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STUDENT COMMENT

REDISCOVERING DANGEROUSNESS: THE EXPANDED SCOPE OF REASONABLE DEADLY FORCE AFTER SCOTT V. HARRIS

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THOUGH the Supreme Court might think otherwise, it has yet to hear a case where a police officer used deadly force to stop a nondangerous fleeing suspect. The Court recently showed its belief to the contrary in *Scott v. Harris*, where it found that a fleeing suspect posed a sufficient danger to justify the use of deadly force.¹ In order to reach that conclusion, the *Scott* Court distinguished *Tennessee v. Garner*, which had held that a police officer could not use deadly force to stop the fleeing suspect.² Although the *Scott* Court never explicitly questioned *Garner's* reasoning, the Court's distinction implicitly demonstrated a fundamental flaw in *Garner's* understanding of dangerousness. *Scott* showed that dangerousness is not confined to a suspect's potential to commit crimes *after* escaping; dangerousness is just as great a concern *during* the escape itself.

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¹ 127 S. Ct. 1769, 1779 (2007).

² 471 U.S. 1 (1985).

Garner is a case of the right Constitutional rule wrongly applied. After being called to the scene of a burglary, Officer Elton Hymon saw the suspect, Edward Garner, running away. Officer Hymon yelled “police, halt,” then shot and killed Mr. Garner, who turned out to be an unarmed, lightly built eighth grader, as he attempted to escape over a fence.³ The question in the subsequent lawsuit was whether this shooting was an unreasonable seizure under the Fourth Amendment. The Court articulated the standard for this inquiry: “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.”⁴

This standard is uncontroversial, but the Court took a narrow view of what this physical threat could entail. Justice White’s majority opinion considered only the likelihood that the suspect would commit future violent crimes *if he remained free*, but nowhere did it contemplate the danger that occurs *while the suspect is fleeing*. For instance, Justice White declared early on that “[i]f subsequent arrest were assured, no one would argue that use of deadly force was justified.”⁵ He also wrote that the only question in the case was “whether the fact that someone has committed a burglary indicates that he has committed, or *might commit*, a violent crime.”⁶ Finally, to reach the conclusion that the officer in *Garner* used unreasonable force, Justice White cited statistics that burglaries rarely result in physical violence, presumably to show that a burglar, if let go, would be unlikely to commit a violent crime.⁷

This view of dangerousness allowed an easier resolution to the overall case, mainly because Officer Hymon actually admitted his belief that the fleeing suspect was unarmed and lightly built.⁸ Still, Officer Hymon never said that Mr. Garner was nondangerous, but the Court was able to reach that very conclusion and more, holding that “Officer Hymon could not reasonably have believed that Garner . . . posed any threat.”⁹ In fact, the Court cited Mr. Garner as

³ Id. at 3–4.

⁴ Id. at 11.

⁵ Id. at 10.

⁶ Id. at 21 n.23 (emphasis added).

⁷ See id.

⁸ Id. at 3–4.

⁹ Id. at 21.

the example that not all burglars are dangerous¹⁰—a mysterious conclusion considering that there were no (prior) findings regarding Mr. Garner's actual dangerousness.¹¹ This logical leap ignored a critical aspect of police escapes by taking a very limited view of dangerousness.

The *Garner* Court focused on the “danger” of having the suspect on the loose and capable of committing additional crimes, a valid concern. But there is also real danger *from the flight itself*, namely in what a suspect would do to escape from the police. In considering this type of danger, there is no such thing as a completely non-dangerous fleeing suspect, because even nondangerous people are capable of becoming quite dangerous when desperately trying to escape. Sociologists have noted that flight-induced panic can cause seemingly harmless people to set aside social norms in order to escape harm, including, for example, parents who abandon young children to escape a life threatening crisis.¹² As a result, anyone who flees the police, or any perceived harm for that matter, presents a danger to anyone standing in the way.

