient in our mind is not whether or not they adopt the MPC rule or some other formulation, but whether they have followed *Garner* in explicitly rejecting the common law rule. In other words, our chart recognizes *Garner* as the watershed decision that it was, supplanting the importance of the MPC as an influence on the law-making behavior of the states. There is now only the one question: Are you sticking with the common law, or are you following *Garner*?

Common Law Rule Definitely Still in Effect		Common Law Rule Definitely Not Still in Effect	Undetermined
Codified by Statute	By Case Law		
8	4	36	2
Total: 12		36	2

III. *GARNER* AND STATE LAWS

To many, the persistence of states that have the common law rule is a source of puzzlement, if not outrage.¹⁴⁵ In the aftermath of the Darren Wilson grand jury to not prosecute Wilson for shooting Michael Brown, it was revealed that the Wilson prosecutors themselves were unclear as to the correct standard to use.¹⁴⁶ The Missouri law is the common law standard and it is the one that was initially given to the grand jurors to use as their basis for

142. We are grateful for a discussion on a criminal law professor's listserv for helping us to confirm this conclusion.

143. The closest it comes is a statute regarding use of force to prevent escape from custody. MONT. CODE ANN. § 45-3-106 (2009).

144. *Garner*, 471 U.S., at 16–17.

145. See Arturo Garvia, *Lawrence O'Donnell Rips St. Louis Prosecutor for Making It "Impossible for Darren Wilson to Fail,"* RAW STORY (Nov. 27, 2014), <http://www.rawstory.com/2014/11/lawrence-odonnell-rips-st-louis-prosecutor-for-making-it-impossible-for-darren-wilson-to-fail/>.

146. See Chad Flanders, *The Wilson Case Illustrates Why We Should Change Missouri's Use of Force Law*, ST. LOUIS PUB. RADIO (Nov. 26, 2014), <http://news.stlpublicradio.org/post/commentary-wilson-case-illustrates-why-we-should-change-missouri-s-use-force-law>.

assessing Wilson's liability.¹⁴⁷ However, later in the proceeding, in fact almost immediately before the jurors were to deliberate, the prosecutors said that the jurors needed to discard the handout they were given that had the Missouri statute on it.¹⁴⁸ When one of the jurors pressed why they were being given a new law, the prosecutors largely shushed them, but appealed to *Garner*.¹⁴⁹ It was because the Supreme Court had overruled the Missouri rule, they said.¹⁵⁰

This is incorrect.¹⁵¹ It is possible that the prosecutors, in an abundance of caution, chose to use the incorrect standard, because it was more stringent: it would be less of a help to Wilson, although it would not be the standard at Wilson's trial, should there have been one. There is also a tension in the Missouri jury instructions, which do refer to *Garner*, and take *Garner* as the established standard.¹⁵² The statute would again trump the instructions.¹⁵³

Why didn't *Garner* make Missouri's statute unconstitutional, just like *Brown* made state laws regarding separate but equal schools unconstitutional? *Garner* involved the application of a standard within a federal civil rights statute, not a in a state criminal prosecution.¹⁵⁴ State law treatises have recognized this point.¹⁵⁵ As the Michigan treatise writes about the *People v. Couch* case discussed above: "*Garner* means that the use of deadly force by the police without regard to dangerousness violates the Fourth Amendment, but, of course, the U.S. Supreme Court cannot change the state substantive

147. Flanders, *supra* note 146.

148. Flanders, *supra* note 146.

149. Garvia, *supra* note 145.

150. Flanders, *supra* note 146.

151. See Bill Freivogel, *Grand Jury Wrangled with Confusing Instructions*, ST. LOUIS PUB. RADIO (Nov. 26, 2014), <http://news.stlpublicradio.org/post/grand-jury-wrangled-confusing-instructions>.

152. Flanders, *supra* note 146.

153. In *State v. Carson* the Court stated:

"[I]n fact, this Court has held that MAI-CR and its Notes on Use are "not binding" to the extent they conflict with the substantive law. *State v. Anding*, 752 S.W.2d 59, 61 (Mo. banc 1988). "Procedural rules adopted by MAI cannot change the substantive law and must therefore be interpreted in the light of existing statutory and case law." *Id.*, citing Mo. Const. art. V, § 5; *State v. Dixon*, 655 S.W.2d 547, 558 (Mo.App.1983), cert. denied 464 U.S. 1072, 104 S.Ct. 982, 79 L.Ed.2d 219 (1984). As the introductory comments to MAI-CR3d specifically provide: The Court has adopted these proposals without judicially deciding or foreclosing any legal, constitutional, procedural, instructional, or other issues which may arise in cases even though the procedures, instructions, and Notes on Use adopted by the Court are followed and used. MAI-CR3d "How to Use This Book-Reservations" pp. ii-iii (1987). If an instruction following MAI-CR3d conflicts with the substantive law, any court should decline to follow MAI-CR3d or its Notes on Use."

State v. Carson, 941 S.W.2d 518, 520 (Mo. 1997).

154. *Tennessee v. Garner*, 471 U.S. 1 (1985).

155. Flanders, *supra* note 146.

criminal law, and this action would therefore not be a state law crime.”¹⁵⁶ The Missouri treatise on criminal law says something similar.¹⁵⁷ The standards for criminal liability in a state criminal prosecution do not have to mimic the standards for a constitutional tort.¹⁵⁸

It is true that the Constitution applies to the states.¹⁵⁹ The First Amendment of the Constitution may mean that a state law is unconstitutional.¹⁶⁰ A state may make it illegal to say bad things about the President, or to burn the flag, or to use coarse language.¹⁶¹ Such laws—and prosecutions under such laws—would not stand under the First Amendment: they would involve obvious violations of free speech.¹⁶² Consider how different that is from whether or not a police officer should be able to appeal to a certain justification under state law when he or she uses force. There, the question is not whether someone should be punished for breaking the law, but whether his or her conduct should be considered a violation of the law at all.¹⁶³ The difference here is between expanding liability in the face of a constitutional provision and being required to hold someone liable. States may be required to strike down laws, but they cannot be required to make them—or get rid of excuses or justifications they may have in the law.

In general, states are free to be more expansive in defining the scope of their criminal law.¹⁶⁴ States have to obey the Constitution, but they do not have to criminalize violations of the Constitution.¹⁶⁵ They can make some things not a crime that the federal government criminalizes—consider the repeal of state marijuana laws in Alaska, Colorado, and Washington. In a similar way, a state could decide to legalize “being a police officer and using deadly force against a fleeing felon,” even if there is a federal law that comes out the other way. Not

156. Gillespie, MICH. CRIM. L. & PROC. SEARCH & SEIZURE § 5:60 (2d ed. 2015).

157. Although the statute may be unconstitutional for purposes of federal civil rights or state tort liability, it does not necessarily follow that the state is obliged to hold an officer criminally liable if his actions fall within the statutory privilege. In other words, it would seem that an officer charged with homicide could still assert the provisions of § 563.046.3 if applicable, to shield himself from criminal liability, since the statute has not been amended or repealed. MO. REV. STAT. § 563.046.3(2)(a) (2010).

158. Flanders, *supra* note 146.

159. U.S. CONST. art. VI, § 1, cl. 2.

160. U.S. CONST. amend. I.

161. *Id.*

162. *Id.*

163. Strictly speaking, the argument would be that the person was justified in breaking the law, and so should not be convicted (not that they had not committed a crime at all).

