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John G. Crowley

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 RETROACTIVE APPLICATION OF TENNESSEE V. GARNER TO CIVIL LITIGATION

INTRODUCTION

In *Tennessee v. Garner*, the Supreme Court held that the fleeing felon rule, a common law doctrine that permitted a police officer to use deadly force to effect the arrest of any escaping felon, was unconstitutional under the fourth amendment. The Court concluded that deadly force could only be used to apprehend a fleeing felon if the officer reasonably believed the suspect posed a significant threat of death or serious physical injury to the officer or to others. The question has since arisen whether this fourth amendment limitation should be applied retroactively to provide a basis for civil liability.

Part I of this Note traces the erosion of the fleeing felon rule, culminating with the Court's decision in *Garner*. Part II identifies the issues to be examined under retroactivity analysis. Part III applies the traditional retroactivity analysis used in civil cases to civil litigation arising out of the use of deadly force to apprehend a fleeing felon. This Note concludes that the Court's holding in *Garner* should be applied retroactively to provide a basis for civil liability against a municipal defendant.

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

5. Civil liability is based on section 1983, which states:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

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I. HISTORICAL PERSPECTIVE OF THE FLEETING FELON RULE

A. Erosion of the Fleeing Felon Rule

The fleeing felon rule permitted a law enforcement officer to use deadly force as a last resort to effect the arrest of any suspected felon, regardless of the severity of his alleged crime. The justification for the use of deadly force against any felon arose in the eighteenth century, when all felonies were punishable by death. Throughout the nineteenth and twentieth centuries, however, the common law rationales supporting the

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1982).

Typically, a section 1983 action is brought against the local municipality for its policy of permitting the use of deadly force to effect the arrest of any felon. See Mitchell v. City of Sapulpa, 857 F.2d 713, 719-20 (10th Cir. 1988) (per curiam); Carter v. City of Chattanooga, 850 F.2d 1119, 1137 (6th Cir. 1988), cert. denied, 109 S. Ct. 795 (1989); Acoff v. Abston, 762 F.2d 1543, 1548-50 (11th Cir. 1985). In Monell v. Department of Social Services, 436 U.S. 658 (1978), the Supreme Court held that a municipality may be held liable for damages under section 1983 for a "policy or custom" which deprived an individual of a constitutional right. See Monell, 436 U.S. at 694.

Although the police officers involved in an incident are usually included in the lawsuit, individual defendants are generally found to have a qualified immunity based on their good faith reliance on fleeing felon statutes and municipal policy. See, e.g., Garner v. Memphis Police Dep't, 600 F.2d 52, 54 (6th Cir. 1979) [hereinafter Garner I]. Individual government officials are generally protected from civil liability insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). However, municipalities generally have no immunity from civil liability flowing from their constitutional violations. See Owen v. City of Independence, 445 U.S. 622, 657 (1980).

6. See, e.g., Jones v. Marshall, 528 F.2d 132, 133-37 (2d Cir. 1975); Stinnett v. Virginia, 55 F.2d 644, 645-46 (4th Cir. 1932); Love v. Bass, 145 Tenn. 522, 529, 238 S.W. 854, 856 (1892); Head v. Martin, 85 Ky. 550, 560, 11 S.W. 651, 653 (1887). The roots of this rule are more than 200 years old: "[i]f persons that are pursued by the officers for felony or for just suspicion thereof... shall not yield themselves to these officers, but instead shall either resist or fly before they are apprehended... are upon necessity slain therein, it is no felony." Casenote, Michigan v. Garner: Fourth Amendment Limitations on a Peace Officer's Use of Deadly Force to Effect an Arrest, 17 Loy. U. Chi. L.J. 151, 156 n.24 (1985) (quoting 2 M. Hale, Historia Placitorum Coronae 85 (1788)). Deadly force was not permitted to prevent the escape of a fleeing misdemeanant. See, e.g., United States v. Clark, 31 F. 710, 712-15 (C.C.E.D. Mich. 1887) (dictum); Thomas v. Kinkead, 55 Ark. 502, 509, 18 S.W. 854, 856 (1892); Head v. Martin, 85 Ky. 480, 483, 3 S.W. 622, 623 (1887); Holloway v. Moser, 193 N.C. 185, 187, 136 S.E. 375, 376 (1927); Casenote, supra, at 156.