Of course, this does not mean that shooting any fleeing suspect is inherently reasonable. Rather, it prescribes an inquiry into what danger the suspect is capable of *in his attempted flight*. This danger is obvious where the suspect is armed, but even where the suspect is unarmed, his alleged crime provides critical insight into his potential to engage in violence in order to escape. Burglary may not be a crime of physical violence by one person upon another, but it is a physical act undertaken with at least a reasonable expectation that the situation could turn violent if, for example, the burglar encounters a resident. It is therefore reasonable for an officer to assume that a burglar is prepared for this potential violence, by being both armed, and ready and willing to put the lives of others in danger in order to escape the police. Even an unarmed fleeing suspect might be quite dangerous, for instance, if he broke into another

¹⁰ Id. (“Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. *This case demonstrates as much.*”) (emphasis added).

¹¹ See id. at 20 (“This conclusion made a determination of Garner’s apparent dangerousness unnecessary.”).

¹² See E. L. Quarantelli, The Sociology of Panic, *in* International Encyclopedia of the Social and Behavioral Sciences 11021 (Neil J. Smelser & Paul B. Baltes eds., 2002).

home in order to hide and was confronted by a less physically fit or smaller resident (for example, the proverbial “little old lady”). The *Garner* Court did not consider this type of dangerousness at all.

The facts of *Scott v. Harris* demonstrate this omission well, as no proxy for potential dangerousness is necessary when the fleeing suspect is in a motor vehicle, because any such suspect is effectively armed with a deadly weapon. In *Scott*, Deputy Timothy Scott attempted to ticket Victor Harris for speeding but instead was lead on a high-speed chase for approximately six minutes. Eventually, Officer Scott attempted a “Precision Intervention Technique (‘PIT’) maneuver,” designed to cause a fleeing vehicle to spin to a stop.¹³ In this case, however, Scott’s attempt caused Harris to crash, leaving him a quadriplegic.¹⁴ Harris sued for excessive use of force in what he claimed was an unreasonable seizure.

Unlike *Garner*, Justice Scalia’s majority opinion in *Scott* embraced the danger from flight-induced panic, finding that Harris posed such a great danger *in his flight* because Harris was escaping at a high speed in a moving vehicle and thus that deadly force was justified in order to stop him. It is possible that this was not a complete refutation of *Garner*’s analysis. Indeed, in order to reach this result the *Scott* Court felt it necessary to explain how Mr. Harris’s actions were *more* dangerous than Mr. *Garner*’s.¹⁵ Justice Scalia avoided any direct confrontation with *Garner* by factually distinguishing a car chase from an unarmed foot pursuit.

Yet in avoiding *Garner*, Justice Scalia struck an implicit blow against it. He did so by explaining that several of *Garner*’s preconditions for deadly force are merely an application of the Fourth Amendment’s reasonableness inquiry and *not* a “magical on/off switch that triggers rigid preconditions whenever an officer’s actions constitute ‘deadly force.’”¹⁶ This reduced *Garner* to little more than an example (as opposed to *the test*)¹⁷ of reasonable use of deadly force against a fleeing suspect, as part of the Fourth Amendment’s overall reasonableness standard. This standard is

¹³ *Scott*, 127 U.S. at 1773.

¹⁴ *Id.*

¹⁵ See *id.* at 1777–78.

¹⁶ *Id.* at 1777.

¹⁷ See, e.g., *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) (per curiam) (stating that a plaintiff’s claim against an officer for an unreasonable seizure was “governed by the principles enunciated in *Tennessee v. Garner*”).

defined by *Graham v. Connor*,¹⁸ which (as a result of *Scott*) now includes a separate standard, *independent* from *Garner*, which any similarly situated defendant will undoubtedly now seek to utilize. Indeed, for all future cases the door is now open to a new conception of dangerousness, under which a court may no longer ignore dangerousness from flight as a Fourth Amendment reasonableness factor.