164. Flanders, *supra* note 146.

165. U.S. CONST. art. VI, § 1, cl. 2.

all states have to have the same defenses.¹⁶⁶ For the most part, federalism is the rule in the substantive criminal law in the states.¹⁶⁷

Furthermore, the Fourth Amendment, as a matter of criminal procedure, rather than criminal substance, does apply to the states.¹⁶⁸ This is not relevant, either, in the context of a state criminal prosecution of a police officer.¹⁶⁹ If Wilson had unreasonably seized Brown, and Brown did not die and was later put on trial, any evidence Wilson had gotten as a result of that seizure could potentially be excluded at trial.¹⁷⁰ The consequence of a Fourth Amendment violation is the exclusion of evidence gathered as a result of that violation—a boon for the defendant. In other words, the Fourth Amendment does not require or mandate any criminal sanction for the officer who has violated the Fourth Amendment.¹⁷¹ It only gives the defendant an advantage at trial, and presumably, in negotiating a plea as well.¹⁷² It is true, however, that a statute *plus* a Fourth Amendment violation can lead to sanctions for an officer who violates the Fourth Amendment.¹⁷³ A statute can say “if a police officer violates the Fourth Amendment, then he or she should be held liable in a court of law.”¹⁷⁴ In fact, this is precisely what some federal civil rights statutes do; they give a cause of action for people to sue for recovery of damages sustained as the result of a Constitutional violation.¹⁷⁵ However, the important thing is that the constitution does not do this by itself. It requires a statute to make something criminal.¹⁷⁶

166. See generally Flanders, *supra* note 146.

167. There may be some point where a criminal law that did not have certain defenses—or made some defenses too expansive (“police may shoot at will”)—may violate due process. The Eighth Circuit briefly flirted with making such a claim about Missouri’s use of force statute, but for procedural reasons, the case is no longer binding. *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976).

168. I credit this explanation to Loyola Law School Professor Eric Miller. See Eric Miller, *The Ends of Policing*, in OBSTACLES TO FAIRNESS IN CRIMINAL PROCEEDINGS: INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS (John Jackson & Sarah Summers eds., forthcoming 2016).

169. Flanders, *supra* note 146.

170. Exclusion of evidence obtained by violation of a suspect’s constitutional rights is the primary remedy for such violations. See *Mapp v. Ohio*, 367 U.S. 643, 654 (1961).

171. U.S. CONST. amend. IV.

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

173. Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 252 (2009).

174. See generally 42 U.S.C. § 1983 (displaying an example of deprivation of rights leading to liability in actions at law, including judicial officers in certain cases).

175. See *id.*

176. Although Congress may “make all Laws which shall be necessary and proper for carrying into Execution” the provisions of the Constitution, the Constitution does not, in its text, provide any remedies for constitutional violations, nor does it require the states to do so. U.S. CONST. art. I, §8, cl. 18.

The officer in *Garner* was sued under precisely such a statute, not under a state criminal statute.¹⁷⁷ If a state's criminal law has a more restrictive standard—the *Garner* standard rather than the common law standard—then of course the officer may be criminally liable under the state law. If the state does not have the *Garner* standard, then it is possible that a police officer could escape criminal liability but still face civil liability under § 1983.¹⁷⁸ This is exactly what the result was in the *Garner* case.¹⁷⁹ Officer Hymon escaped criminal liability (in fact, he was not even a party to the civil suit by the time *Garner* reached the Supreme Court), but it was still possible for the *Garner* family to recover damages from what the officer did.¹⁸⁰

Therefore, the prosecutors were right initially when they gave the grand jurors Missouri's law as the one to apply to any prosecution of Wilson.¹⁸¹ That rule—basically the common law rule—is what applied, and not the *Garner* standard.¹⁸² *Garner* did not, as some commentators mistakenly asserted, “overturn” Missouri's law, or Tennessee's law, for that matter.¹⁸³ Of course, one might favor the *Garner* standard for policy reasons, and many states did post *Garner*. However, it is a mistake to say that *Garner* meant that the states had to change their law, because *Garner* left those laws untouched. There is no requirement that state law fit with the standards for a federal civil rights suit against a police officer. If the attorneys supervising the grand jury thought that *Garner* somehow “overrides” the state statute, they were wrong.¹⁸⁴ The substantive criminal law of the fifty states does not have to meet a constitutional standard of reasonableness.¹⁸⁵

IV. PROPOSED CHANGES TO MISSOURI'S LAW¹⁸⁶

As we saw, Missouri was one of the states cited by the Court in 1985 as having the common law rule,¹⁸⁷ and thirty years after *Garner*, Missouri still

177. See *Tennessee v. Garner*, 471 U.S. 1 (1985).

178. *Id.*; see also 42 U.S.C. § 1983.

179. See generally *id.* (1985).

180. *Id.* at 23.

181. Flanders, *supra* note 146.

182. See *Garner*, 471 U.S. at 15.

183. *Id.* at 22.

184. Flanders, *supra* note 146.

185. Flanders, *supra* note 146.

186. This Part is based on thoughts first presented in Chad Flanders & Marcia McCormick, *Steps to a Sensible Use of Force Law* ST. LOUIS POST-DISPATCH (Feb. 12, 2015), http://www.stltoday.com/news/opinion/steps-to-a-sensible-use-of-force-law/article_7e237cd7-0d_cf-50f8-bcde-b4c07fca8c07.html.

187. 3. A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only

(1) When such is authorized under other sections of this chapter; or

has the same rule. In the major reform to the criminal code passed by the Missouri legislature last year,¹⁸⁸ they kept the rule—making only minor grammatical changes to the text of the statute. Moreover, in the comment to the statute, which was made effective in 1979, the legislature expressly disavowed limiting the use of deadly force to certain felonies (e.g., ones that involved a risk of death or serious physical injury), saying that such an approach was “cumbersome and impractical.”¹⁸⁹ The comment did say that the officer should use his judgment as to whether the situation was dangerous enough to merit deadly force.¹⁹⁰ However, such a dangerousness requirement is nowhere to be found in the text of the statute itself, which permits the use of force in cases where *any* felony is committed, even a non-violent one.¹⁹¹ In principle, an officer in Missouri would be protected by the Missouri law enforcement officer use of force statute if he used deadly force against a fleeing check forger (a class D felony).¹⁹²

The shooting of Michael Brown—and the subsequent decision not to prosecute Darren Wilson—brought renewed attention to Missouri’s use of force law. Add to this the confusion about the proper jury instructions given to the grand jury, and there was a sense that law needed to change, or at least be clarified. Missouri’s pattern jury instructions follow *Garner* by leaving out the justification of deadly force on a fleeing felon—departing from the clear text of the statute, which allows force to be used against any fleeing felon.¹⁹³ Police

(2) When he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

- (a) Has committed or attempted to commit a felony; or
- (b) Is attempting to escape by use of a deadly weapon; or
- (c) May otherwise endanger life or inflict serious physical injury unless arrested without delay.

4. The defendant shall have the burden of injecting the issue of justification under this section.

MO. REV. STAT. § 563.046 (2010); *Tennessee v. Garner*, 471 U.S. 1, 20 n.21 (1985).

188. The changes will not take effect until 2017. Alan Burdziak, *Prosecutors discuss changes to Missouri’s criminal code*, COLUM. DAILY TRIB. (Feb. 12, 2015, 2:00 PM), http://www.columbiatribune.com/news/crime/prosecutors-discuss-changes-to-missouri-s-criminal-code/article_972acf33-08e4-5822-93b8-bae1b843070b.html.