7. See Sherman, Execution Without Trial: Police Homicide and the Constitution, 33 Vand. L. Rev. 71, 74 (1980); see also Comment, Deadly Force to Arrest: Triggering Constitutional Review, 11 Harv. C.R.-C.L. L. Rev. 361, 365 (1976) (common law felonies were murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, prison break and larceny, all of which were punishable by death). The use of deadly force to prevent a felon's escape was seen as merely accelerating the penal process. Because the felon had forfeited his life by committing the crime, it was assumed he would be more likely to flee and therefore greater force would be needed for his apprehension. Another rationale underlying the fleeing felon rule was that, because of the lack of sophisticated law enforcement techniques, if the suspect was not captured at the scene he would probably never be apprehended. See Sherman, supra, at 76.
fleeing felon rule eroded entirely. Courts and commentators widely criticized the rule because the decision to use deadly force hinged solely on whether a crime was classified as a felony or misdemeanor.

Practically speaking, the rule lost much of its force because an overwhelming majority of police departments adopted policies on the use of deadly force that were more restrictive than the common law rule. 8

8. See Sherman, supra note 7, at 74-77. While the number of crimes classified as felonies increased, the number of crimes punishable by death decreased dramatically. See Comment, supra note 7, at 366-67. Violence no longer distinguished felonies from misdemeanors. In fact, some misdemeanors presented a more serious threat to public safety than felonies. See Greenstone, Liability of Police Officers for Misuse of Their Weapons, 16 Clev.-Mar. L. Rev. 397, 402-03 (1967) (addressing some of the varying degrees of danger associated with certain misdemeanors and felonies). In the latter half of the nineteenth century, most states retained capital punishment only for treason and crimes endangering life. See Comment, supra note 7, at 366. Improvements in law enforcement techniques meant it was no longer necessary to apprehend the suspect at the scene to ensure his capture. See Sherman, supra note 7, at 76. Finally, the invention of the revolver meant that law enforcement officers could inflict deadly force more easily and from distances never envisioned at the inception of the original rule. See id. at 75 (when the fleeing felon rule originated, deadly force could be inflicted only if the suspect resisted in a hand-to-hand struggle).

9. See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting) ("[A] 'shoot' [to kill] order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter."); Jones v. Marshall, 528 F.2d 132, 138-39 (2d Cir. 1975) (preferable rule would be one limiting the use of deadly force only to prevent the escape of violent felons); United States v. Clark, 31 F. 710, 713 (C.C.E.D. Mich. 1887) (deadly force to effect the arrest of petit larceny suspect "is altogether too disproportional to the magnitude of the offense"); Storey v. State, 71 Ala. 329, 341 (1882) ("shocking to the good order of government" to permit the use of deadly force on minor felony suspects); State v. Bryant, 65 N.C. 327, 328 (1871) (noting the varying degrees of importance to society in arresting capital felons as opposed to inferior felons); Reneau v. State, 70 Tenn. 720, 721-22 (1879) (inquiring whether the rule should be modified in view of the large number of crimes now classified as felonies); Greenstone, supra note 8, at 402-03; Pearson, The Right to Kill in Making Arrests, 28 Mich. L. Rev. 957, 974 (1930); Sherman, supra note 7, at 76-77; Comment, supra note 7, at 361; Note, Legalized Murder of a Fleeing Felon, 15 Va. L. Rev. 582, 583-84 (1929).

The American Law Institute ("A.L.I.") first expressed what it considered to be the preferable view of the law in its Restatement of the Law of Torts. This view limited the use of deadly force to effect an arrest to felonies that normally involve death or serious bodily harm, the breaking and entry of a dwelling place or treason. See Restatement of Torts § 131 (1934). When no case followed the first Restatement, the 1948 Supplement and the Second Restatement returned to the common law fleeing felon rule. See Restatement of Torts § 131 (1948); Restatement (Second) of Torts § 131 (1965) (permitting the use of deadly force to effect the arrest of any felon). The A.L.I.'s Model Penal Code sought to limit a police officer's authority to use deadly force to situations where apprehension is necessary to prevent death or serious bodily harm to others. See Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962).