The Court's willingness to embrace dangerousness from flight made the remainder of the analysis fairly straightforward. The Court was able to explain convincingly the danger behind Harris's conduct, thanks in large part to a videotape of the chase.¹⁹ The factual observations as to dangerousness from the videotape seem indisputable, except for Justice Stevens's lone dissent. Sarcastically referring to his "colleagues on the jury,"²⁰ Justice Stevens seemingly thought that this was typical driving for a two lane road: "Had [the other Justices] learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."²¹

In fact, the tape shows Mr. Harris speeding, mostly down a two-lane road, running through intersections, and passing cars by swerving into the opposing lane, up until the sixth minute. At one point, the tape shows him nearly hitting a police car head-on (instead only colliding slightly) while tearing through a *shopping-center* parking lot. Justice Stevens describes another one of these incidents where Harris "found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction before overtaking the car in front of him while using his turn signal to do so."²²

¹⁸ 490 U.S. 386 (1989). Interestingly, although the *Scott* Court distinguished *Garner*, it did not directly apply *Graham*. This is somewhat surprising, because *Graham* purported to apply to all use-of-force cases, with which *Garner* specifically did not deal. *Id.* at 395. As such, *Scott*'s choice to distinguish *Garner*, but also not to directly apply *Graham*, may signal a more general distancing from *Graham*.

¹⁹ See *Scott*, 127 S. Ct. at 1778. The video is available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

²⁰ *Id.* at 1782 (Stevens, J., dissenting).

²¹ *Id.* at 1781 n.1.

²² *Id.* at 1783.

This may well be compelling evidence that Mr. Harris hoped to survive, as well as escape, but it does little to allay the most obvious question surrounding his flight: how was it going to end?²³

Mr. Harris made another argument, which Justice Stevens again bought, that the innocent public could have been equally protected (and the tragic accident entirely avoided) if the police had ceased their pursuit entirely.²⁴ Indeed, Justice Stevens pointed out that the officers had Mr. Harris's license plate number and thus could have apprehended him later.²⁵ But as the Court aptly noted, how exactly would the police have conveyed to Mr. Harris that "the chase was off, and that he was free to go"?²⁶ In the same vein, how would Mr. Garner have known that the other officer was left behind at the fence and that he was no longer being chased? Did the Court seriously believe that the fleeing suspect would simply stroll away after clearing the fence? And when exactly did the Constitution grant a right to flee and be caught later?

These situations might have ended harmlessly, but it was reasonable to believe that they would have endangered the police or others, and certainty has never been a necessary element of reasonableness. A seemingly better gauge, as noted by the *Scott* Court, is the suspect's culpability in choosing to flee.²⁷ Culpability is particularly important to forecasting whether the suspect will commit harm in the course of flight, because a person who chooses to flee in a motor vehicle, like a person who chooses to burglarize a house, is almost certainly aware of the possibility of a violent outcome. In fact, with a flight involving motor vehicles, unlike the foot pursuit in *Garner*, the car itself is a deadly weapon, and there is thus no doubt as to whether the suspect is armed. As a result, it is quite reasonable to believe that a person who chooses to engage in this conduct is also likely to hurt someone, intentionally or unintentionally, in the process of escaping.

What seems most ironic in these cases is that these fleeing suspects, who put the lives of those around them at risk (particularly

²³ Forty percent of high-speed police chases end in crashes. See Geoffrey P. Alpert, Nat'l Inst. of Justice, *Police Pursuit: Policies and Training* 5 (2007), <http://www.ncjrs.gov/pdffiles/164831.pdf>.

²⁴ See *Scott*, 127 S. Ct. at 1783–84 (Stevens, J., dissenting).

²⁵ *Id.* at 1783.

²⁶ *Id.* at 1779 (majority opinion).

²⁷ See *Scott*, 127 S. Ct. at 1778.

Mr. Harris, who just minutes before crashing almost hit an officer head-on), then sue their pursuers for how much force it took to stop them. This is not to say that police *should* kill or seriously injure those who flee, nor is a dead suspect always preferable to a free one. Of course we do not want our criminal justice system to be short circuited at the arrest phase (although apprehending suspects is also necessary for our system to work). Rather, the question of when deadly force *should* be used is a matter of policy, beyond the question of what is permissible under the Fourth Amendment. And under the Fourth Amendment's inquiry, a fleeing suspect greatly raises his own reasonableness ante, because at the moment he takes off he potentially endangers all who may stand in his path. *Scott v. Harris* is an important step towards recognizing that this danger from flight can be equally relevant to a reasonableness calculation as the danger from continued freedom.

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