189. MO. ANN. STAT. § 563.046 (West) (Comment to 1973 Proposed Code).

190. *Id.*

191. *Id.* § 563.046.3(2)(a).

192. *Id.* (noting the relevant language states “Has committed or attempted to commit a felony”).

193. MAI-CR 306.14, *Notes on Use* (“One of [the grounds for use of deadly force] is if the officer ‘reasonably believes that the person to be arrested has committed or attempted to commit a felony.’ This basis for the lawful use of deadly force by a law enforcement officer is not included in this instruction.”).

practice in Missouri also embodies the *Garner* standard.¹⁹⁴ Again, Missouri state law is not required to follow *Garner*, as several media outlets misleadingly reported in the wake of the grand jury's decision.¹⁹⁵ However, changing the law might have at least some symbolic significance, even if it might not matter that much to practice. It could show that Missouri believes its police officers should use force only sparingly, that is, only when the suspected felon actually, and presently, presents a threat to others.¹⁹⁶

Several proposals were made to change the law in the spring 2015 legislative session, introduced by Senators Dixon, Chappelle-Nadal, and Nasheed, and by Representatives Adams and Pierson.¹⁹⁷ None of the bills passed the General Assembly, although it seems reasonable to predict that many of them will be introduced in the new legislative session.¹⁹⁸ Our purpose in discussing them here is not to endorse one proposal over another, but rather to highlight the differences between the bills, and see how they compare to the standard articulated in the *Garner* decision.

The bill that got the most media attention was the one proposed by Senator Nasheed.¹⁹⁹ Her proposal required that police exhaust "all other reasonable

194. Some departments have policies far more restrictive than the rule announced in *Garner*. The St. Louis County Police Department policy, for example, authorizes deadly force only when the officer either reasonably believes it is needed to defend himself or others from imminent threat of death or serious physical injury, or when ALL of the following conditions exist: "1. The suspect committed or attempted to commit a felony; and 2. The crime involved the use or threatened use of deadly force; and 3. There is a substantial risk that the fleeing suspect will cause death or serious physical injury if apprehension is delayed." The policy also requires first giving a verbal warning when feasible. St. Louis County, Mo., Police Department Procedures, Use of Force, Departmental General Order 10-29, <http://www.stlouisco.com/LawandPublicSafety/PoliceDepartment/ResourcesforCitizens/DepartmentProcedures> (click on "Use of Force" for PDF download).

195. See Part III, *infra*.

196. Our focus, for obvious reasons, is on Missouri, but we are aware of movements in other common law states to change their laws to something approximating the *Garner* standard. For the Missouri bills, see generally William Freivogel, 'Flawed' Bills Won't Fix Confusion Over Deadly Force, ST. LOUIS PUB. RADIO (Feb. 8, 2015), <http://news.stlpublicradio.org/post/flawed-bills-won-t-fix-confusion-about-deadly-force#stream/0>.

197. Some proposals were sweeping in their suggestions for reform, going to the regulation of police more generally. We focus here, for obvious reasons, only on the reform of the Missouri law enforcement use of force statute in each bill. See e.g. S. B. 42, 98th Gen. Assemb., Reg. Sess. (Mo. 2015), <http://www.senate.mo.gov/15info/pdf-bill/intro/SB42.pdf>.

198. Ray Howze, *Senate Send Bill Changing Missouri's Deadly Force Law to the House*, ST. LOUIS PUB. RADIO (Apr. 29, 2015), <http://news.stlpublicradio.org/post/senate-sends-bill-changing-missouris-deadly-force-law-house>.

199. S. B. 42, *supra* note 197. Nasheed was an early proponent of revising Missouri's use of force law. See Farrah Fazzal, *Mo. State Senator Wants Revision to 'Use of Force' Law*, USA TODAY (Dec. 1, 2014), <http://www.usatoday.com/story/news/nation/2014/12/01/missouri-use-of-force-laws/19731233/>.

means” before using deadly force and also that a warning be given.²⁰⁰ Such measures arguably move beyond the *Garner* standard (i.e., make the use of force more difficult to justify than *Garner* would), although *Garner* itself suggests the advisability that officers give a warning.²⁰¹

Nasheed’s proposal also gave police officers the permission to use deadly force against someone who is attempting to escape and “possesses a deadly weapon,” a change that potentially makes the statute *less* restrictive than *Garner* when it comes to the use of deadly force: on one interpretation of the language, an officer could shoot at a fleeing misdemeanor, whom the officer believed had a weapon on his person.²⁰² There are other problems: requiring use of a deadly weapon—which is given a particular definition elsewhere in the Missouri Criminal Code—leaves out cases where a person threatens an officer or others with a non-switchblade knife or baseball bat or crowbar—all “dangerous instruments” but not “deadly weapons.”²⁰³ Nasheed’s proposal seemingly left open the recurring high speed car chase scenario, where a person may pose a serious risk to others, but without the use of “deadly weapon.”²⁰⁴ Finally, Nasheed’s suggested revisions would remove the most *Garner*-like part of the current Missouri statute: section (c) which allows the use of force against someone who may “endanger life or inflict serious physical injury.”²⁰⁵

Senator Chappelle-Nadal’s bill, which got rid of the felony requirement altogether and says force is justified only if the person to be arrested “poses a clear danger to the officer or any other person” seems very close to the standard laid out in *Garner*.²⁰⁶ However, “danger” is an ambiguous term, and not one used in *Garner*, which specified that the danger be one of death or serious physical injury. Senator Dixon and Representative Adams’s bills come

200. Fazzal, *supra* note 199.

201. “Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.” *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

202. S. B. 42, *supra* note 197.

203. As defined by Missouri statute, a deadly weapon is “any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged, or a switchblade knife, dagger, billy, blackjack or metal knuckles.” MO. REV. STAT. § 556.061 (2010). Alternatively, a “deadly instrument” is “any instrument, article or substance, which, under the circumstances in which it used, is readily capable of causing death or other serious injury. *Id.*”

204. See *Scott v. Harris*, 550 U.S. 372, 374–376 (2007).

205. MO. REV. STAT. 563.046.3(2)(c) (2010).

206. S. B. 21, 98th Gen. Assemb., Reg. Sess. (Mo. 2015); S. B. 417, 98th Gen. Assemb., Reg. Sess. (Mo. 2015).

closest to *Garner*.²⁰⁷ Adams's bill keeps the felony language of the Missouri statute, but adds that it must be a "violent" felony.²⁰⁸ *Garner* avoids the use of the term "violence," which has the potential for ambiguity,²⁰⁹ and instead uses the language of physical injury and deadly force. Still, Adams's proposal is roughly in the spirit of *Garner*.

Senator Dixon's proposed revision was probably the one that would bring Missouri law closest to *Garner*.²¹⁰ Like Chapelle-Nadal's and Adams's bills, it gets rid of the felony language altogether, and leaves in the existing statutory language allowing the use of deadly force if the felon may endanger life or inflict serious physical injury unless immediately stopped.²¹¹ That is the *Garner* idea and the *Garner* language, and it is already present in the Missouri statute. Dixon's proposal was also the easiest fix to the existing Missouri statute, as it just cuts out the language that allows police officers to use force to stop a person who has committed "a felony."