State legislatures were slower to modify the codified versions of the common law fleeing felon rule, but a large number eventually did restrict the use of deadly force. Despite these factors, courts hesitated to strike down the fleeing felon rule on constitutional grounds. The majority of

11. See Garner, 471 U.S. at 18 (noting the "long-term movement" away from the fleeing felon rule).


13. See Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1251 (6th Cir.), cert. denied,
litigation concerning the fleeing felon rule dealt with the reasonableness of the police officers' conduct, not the constitutionality of the practice itself.\textsuperscript{14}

B. \textit{The Supreme Court's Decision in} Tennessee v. Garner

In 1985, the Supreme Court struck down as unconstitutional a statute that codified the common law fleeing felon rule.\textsuperscript{15} The Court held that the statute violated the fourth amendment requirement that all seizures be reasonable under the circumstances.\textsuperscript{16} The Court concluded that deadly force is permissible to effect the arrest of a fleeing suspect only if three conditions are met. First, the police officer must reasonably believe that the felon poses a threat of serious physical harm, either to the officer or to others.\textsuperscript{17} Probable cause for this belief would exist if the suspect threatened an officer with a weapon or if the officer believed the suspect committed a crime involving the infliction or threatened infliction of serious physical harm.\textsuperscript{18} Second, deadly force must be necessary to prevent the escape of the suspect.\textsuperscript{19} Finally, the officer must, if feasible, provide a warning to the suspect.\textsuperscript{20}

\textit{Garner} thus eliminated much of the confusion concerning the use of deadly force to effect the arrest of a fleeing criminal suspect.\textsuperscript{21} The deci-
sion also provided a basis for examining all future claims of excessive force by police officers under a fourth amendment reasonableness standard as opposed to a fifth amendment due process standard. However, some confusion has arisen over whether Garner should apply retroactively to impose civil liability against a municipal defendant.

II. RETROACTIVITY ANALYSIS

The Garner decision poses a novel retroactivity question: whether a new fourth amendment limitation on police conduct should be applied retroactively in a civil lawsuit. The general presumption has always constitutional use of deadly force. It does not assess what constitutes deadly force, whether a suspect must in fact be apprehended to permit a suit or if there is any remedy for the mere use of deadly force without injury. Justice O'Connor raised these issues in her dissent. See Garner, 471 U.S. at 31-32 (O'Connor, J., dissenting).

22. See, e.g., Lester v. City of Chicago, 830 F.2d 706, 711-12 (7th Cir. 1987) (relying on Garner in concluding that excessive force claims are to be examined under fourth amendment balancing of interests test); Martin v. Malhoyt, 830 F.2d 237, 261-62 & n.76 (D.C. Cir. 1987) (Garner's fourth amendment reasonableness standard applied to excessive force claim as opposed to the due process standard of Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)); Spell v. McDaniel, 824 F.2d 1380, 1384 n.3 (4th Cir. 1987) (citing Garner for proposition that fourth amendment protects against unreasonable use of force in arrest process), cert. denied, 108 S. Ct. 752 (1988); Dugan v. Brooks, 818 F.2d 513, 516-17 (6th Cir. 1987) (relying on Garner in finding the means of an arrest unreasonable); Ryder v. City of Topeka, 814 F.2d 1412, 1419-23 (10th Cir. 1987) (applying Garner standard to use of deadly force to prevent felon's escape); Lundgren v. McDaniel, 814 F.2d 600, 602-03 (11th Cir. 1987) (upholding as reasonable jury finding that use of deadly force was unconstitutional under Garner standard); Fernandez v. Leonard, 784 F.2d 1209, 1217 & n.3 (1st Cir. 1986) ("clearly established in December 1976" that use of deadly force to effect an arrest was a seizure subject to fourth amendment's reasonableness requirement; whether the fleeing felon rule was reasonable was a novel question in 1985); Bissonette v. Haig, 776 F.2d 1384, 1386-87 (8th Cir. 1985) (relying on Garner in concluding that an otherwise permissible seizure can be invalid if found to be unreasonable under the circumstances), aff'd, 108 S. Ct. 1253 (1988); Jamieson v. Shaw, 772 F.2d 1205, 1209-11 (5th Cir. 1985) (Garner applied to unreasonable police traffic stop).