What eventually made it to the House was a compromise bill that included changes from both Senator Dixon's and Senator Chappelle-Nadal's bills: it would qualify the any felony language to include only felonies that involved "the infliction or threatened infliction of serious physical injury" and clarified that officers may also use force against a person who might endanger the life or inflict serious physical injury on "the officer or another person" unless arrested without delay.²¹² Both changes are broadly consonant with *Garner* and its emphasis on the seriousness of the risk to the life or the physical safety of the officer and those around him, based either on the fact that the person (a) has committed a dangerous felony or (b) immediately presents a risk of causing death or serious injury.²¹³ Senator Nasheed voted against the bill, arguing against the bill as "watered down." She would have preferred that the standard of belief for the officers be "probable cause" rather than "reasonable suspicion"—which would bring the Missouri law even closer in line with

207. H. B. 602, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015) (Representative Pierson's bill represented almost no change to the law, as it still would allow deadly force to be used for any felony committed. Indeed, Pierson's bill would remove the requirement that officer reasonably believe the use of force is "immediately necessary." The reason for removing that phrase is not clear.).

208. H. B. 415, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

209. In interpreting a statute with the phrase "crime of violence," courts have wrestled with its ambiguity—even when the statute purports to narrow the meaning of the phrase. *See, e.g., United States v. Phillips*, 732 F. Supp. 255, 260 (D. Mass. 1990).

210. H.B. 602, *supra* note 207.

211. S. B. 199, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

212. *Id.*

213. This again reflects the ambiguity in *Garner*: whether or not a person who has committed a felony involving the infliction of harm can be presumed to present an immediate threat.

Garner's holding.²¹⁴ Senator Rob Schaaf also voted against the bill, asserting that if the bill were passed the "perpetrator has no reason to stop when the police say stop because they know they can get away."²¹⁵ The bill was approved by the House, but eventually died in the Senate. According to reports at the time, Governor Jay Nixon "said he would encourage lawmakers to revisit the issue next year."²¹⁶

CONCLUSION

Garner was an important decision, but not important in the way many now think it was. It did not itself change state laws or require them to be changed—and many of them still remain unchanged. However, it did state, clearly and powerfully, the problems with the common law approach to police use of deadly force. It set the constitutional standard and in so doing, it doubtlessly inspired many states to change their laws so that they no longer conflicted with *Garner*. Many police departments were also moved to change their standards to be in line with *Garner*, although as *Garner* made clear, police departments tended to be ahead of the curve in the standards they employed.²¹⁷

Whether the remaining common law states will stick to that standard, especially in light of recent events, we must wait and see. However, these states stand against the historical trend and the powerful message of *Garner*.

214. Howze, *supra* note 198. It is unclear whether in practice a requirement of probable cause would be that much more demanding than reasonable suspicion. Both are vague standards. *Ornelas v. United States*, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."). Nonetheless, in the criminal law, probable cause is a more demanding standard, and so a requirement of probable cause would send a stronger signal that police should use deadly force sparingly, if at all. Remember *Garner* required "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

215. Howze, *supra* note 198.

216. David A. Lieb, *Missouri Lawmakers Quit Early; Deadly Force Bill Fails*, MIAMI HERALD (May 16, 2015, 1:39 AM), <http://www.miamiherald.com/news/nation-world/national/article21159438.html>.

217. See *Garner*, 471 U.S. at 18 (discussing a brief review of law enforcement accreditation agencies). Although we hasten to add that merely because police departments adopt certain policies, it does not mean that these policies are always followed or that officers are adequately trained in them. That remains a separate question, which we have not considered here.

APPENDIX

Survey of All Fifty States Use of Force Law

All Statutes: Current Publication; all bolding added.

Key: CL: common law rule in effect; G: common law rule not in effect (Garner-like rule); MPC: verbatim Model Penal Code; ?: undetermined; -s: by statute; -c: by case law.

Model Penal Code

(1) **Use of Force Justifiable to Effect an Arrest.** Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) **Limitations on the Use of Force.**

(a) The use of force is not justifiable under this Section unless:

(i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(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.

MODEL PENAL CODE § 3.07.

Alabama

Garner category: CL

Current category: CL-s

(b) A peace officer is justified in using deadly physical force upon another person when and to the extent that he reasonably believes it necessary in order:

(1) To make an arrest for a felony or to prevent the escape from custody of a person arrested for a felony, **unless the officer knows that the arrest is unauthorized;** or

(2) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

ALA. CODE § 13A-3-27.

Alaska

Garner category: G

Current category: G-s

(a) The officer may use deadly force only when and to the extent the officer reasonably believes the use of deadly force is necessary to make the arrest or terminate the escape or attempted escape from custody of a person the officer reasonably believes

(1) has committed or attempted to commit a felony which involved the use of force against a person;

(2) has escaped or is attempting to escape from custody while in possession of a firearm on or about the person; or

(3) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

ALASKA STAT. § 11.81.370.

Arizona

Garner category: G

Current category: G-s

C. The use of deadly force by a peace officer against another is justified pursuant to § 13-409 only when the peace officer reasonably believes that it is necessary:

1. To defend himself or a third person from what the peace officer reasonably believes to be the use or imminent use of deadly physical force.

2. To effect an arrest or prevent the escape from custody of a person whom the peace officer reasonably believes:

(a) Has committed, attempted to commit, is committing or is attempting to commit a felony involving the use or a threatened use of a deadly weapon.

(b) Is attempting to escape by use of a deadly weapon.

(c) Through past or present conduct of the person which is known by the peace officer that the person is likely to endanger human life or inflict serious bodily injury to another unless apprehended without delay.

(d) Is necessary to lawfully suppress a riot if the person or another person participating in the riot is armed with a deadly weapon.

ARIZ. REV. STAT. § 13-410.

Arkansas

Garner category: G

Current category: G-s

(b) A law enforcement officer is justified in using deadly physical force upon another person if the law enforcement officer reasonably believes that the use of deadly physical force is necessary to:

(1) **Effect an arrest** or to prevent the escape from custody of an arrested person **whom the law enforcement officer reasonably believes has committed or attempted to commit a felony and is presently armed or dangerous;** or

(2) Defend himself or herself or a third person from what the law enforcement officer reasonably believes to be the use or imminent use of deadly physical force.

ARK. CODE ANN. § 5-2-610.

California

Garner category: CL

Current category: G-s

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

1. In obedience to any judgment of a competent Court; or,

2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

3. **When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.**

CAL. PENAL CODE § 196 (West).²¹⁸

Colorado

Garner category: G

Current category: G-s

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section **only when he reasonably believes that it is necessary:**

218. But see the authority given in *Garner* that construes the word "felony" in subsection 3 of the statute to mean only the kinds of felonies that would justify lethal force as given in the Garner rule. "Consequently, the deadly force authorized by such statutes and regulations may be resorted to only if the felony is a 'forcible and atrocious one' which threatens death or serious bodily harm or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or other person." *Kortum v. Alkire*, 138 Cal. Rptr. 26, 31 (Ct. App. 1977).

(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) **To effect an arrest**, or to prevent the escape from custody, **of a person whom he reasonably believes:**

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon; or

(III) Otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

COLO. REV. STAT. § 18-1-707.

Connecticut

Garner category: CL

Current category: G-s

(c) **A peace officer**, special policeman appointed under section 29-18b, motor vehicle inspector designated under section 14-8 and certified pursuant to section 7-294d or authorized official of the Department of Correction or the Board of Pardons and Paroles **is justified in using deadly physical force** upon another person for the purposes specified in subsection (b) of this section **only when he or she reasonably believes such to be necessary to:**

(1) Defend himself or herself or a third person from the use or imminent use of deadly physical force; or

(2) **effect an arrest or prevent the escape from custody of a person whom he or she reasonably believes has committed or attempted to commit a felony which involved the infliction or threatened infliction of serious physical injury and if, where feasible, he or she has given warning of his or her intent to use deadly physical force.**

CONN. GEN. STAT. § 53a-22.

Delaware

Garner category: G

Current category: G-s

(c) **The use of deadly force is justifiable under this section if all other reasonable means of apprehension have been exhausted, and:**

(1) **The defendant believes the arrest is for any crime involving physical injury or threat thereof, and the deadly force is directed at a vehicle to disable it for the purpose of effecting the arrest, or the defendant believes the arrest is for a felony involving physical injury or threat thereof;**

(2) **The defendant believes that the force employed creates no substantial risk of injury to innocent persons; and**

(3) **The defendant believes that there is a substantial risk that the person to be arrested will cause death or serious physical injury, or will never be captured if apprehension is delayed.**

DEL. CODE ANN. tit. 11, § 467 (West).

Florida

Garner category: CL

Current category: CL-s

A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. **The officer is justified in the use of any force:**

(1) Which he or she reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest;

(2) When necessarily committed in retaking felons who have escaped; or

(3) **When necessarily committed in arresting felons fleeing from justice.**

However, this subsection shall not constitute a defense in any civil action for damages brought for the wrongful use of deadly force unless the use of deadly force was necessary to prevent the arrest from being defeated by such flight and, when feasible, some warning had been given, and:

(a) The officer reasonably believes that the fleeing felon poses a threat of death or serious physical harm to the officer or others; or

(b) The officer reasonably believes that the fleeing felon has committed a crime involving the infliction or threatened infliction of serious physical harm to another person.

FLA. STAT. § 776.05.²¹⁹

Georgia

Garner category: G

Current category: G-s

(b) **Sheriffs and peace officers** who are appointed or employed in conformity with Chapter 8 of Title 35 **may use deadly force to apprehend a suspected felon only when the officer reasonably believes that the suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others; or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm.** Nothing in this Code section shall be construed so as to restrict such sheriffs or peace officers from the use of such reasonable nondeadly force as may be necessary to apprehend and arrest a suspected felon or misdemeanor.

GA. CODE ANN. § 17-4-20.

219. Note: everything from "However" on in subsection 3 pertains only to defenses in a civil action. For purposes of criminal justification defense, the only operative language is the bolded text.

Hawaii

Garner category: MPC

Current category: G-s

(3) The use of deadly force is not justifiable under this section unless:**(a) The arrest is for a felony;**

(b) The person effecting the arrest is authorized to act as a law enforcement officer or is assisting a person whom he believes to be authorized to act as a law enforcement officer;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(i) The crimes for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(ii) There is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

HAW. REV. STAT. § 703-307.²²⁰

Idaho

Garner category: CL

Current category: G-s

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either:

1. In obedience to any judgment of a competent court; or

2. **When reasonably necessary in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty** including suppression of riot or keeping and preserving the peace. **Use of deadly force shall not be justified in overcoming actual resistance unless the officer has probable cause to believe that the resistance poses a threat of death or serious physical injury to the officer or to other persons;** or

3. When reasonably necessary in preventing rescue or escape or in retaking inmates who have been rescued or have escaped from any jail, **or when reasonably necessary in order to prevent the escape of any person charged with or suspected of having committed a felony, provided the officer has probable cause to believe that the inmate, or persons assisting his escape, or the person suspected of or charged with the commission of a felony poses a threat of death or serious physical injury to the officer or other persons.**

IDAHO CODE ANN. § 18-4011.

220. Note the additional limitation in subsection (3)(c) that force may not be used when it poses a risk to innocent bystanders. This provision goes beyond the rule in *Garner*.

Illinois

Garner category: G

Current category: G-s

(a) **A peace officer**, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. **He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest** and of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. **However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:**

(1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(2) The person to be arrested has committed or attempted a forcible felony which involves the infliction or threatened infliction of great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

720 ILL. COMP. STAT. 5/7-5.

Indiana

Garner category: CL

Current category: G-s

(b) A law enforcement officer is justified in using reasonable force if the officer reasonably believes that the force is necessary to effect a lawful arrest. However, **an officer is justified in using deadly force only if the officer:**

(1) has probable cause to believe that that deadly force is necessary:

(A) to prevent the commission of a forcible felony; or

(B) to effect an arrest of a person who the officer has probable cause to believe poses a threat of serious bodily injury to the officer or a third person; and

(2) has given a warning, if feasible, to the person against whom the deadly force is to be used.

IND. CODE § 35-41-3-3.²²¹

Iowa

Garner category: G

Current category: G-s

1. A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer reasonably believes to be necessary to effect the

221. While *Garner* placed Indiana in the common law category, it noted some limitation: "In Indiana, deadly force may be used only to prevent injury, the imminent danger of injury or force, or the threat of force. It is not permitted simply to prevent escape." *Tennessee v. Garner*, 471 U.S. 1, 17 (1985) (citing *Rose v. State*, 431 N.E.2d 521 (Ind.App.1982)).

arrest or to defend any person from bodily harm while making the arrest. However, **the use of deadly force is only justified when a person cannot be captured any other way and either of the following apply:**

a. The person has used or threatened to use deadly force in committing a felony.

b. The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.

IOWA CODE § 804.8.

Kansas

Garner category: CL

Current category: G-s

(a) **A law enforcement officer**, or any person whom such officer has summoned or directed to assist in making a lawful arrest, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Such officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest and the use of any force which such officer reasonably believes to be necessary to defend the officer's self or another from bodily harm while making the arrest. However, such officer **is justified in using deadly force only** when such officer reasonably believes that such force is necessary to prevent death or great bodily harm to such officer or another person, **or when such officer reasonably believes that such force is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit a felony involving death or great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that such person will endanger human life or inflict great bodily harm unless arrested without delay.**

KAN. STAT. ANN. § 21-5227.

Kentucky

Garner category: G

Current category: G-s

(2) **The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when:**

(a) The defendant, in effecting the arrest, is authorized to act as a peace officer; and

(b) The arrest is for a felony involving the use or threatened use of physical force likely to cause death or serious physical injury; and

(c) The defendant believes that the person to be arrested is likely to endanger human life unless apprehended without delay.

KY. REV. STAT. ANN. § 503.090 (West).

Louisiana

Garner category: MPC

Current category: G-s

A person shall submit peaceably to a lawful arrest. **The person making a lawful arrest may use reasonable force to effect the arrest** and detention, and also to overcome any resistance or threatened resistance of the person being arrested or detained.

LA. CODE CRIM. PROC. ANN. art. 220.

Section 14:20. Justifiable homicide

A. A homicide is justifiable:

(1) When committed in self-defense by one who reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger.

(2) **When committed for the purpose of preventing a violent or forcible felony involving danger to life or of great bodily harm by one who reasonably believes that such an offense is about to be committed and that such action is necessary for its prevention. The circumstances must be sufficient to excite the fear of a reasonable person that there would be serious danger to his own life or person if he attempted to prevent the felony without the killing.**

LA. REV. STAT. ANN. § 14:20.