Prior to the Supreme Court's decision in Garner, a due process standard was sometimes applied to evaluate police use of force in effecting arrests. See Norris v. District of Columbia, 737 F.2d 1148, 1150 (D.C. Cir. 1984); Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir. 1973). Under this approach, the use of force would be unconstitutional if the police conduct "shocked the conscience." Johnson, 481 F.2d at 1033 (quoting Rochin v. California, 342 U.S. 165 (1952)). In order to determine this, a court would examine "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort ... or maliciously and sadistically . . . ." Johnson, 481 F.2d at 1033.

23. See supra note 4 and accompanying text.

24. The only explicit Supreme Court treatment of a similar question appears in Justice Powell's dissent in Pembaur v. City of Cincinnati, 475 U.S. 469, 492-96 (1986) (Powell, J., dissenting). That decision involved a section 1983 action for damages in which the petitioner claimed a violation of his fourth amendment rights. Police officers, acting under the direction of the County Prosecutor, entered and searched the petitioner's office without a search warrant in order to arrest a non-resident occupant. See id. at 472-73. At that time, the Sixth Circuit permitted this type of search. See id. at 492-93 (Powell, J., dissenting). After the search, but before Pembaur's appeal, the Supreme Court held that an officer may not search for a suspect in a third party's home without a warrant, unless
been, and remains today, that judicial decisions apply retroactively.25 Within the last twenty-five years, however, the Supreme Court has created exceptions to this general rule.26 The Court has set forth separate analyses for cases involving fourth amendment rules of criminal proce-

the third party consents or certain exigent circumstances exist to justify the search. See Steagald v. United States, 451 U.S. 204, 209 (1981). The Pembaur majority concluded that the respondent had conceded the issue of retroactivity and therefore did not address the question. See Pembaur, 475 U.S. at 477 n.5.

Justice Powell's dissent did address retroactivity. See id. at 492-96 (Powell, J., dissenting). Without discussing other fourth amendment retroactivity analyses, Justice Powell applied the civil retroactivity test of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). See Pembaur, 475 U.S. at 493-94. The dissent concluded that Steagald should not be applied retroactively. See id. at 494.


[I]f subsequent to the judgment [in the trial court] and before the decision of the appellate court a law intervenes and positively changes the rule which governs . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment . . . which cannot be affirmed but in violation of law, the judgment must be set aside.

United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (footnote omitted). The principle was reiterated by Justice Holmes: "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). Chief Justice Rehnquist stated: "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." United States v. Security Indus. Bank, 459 U.S. 70, 79 (1982). The presumption has been traced by the Supreme Court to the Blackstonian theory that judges did not create law, but discovered it. See Linkletter v. Walker, 381 U.S. 618, 622-23 (1965). Therefore, the newly discovered law was in fact not new at all — it had always been the law. Judges merely discovered the correct application of the existing law. For a complete discussion of the theories surrounding the presumption of retroactivity, see Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201 (1965); Note, Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions, 1985 U. Ill. L. Rev. 117.

26. Retroactivity analysis is generally considered to have begun in 1965 with the Supreme Court's decision in Linkletter v. Walker, 381 U.S. 618 (1965). Linkletter stated that a court, in considering the retroactivity question, "must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Id. at 629. Linkletter analyzed the retroactivity of a decision holding that the fourteenth amendment due process clause requires state courts to exclude from criminal trials evidence obtained in violation of the fourth amendment. See id. at 619-20. In examining the retroactivity question, the Court considered three criteria: (1) the purpose to be served by the new rule, (2) the reliance placed by the parties on the old rule, and (3) the effect retroactive application would have on the administration of justice. See id. at 636. For a discussion of the Linkletter decision and the retroactivity decisions that follow, see Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557 (1975); Corr, Retroactivity: A Study in Supreme Court Doctrine "As Applied", 61 N.C.L. Rev. 745 (1983).
dure and for cases concerning civil liability. Some courts have applied the criminal procedure analysis to the Garner retroactivity question because civil liability is based on fourth amendment rules, which are ordinarily applied in criminal prosecutions. Nevertheless, under either criminal or civil analysis, the Garner holding should be applied retroactively in a civil case.