Maine

Garner category: G

Current category: G-s

2. A law enforcement officer is justified in using deadly force only when the officer reasonably believes such force is necessary:

A. For self-defense or to defend a 3rd person from what the officer reasonably believes is the imminent use of unlawful deadly force; or

B. **To effect an arrest or prevent the escape from arrest of a person when the law enforcement officer reasonably believes that the person has committed a crime involving the use or threatened use of deadly force, is using a dangerous weapon in attempting to escape or otherwise indicates that the person is likely to endanger seriously human life or to inflict serious bodily injury unless apprehended without delay; and**

(1) The law enforcement officer has made reasonable efforts to advise the person that the officer is a law enforcement officer attempting to effect an arrest or prevent the escape from arrest and the officer has reasonable grounds to believe that the person is aware of this advice; or

(2) The law enforcement officer reasonably believes that the person to be arrested otherwise knows that the officer is a law enforcement officer attempting to effect an arrest or prevent the escape from arrest.

For purposes of this paragraph, "a reasonable belief that another has committed a crime involving use or threatened use of deadly force" means such reasonable belief in facts, circumstances and the law that, if true, would

constitute such an offense by that person. If the facts and circumstances reasonably believed would not constitute such an offense, an erroneous but reasonable belief that the law is otherwise justifies the use of deadly force to make an arrest or prevent an escape.

ME. REV. STAT. tit. 17-A, § 107.

Maryland Garner category: ? Current category: G-c

Maryland has moved to a Garner-like rule from undetermined (probably closer to the common law rule) by tying its common law “reasonable” analysis to compliance with established law enforcement policies.²²²

Massachusetts Garner category: MPC-c Current category: G-c

Garner cited two cases, *Klein* and *Randazzo* in saying Massachusetts should probably be considered to have adopted the MPC via its case law. Both cases explicitly adopt the MPC as their rule. *Com. v. Klein*, 363 N.E.2d 1313, 1318 (Mass. 1977); *Julian v. Randazzo*, 403 N.E.2d 931, 934 (Mass. 1980).²²³

Michigan Garner category: CL Current category: CL-c

Michigan has not moved on. It still has no statute and the case law (especially *Couch*) explicitly rejects adopting a *Garner*-like rule. *People v. Couch*, 461 N.W.2d 683, 684 (1990). While *Couch* involves a private citizen attempting to arrest a fleeing felon, the Michigan Supreme Court makes clear that it would apply the same rule if the person attempting the arrest were a police officer:

In our view, even if the defendant *were* a police officer, *Garner* could not apply ‘directly’ as the basis for a homicide charge. That would require, in effect, two different definitions of both murder and manslaughter, one for police officers and one for the rest of us. Such a scheme could raise a significant constitutional question.

Id. at 684 n. 1.

A post-*Couch* case (which, like *Couch*, involved a private citizen asserting the fleeing felon defense) recites the common law rule in Michigan:

222. In 1986, following *Garner*, Maryland’s Attorney General published a letter concluding that Maryland’s law enforcement policies are in line with *Garner*. 1986 WL 287649, 71 Md. Op. Atty. Gen. 87 (1986). Maryland’s common law rule has developed to conclude that force can only be justified when it complies with law enforcement policies. *See State v. Albrecht*, 649 A.2d 336, 349–50 (1994); *State v. Pagotto*, 762 A.2d 97, 103–07, 112 (2000).

223. A recent case repeated the rule from *Randazzo*, though it did not reach the issue. *Com. v. Asher*, N.E.3d 1055, 1059 (Mass. 2015)

To justify the use of deadly force to prevent the escape of a fleeing felon: "(1) the evidence must show that a felony actually occurred, (2) the fleeing suspect against whom force was used must be the person who committed the felony, and (3) the use of deadly force must have been 'necessary' to ensure the apprehension of the felon." *Id.* at 596-597. Necessity is a question of fact for the jury to decide. *Id.* at 597. In addition, the private person must apply reasonable care to prevent the felon's escape without violence. *People v. Couch*, 436 Mich. 414, 421; 461 NW2d 683 (1990), quoting *People v. Gonsler*, 251 Mich. 443, 446-447; 232 NW 365 (1930).

People v. Spears, 267572, 2007 WL 1203537, at *2 (Mich. Ct. App. Apr. 24, 2007).

Minnesota

Garner category: G

Current category: G-s

Subd. 2. Use of deadly force

Notwithstanding the provisions of section 609.06 or 609.065, **the use of deadly force by a peace officer in the line of duty is justified only when necessary:**

(1) to protect the peace officer or another from apparent death or great bodily harm;

(2) **to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force;** or

(3) **to effect the arrest or capture, or prevent the escape, of a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.**

MINN. STAT. § 609.066.

Mississippi

Garner category: CL

Current category: CL-s

(1) **The killing of a human being by the act**, procurement or omission of another **shall be justifiable in the following cases:**

(a) When committed by public officers, or those acting by their aid and assistance, in obedience to any judgment of a competent court;

(b) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty;

(c) When necessarily committed by public officers, or those acting by their command in their aid and assistance, in retaking any felon who has been rescued or has escaped;

(d) **When necessarily committed by public officers, or those acting by their command in their aid and assistance, in arresting any felon fleeing from justice;**

MISS. CODE. ANN. § 97-3-15.

Missouri

Garner category: CL

Current category: CL-s

3. **A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only**

(1) When such is authorized under other sections of this chapter; or

(2) **When he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested**

(a) **Has committed or attempted to commit a felony;** or

(b) Is attempting to escape by use of a deadly weapon; or

(c) May otherwise endanger life or inflict serious physical injury unless arrested without delay.

MO. REV. STAT. § 563.046.

Montana

Garner category: ?

Current category: ?

Still no statute or case law on point. The closest it comes is a statute regarding use of force to present escape from custody.

MONTANA STAT. 45-3-106.

Nebraska

Garner category: MPC

Current category: G-s

(3) **The use of deadly force is not justifiable under this section unless:**

(a) The arrest is for a felony;

(b) Such 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;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) **The actor believes that:**

(i) **The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or**

(ii) **There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.**

NEB. REV. STAT. § 28-1412.

Nevada

Garner category: CL

Current category: G-s

If necessary to prevent escape, an officer may, after giving a warning, if feasible, use deadly force to effect the arrest of a person only if there is probable cause to believe that the person:

1. Has committed a felony which involves the infliction or threat of serious bodily harm or the use of deadly force; or 2. Poses a threat of serious bodily harm to the officer or to others.

NEV. REV. STAT. § 171.1455.

New Hampshire Garner category: G

Current category: G-s

II. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary:

(a) To defend himself or a third person from what he reasonably believes is the imminent use of deadly force; or

(b) **To effect an arrest or prevent the escape from custody of a person whom he reasonably believes:**

(1) Has committed or is committing a felony involving the use of force or violence, is using a deadly weapon in attempting to escape, or otherwise indicates that he is likely to seriously endanger human life or inflict serious bodily injury unless apprehended without delay; and

(2) He had made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest and has reasonable grounds to believe that the person is aware of these facts.

(c) Nothing in this paragraph constitutes justification for conduct by a law enforcement officer amounting to an offense against innocent persons whom he is not seeking to arrest or retain in custody.

VIII. Deadly force shall be deemed reasonably necessary under this section whenever the arresting law enforcement officer reasonably believes that the arrest is lawful and there is apparently no other possible means of effecting the arrest.

N.H. REV. STAT. ANN. § 627:5.