A. Fourth Amendment Criminal Procedure Retroactivity Analysis

Courts examining new rules of fourth amendment criminal procedure apply different analyses depending on whether the retroactivity question arises in a conviction on direct review or in one that is collaterally attacked. In Griffith v. Kentucky, the Court stated that new rules of criminal procedure were to be applied retroactively to all cases on direct review. Conversely, new rules generally should not apply retroactively to cases on collateral attack. Prior to the Griffith decision a new rule would be applied retroactively to all cases unless it represented a "clear break" from prior precedent. Justice Powell, in his dissent in Pembaur v. Cincinnati, questioned whether a new rule of criminal procedure should ever apply retroactively to create civil liability. He was concerned that the distinction in criminal retroactivity analysis between direct review and collateral attack could produce the anomalous result of preventing the defendant from benefitting from the new rule in a collateral attack on his criminal conviction while allowing the defendant to gain the benefit of the rule in his

28. See Davis v. Little, 851 F.2d 605, 608-10 (2d Cir. 1988); Acoff v. Abston, 762 F.2d 1543, 1548 & n.6 (11th Cir. 1985); see also Carter v. City of Chattanooga, 850 F.2d 1119, 1145 n.3 (6th Cir. 1988) (Merritt, J., dissenting) (consistency may require criminal procedure retroactivity analysis apply to retroactivity questions concerning new fourth amendment rules arising in civil litigation), cert. denied, 109 S. Ct. 795 (1989).
29. See Teague v. Lane, 109 S. Ct. 1060, 1071-72 (1989). A decision is considered final, and thus subject only to collateral review, when a judgment has been rendered, appeals exhausted, and the time for petition for certiorari has expired. See Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986).
31. See Griffith, 479 U.S. at 328.
32. See Teague v. Lane, 109 S. Ct. 1060, 1075 (1989). In Teague, the Court stated two exceptions to this general rule of nonretroactivity. First, a ruling that a trial court lacked the authority to convict a defendant should be applied retroactively. See id. at 1075; United States v. Mitchell, 867 F.2d 1232, 1233 (9th Cir. 1989); Ingebr v. Enzor, 841 F.2d 450, 453-54 (2d Cir. 1988). Second, the new rule should apply retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" Teague, 109 S. Ct. at 1075. (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (opinion of Harlan, J.) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))).
subsequent civil litigation. But this is not a concern in applying Garner retroactively because the new rule announced in Garner has no application in a criminal prosecution of the fleeing felon.

It is clear that Griffith mandates retroactive application of Garner because all civil litigation would be on direct review where the plaintiff is seeking damages for the injury sustained from the unconstitutional use of deadly force. In addition, two courts have applied Garner retroactively under the pre-Griffith "clear break" analysis.

The Eleventh Circuit applied the pre-Griffith standard of Johnson v. United States because "civil liability would be based on a transgression of duties imposed by constitutional rules of criminal procedure." The Eleventh Circuit applied the Johnson "clear break" exception prior to the Court's eliminating it in Griffith. The Second Circuit applied the Johnson analysis despite the Griffith decision. In the court's opinion, Griffith did not change the Johnson analysis as it applied to the Garner retroactivity question. The Second Circuit concluded that "no real question of retroactivity arises 'when a decision of [the] Court merely applied settled precedents to new and different factual situations.'"

However, criminal retroactivity analysis seems inappropriate for the Garner retroactivity question because of the distinction it draws between cases arising on direct review and collateral attack. The Garner retroactivity question will arise only on direct review. Furthermore, the Supreme Court expressly stated in Griffith that all questions of civil retroactivity are to be governed by the standard announced in Chevron Oil Co. v. Huson. Thus, while retroactivity would be mandated under a Johnson/Griffith analysis, civil retroactivity analysis is more appropriate for a civil case.