New Jersey

Garner category: G

Current category: G-s

(2) The use of deadly force is not justifiable under this section unless:

(a) **The actor effecting the arrest is authorized to act as a peace officer** or has been summoned by and is assisting a person whom he reasonably believes to be authorized to act as a peace officer; **and**

(b) The actor reasonably believes that the force employed creates no substantial risk of injury to innocent persons; and

(c) **The actor reasonably believes that the crime for which the arrest is made was homicide, kidnapping, an offense under 2C:14-2 or 2C:14-3, arson, robbery, burglary of a dwelling, or an attempt to commit one of these crimes; and**

(d) The actor reasonably believes:

(i) There is an imminent threat of deadly force to himself or a third party; or

(ii) The use of deadly force is necessary to thwart the commission of a crime as set forth in subparagraph (c) of this paragraph; or

(iii) The use of deadly force is necessary to prevent an escape.

N. J. STAT. § 2C:3-7.

New Mexico

Garner category: CL

Current category: G-s

A. Homicide is justifiable when committed by a public officer or public employee or those acting by their command and in their aid and assistance:

(1) in obedience to any judgment of a competent court;

(2) when necessarily committed in overcoming actual resistance to the execution of some legal process or to the discharge of any other legal duty;

(3) when necessarily committed in retaking felons who have been rescued or who have escaped **or when necessarily committed in arresting felons fleeing from justice;** or

(4) when necessarily committed in order to prevent the escape of a felon from any place of lawful custody or confinement.

B. For the purposes of this section, homicide is necessarily committed when a public officer or public employee has probable cause to believe he or another is threatened with serious harm or deadly force while performing those lawful duties described in this section. Whenever feasible, a public officer or employee should give warning prior to using deadly force.

N. M. STAT. ANN. § 30-2-6.

New York

Garner category: G

Current category: G-s

1. [E]xcept that **deadly physical force may be used for such purposes only when he or she 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 police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

N.Y. PENAL LAW. § 35.30 (Consol.).

North Carolina Garner category: G

Current category: G-s

(d) Use of Force in Arrest.— . . .

(2) **A law-enforcement officer is justified in using deadly physical force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby:**

a. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;

b. **To effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay;** or

c. To prevent the escape of a person from custody imposed upon him as a result of conviction for a felony.

N.C. GEN. STAT. § 15A-401.

North Dakota Garner category: G

Current category: G-s

2. Deadly force is justified in the following instances: . . .

(d.) **When used by a public servant authorized to effect arrests or prevent escapes, if the force is necessary to effect an arrest or to prevent the escape from custody of an individual who has committed or attempted to commit a felony involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that the individual is likely to endanger human life or to inflict serious bodily injury unless apprehended without delay.**

N.D. CENT. CODE 12.1-05-07.

Ohio Garner category: CL

Current category: G-c

Post *Garner*, Ohio has adopted a *Garner*-like rule by case law.

Courts therefore apply *Garner* and *Graham* in reviewing criminal convictions arising from a police officer's use of deadly force. *See, e.g., United States v. Ramos*, 537 F.3d 439, 457 (5th Cir.2008) ("there is no question but that a police officer's unjustifiable shooting of a victim qualifies as a crime of violence; there is no question but that a police officer's shooting a victim who

poses no physical threat to the safety of the officer or the public is unjustifiable”); *State v. Pagotto*, 361 Md. 528, 555, 762 A.2d 97 (2000) (prosecution of police officer for involuntary manslaughter and reckless endangerment); *State v. Smith*, 73 Conn. App. 173, 198, 807 A.2d 500 (2002) (prosecution of police officer for first-degree manslaughter); *State v. Mantelli*, 131 N.M. 692, 2002–NMCA–033, 42 P.3d 272, ¶ 31 (prosecution of police officer for voluntary manslaughter, aggravated assault with a deadly weapon, and shooting at a motor vehicle resulting in injury); *People v. Martin*, 168 Cal. App. 3d 1111, 1124, 214 Cal. Rptr. 873 (1985) (noting that *Garner* “limits the scope of justification for homicide”).

State v. White, 29 N.E.3d 939, 947 (Ohio 2015).²²⁴

Oklahoma

Garner category: CL

Current category: G-s

A peace officer, correctional officer, or any person acting by his command in his aid and assistance, **is justified in using deadly force when:** False

2. In effecting an arrest or preventing an escape from custody following arrest and the officer reasonably believes both that:

a. such force is necessary to prevent the arrest from being defeated by resistance or escape, and

b. there is probable cause to believe that the person to be arrested has committed a crime involving the infliction or threatened infliction of serious bodily harm, or the person to be arrested is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay; or

3. The officer is in the performance of his legal duty or the execution of legal process and reasonably believes the use of the force is necessary to protect himself or others from the infliction of serious bodily harm; or

4. The force is necessary to prevent an escape from a penal institution or other place of confinement used primarily for the custody of persons convicted of felonies or from custody while in transit thereto or therefrom unless the officer has reason to know:

a. the person escaping is not a person who has committed a felony involving violence, and

b. the person escaping is not likely to endanger human life or to inflict serious bodily harm if not apprehended.

OKLA. STAT. TIT. 21 § 732.

224. See also *State v. White*, 988 N.E.2d 595, 612 (Ohio Ct. App. 2015) (stating that “it would seem logical” that *Garner* would apply in a criminal prosecution).

Oregon

Garner category: CL

Current category: CL-s

(1) Notwithstanding the provisions of ORS 161.235 [general provisions for use of force while making an arrest or preventing escape], **a peace officer may use deadly physical force only when the peace officer reasonably believes that:**

(a) The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person; or

(b) The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; 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 the use or threatened imminent use of deadly physical force; or

(d) **The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary;** or

(e) The officer's life or personal safety is endangered in the particular circumstances involved.

OR. REV. STAT. § 161.239.

Pennsylvania

Garner category: G

Current category: G-s

(a) Peace officer's use of force in making arrest.—

(1) **A peace officer . . . is justified in the use of any force which he believes to be necessary to effect the arrest** and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. **However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:**

(i) **such force is necessary to prevent the arrest from being defeated by resistance or escape; and**

(ii) **the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.**

PA. CONS. STAT. § 508.

Rhode Island

Garner category: CL

Current category: CL-s

A police officer may use force dangerous to human life to make a lawful arrest for committing or attempting to commit a felony, whenever he or

she reasonably believes that force dangerous to human life is necessary to effect the arrest and that the person to be arrested is aware that a peace officer is attempting to arrest him or her.

R.I. GEN. LAWS § 12-7-9.

South Carolina Garner category: ?

Current category: CL-s

South Carolina seems to follow the old common law rule by case law, despite apparently applying the *Garner* rule to test the legality of the officer's use of force in *Sheppard v. State*. South Carolina still has confusing and incoherent case law. In 2004, the Supreme Court of South Carolina incorrectly recited the Garner rule:

The trial court also properly charged that an officer may use whatever force is necessary to effect the arrest of a felon including deadly force to effect that arrest. See *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (during felony arrest, if arresting officer has probable cause to believe suspect poses threat of serious physical harm, officer may prevent escape by using deadly force).

Sheppard v. State, 594 S.E.2d 462, 473 (2004).

South Dakota Garner category: CL

Current category: CL-s

Lawful force in arrest and delivery of felon

To use or attempt to use or offer to use force or violence upon or toward the person of another is not unlawful if necessarily committed by any person in arresting someone who has committed any felony or in delivering that person to a public officer competent to receive him or her in custody.

S.D. CODIFIED LAWS § 22-18-3.

Justifiable homicide. Law enforcement officers or at command of officer—Overcoming resistance—Capturing or arresting fleeing felons.