B. The Civil Litigation Retroactivity Analysis:

In Chevron Oil Co. v. Huson, the Court established a three-prong...
retroactivity analysis for federal civil litigation. These three prongs have been labeled the reliance, purpose and inequity factors.

The reliance prong of the *Chevron* test is considered the threshold question. Under the reliance prong "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." The purpose prong instructs a court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Last, under the inequity prong, a court must "weigh . . . the inequity imposed by retroactive application."

In examining the threshold inquiry posed by *Chevron* 's reliance prong it is useful to refer to the "clear break" exception analysis that existed prior to *Griffith* because it parallels the reliance prong under *Chevron*. In *United States v. Johnson*, the Court set forth three criteria, any one of which, if met, meant the new "ruling caused 'such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one.'" First, if the new decision explicitly overruled prior Supreme Court precedent, it would not be applied retroactively. Second, if the law-changing decision disapproved of a practice the Supreme Court arguably had sanctioned in prior cases, the decision would be nonretroactive. Third, retroactive application was considered inappropriate if the Court's ruling overturned a longstanding and widespread practice to which it had not spoken, but which a near unanimous body of lower court authority had expressly approved.

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46. See *Chevron*, 404 U.S. at 106-07.
47. See Note, supra note 25, at 123 (labeling the *Chevron* prongs reliance, purpose and inequity factors).
48. See *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982) ("In the civil context . . . the 'clear break' principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively."); see also *Mitchell v. City of Sapulpa*, 857 F.2d 713, 718-19 (10th Cir. 1988) (applying *Chevron* reliance prong as a threshold test to *Garner* retroactivity question) (per curiam); *Carter v. City of Chattanooga*, 850 F.2d 1119, 1122-23 (6th Cir. 1988) (same), cert. denied, 109 S. Ct. 795 (1989).
49. *Chevron*, 404 U.S. at 106 (citations omitted).
50. Id. at 106-07.
51. Id. at 107.
52. See *United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982) (noting the "clear break" principle in the civil context is a threshold question); see also *Carter v. City of Chattanooga*, 850 F.2d 1119, 1122-23 (6th Cir. 1988) (applying *Chevron* but relying on *Johnson* for framework of reliance prong analysis), cert. denied, 109 S. Ct. 795 (1989); *Acoff v. Abston*, 762 F.2d 1543, 1548 n.6 (11th Cir. 1985) (court concluded it would reach same result to the *Garner* retroactivity question under either the *Johnson* "clear break" analysis or the *Chevron* test).
54. See id.
55. See id.
56. See id.
III. Application of the Chevron Retroactivity Analysis to Garner

A. The Reliance Prong of the Chevron Test

The Chevron reliance prong, as applied to Garner, determines whether municipal reliance on the supposed constitutionality of a fleeing felon statute was justified, thus requiring an exception to the general rule of retroactive application. In order to bar retroactive application, past precedent must be undeniably clear and create a sound reliance interest, especially when a municipal defendant has infringed on a constitutional right.

The Chevron reliance prong instructs a court to examine two questions, either one of which, if met, will satisfy the threshold inquiry. First, a court must determine whether the law-changing decision overruled "clear past precedent on which litigants may have relied." Second, a court must examine whether the decision was "an issue of first impression whose resolution was not clearly foreshadowed."

1. The Garner Decision: Clear Past Precedent?

The Court's decision in Garner neither overruled nor significantly modified any Supreme Court precedent. Although split on the ultimate holding, the Court unanimously agreed that the use of deadly force to effect the arrest of a suspect was a seizure subject to the fourth amendment's reasonableness requirement. In order to determine if the seizure was reasonable, the Court applied a balancing test, weighing "the nature