Homicide is justifiable if committed by a law enforcement officer or by any person acting by command of a law enforcement officer in the aid and assistance of that officer:

- (1) If necessarily committed in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty; or
- (2) If necessarily committed in retaking felons who have been rescued or who have escaped; or

- (3) **If necessarily committed in arresting felons fleeing from justice**

S.D. CODIFIED LAWS § 22-18-2.

Justifiable homicide. Apprehending felon—Suppressing riot—Preserving peace.

Homicide is justifiable if necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.
S.D. CODIFIED LAWS § 22-16-33.

Tennessee

Garner category: CL

Current category: G-s

(b) Notwithstanding subsection (a) [general provision allowing officer, after identifying self, to use or threaten to use force], **the officer may use deadly force to effect an arrest only if all other reasonable means of apprehension have been exhausted or are unavailable**, and where feasible, the officer has given notice of the officer's identity as an officer and given a warning that deadly force may be used unless resistance or flight ceases, **and:**

(1) The officer has probable cause to believe the individual to be arrested has committed a felony involving the infliction or threatened infliction of serious bodily injury; or

(2) The officer has probable cause to believe that the individual to be arrested poses a threat of serious bodily injury, either to the officer or to others unless immediately apprehended.

TENN. CODE ANN. § 39-11-620.

Texas

Garner category: G

Current category: G-s

(c) **A peace officer is justified in using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest**, or to prevent escape after arrest, if the use of force would have been justified under Subsection (a) and:

(1) the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; or

(2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed.

TEX. PENAL CODE ANN. § 9.51.

Utah

Garner category: G

Current category: G-s

(1) A peace officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when:

(a) the officer is acting in obedience to and in accordance with the judgment of a competent court in executing a penalty of death under Subsection 77-18-5.5(3) or (4);

(b) **effecting an arrest** or preventing an escape from custody following an arrest, **where the officer reasonably believes that deadly force is necessary to prevent the arrest from being defeated by escape; and**

(i) **the officer has probable cause to believe that the suspect has committed a felony offense involving the infliction or threatened infliction of death or serious bodily injury; or**

(ii) **the officer has probable cause to believe the suspect poses a threat of death or serious bodily injury to the officer or to others if apprehension is delayed; or**

(c) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

(2) If feasible, a verbal warning should be given by the officer prior to any use of deadly force under Subsection (1)(b) or (1)(c).

UTAH CODE ANN. § 76-2-404.

Vermont

Garner category: G

Current category: G-s

Justifiable homicide. **If a person kills or wounds another under any of the circumstances enumerated below, he or she shall be guiltless:**

(1) In the just and necessary defense of his or her own life or the life of his or her husband, wife, parent, child, brother, sister, master, mistress, servant, guardian or ward; or

(2) **In the suppression of a person attempting to commit murder, sexual assault, aggravated sexual assault, burglary or robbery, with force or violence; or**

(3) In the case of a civil officer; or a military officer or private soldier when lawfully called out to suppress riot or rebellion, or to prevent or suppress invasion, or to assist in serving legal process, in suppressing opposition against him or her in the just and necessary discharge of his or her duty.

VT. STAT. ANN. § 2305.

Virginia

Garner category: CL

Current category: CL-c

Still has the older common law rule. However, Virginia courts get much use out of “necessity” by giving the question of whether the use of lethal force was necessary to the jury with virtually no limits on what the jury can consider (including the gravity of the felony committed by the fleeing person and apparently even the gravity of the crime the officer is charged with) and have affirmed manslaughter convictions against police officers, both before and after *Garner*.²²⁵

225. See *Hendricks v. Com.*, 178 S.E. 8, 12 (Va. 1935); see also *Couture v. Com.*, 656 S.E.2d 425, 427-28 (Va. Ct. App. 2008).

Washington

Garner category: CL

Current category: G-s

Justifiable homicide or use of deadly force by public officer, peace officer, person aiding

(1) Homicide or the use of deadly force is justifiable in the following cases:

False

(c) When necessarily used by a peace officer or person acting under the officer's command and in the officer's aid:

(i) To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony; . . .

(2) In considering whether to use deadly force under subsection (1) (c) of this section, to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. Among the circumstances which may be considered by peace officers as a "threat of serious physical harm" are the following:

(a) The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or

(b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.

Under these circumstances deadly force may also be used if necessary to prevent escape from the officer, where, if feasible, some warning is given.

(3) A public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section.

WASH. REV. CODE §9A.16.040.

If after notice of the intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

WASH. REV. CODE §10.31.050.

West Virginia

Garner category: CL

Current category: CL-c

West Virginia still has the common law rule by its case law. A 2012 civil case (including state tort claims as well as § 1983) involving a claim for damages for excessive (but not lethal) use of force by an officer in dealing with a person reported as being suicidal did not even mention *Garner*:

Respondents Cayton and the West Virginia State Police argue that an excessive force claim must be analyzed under an objectionably reasonable standard, which does not require the officer to use the least intrusive means to effectuate a seizure or even the minimum amount of force available. According

to respondents, reasonableness is instead judged by whether the officer's use of force was within a range of conduct that could be deemed to have been reasonable under the circumstances. Because the officers had a reasonable belief petitioner would harm himself, respondents argue that the actions were warranted and did not constitute excessive force. Further, respondents argue that petitioner's expert's testimony did not create a genuine issue of material fact because the circuit court found that the expert misstated the relevant legal standard for the use of force and then properly ruled his testimony to be irrelevant.

Posey v. Davis, 11-1204, 2012 WL 5857309, at *2 (W. Va. Nov. 16, 2012).

Wisconsin

Garner category: CL

Current category: CL-s

939.45 Privilege. The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. **The defense of privilege can be claimed under any of the following circumstances:**

(4) When the actor's conduct is a reasonable accomplishment of a lawful arrest;

WIS. STAT. § 939.45(4) (2015).²²⁶

Wyoming

Garner category: ?

Current category: G-c

Wyoming still has no statute and no case law on point. It remains in the unknown category.

The title of Article 6 of the criminal code is "Justification." The only justification statute is the justified use of force in self-defense/defense of others statute which makes no mention of arrest or any special justification for police officers. WYO. STAT. ANN. § 6-2-602. Section 6-2-601, however, states, "The common law shall govern in all cases not governed by this article."

But a post-*Garner* case seems to apply *Garner* to this fact set:

During that felony traffic stop, the suspect exited the vehicle as directed by the police officers, but he failed to follow police orders to keep his hands up and began to move forward as if to run in spite of a police order to halt. As the suspect moved, he also reached with his left hand toward the small of his back. One of the officers, believing the suspect was reaching for a weapon and

226. But, the annotated statutes published by the legislature mentions the same case mentioned in *Garner* footnote 14:

"Flight on the part of one suspected of a felony does not, of itself, warrant the use of deadly force by an arresting officer, and it is only in certain aggravated circumstances that a police officer may shoot a fleeing suspect. *Clark v. Ziedonis*, 368 F. Supp. 544 (1973)." See also <http://docs.legis.wisconsin.gov/document/statutes/939.45>.

perceiving a threat, discharged his shotgun, hitting the suspect. The suspect was then apprehended.

Roose v. State, 759 P.2d 478, 479 (Wyo. 1988). The Wyoming Supreme Court quoted the rule from *Garner*, and then concluded, "Looking at the totality of the circumstances in this case and recognizing that a police officer must make split second decisions regarding such grave matters, we hold that the police officer was justified in using the force he used in this instance." *Id.* at 484.

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