57. See supra note 25 and accompanying text.
58. The Supreme Court has demonstrated the clarity of precedent required for a holding of nonretroactivity. In Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987), the Court did not apply Wilson v. Garcia, 471 U.S. 261 (1985), retroactively because the prior circuit court precedent "clearly established" that a six year statute of limitations applied to the plaintiff's section 1981 claim rather than the two year statute of limitations suggested by Wilson. See Saint Francis, 481 U.S. at 608-09. In Goodman v. Lukens Steel Co., 482 U.S. 656 (1987), the Court applied Wilson retroactively because there was no clear past precedent on which statute of limitations applied and therefore the plaintiff could not justifiably rely on the longer six year period. See Goodman, 482 U.S. at 662-63. Goodman and Saint Francis each addressed a section 1981 cause of action concerning the same statute of limitations in the Third Circuit. The distinguishing factor was the timing of the claims. In Saint Francis the suit was filed two years after the Third Circuit had expressly held that a six year statute of limitations applied to section 1981 actions. See Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3d Cir. 1977); Wilson v. Sharon Steel Corp., 549 F.2d 276 (3d Cir. 1977). In Goodman the suit was filed prior to the Third Circuit's holding that the longer statute applied. Therefore, the Goodman decision was initiated when the circuit court precedent was not clear and thus reliance was not justified. See Goodman, 482 U.S. at 663.
59. See infra notes 85-90 and accompanying text.
61. See supra notes 52-56 and accompanying text.
and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." 64

The Garner Court concluded that the suspect's interest in his own life, and society's interest in allowing the judicial system to determine a person's guilt and punishment, outweighed the state's interest in apprehending nonviolent felons. 65 The Court's treatment of prior precedent in Garner cannot be characterized as an unexpected modification of any established rule. 66 In fact, the Court merely applied a predictable and traditional fourth amendment balancing of the interests test to what was undeniably a fourth amendment seizure. 67

The Garner decision did not disapprove a practice the Court had "arguably" sanctioned in prior cases. 68 Indeed, the use of deadly force to effect the arrest of any fugitive had been questioned by at least one Supreme Court Justice. 69

Garner also did not overrule a "longstanding and widespread practice . . . which a near-unanimous body of lower court authority [had] expressly approved." 70 Although a majority of courts addressing the ques-

64. Id. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)). The dissent agreed that this is the proper test to apply to this question. See id. at 26 (O'Connor, J., dissenting). For other applications of this balancing of the interests test, see Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981); Delaware v. Prouse, 440 U.S. 648 (1979).
66. See id. at 7-12. Garner was a novel decision because the Court had never before held the method of an arrest to be unreasonable once an officer had probable cause to make the arrest. See The Supreme Court—Leading Cases, 99 Harv. L. Rev. 120, 248 (1985). Garner may have been an unexpected decision because the Burger Court had "generally curtailed the scope of fourth amendment protections and because federal and state courts had been almost unanimous in upholding similar deadly force rules." See id. (footnotes omitted). But none of these reasons involve any clear past precedent that could have been relied on.
67. See Davis v. Little, 851 F.2d 605, 609 (2d Cir. 1988); Acoff v. Abston, 762 F.2d 1543, 1549 (11th Cir. 1985). The Second Circuit stated that while Garner went "beyond merely applying past precedents," the decision did not announce a new rule of law, but instead "applied a traditional Fourth Amendment balancing test to a particular set of facts." Davis, 851 F.2d at 609. The court pointed out that the Garner decision did not overrule or significantly modify any existing Supreme Court precedents. See id. The Eleventh Circuit held "that the Garner decision was not an entirely new and unanticipated principle of law that would justify non-retroactivity." Acoff, 762 F.2d at 1549. Although the court noted that the Garner decision applied a typical fourth amendment balancing test, it did admit that the Garner decision was "not a simple application of past precedent." Id.
69. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting). Chief Justice Burger drew an analogy to the graded response for the use of deadly force in addressing the mechanical inflexibility of judges in applying the exclusionary rule to all varying degrees of police error: "We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a 'shoot' order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter." Id.
70. Johnson, 457 U.S. at 551. Two circuit courts have applied the Johnson analysis and concluded that Garner should be applied retroactively. See Davis v. Little, 851 F.2d
tion of constitutionality had upheld the fleeing felon rule, the precedent concerning the constitutionality of the rule falls far short of the "near-


The court in Carter applied the Chevron civil standard. See id. at 1122-23 (applying Chevron but agreeing with the Second and Eleventh Circuits that the novelty of the decision to be applied retroactively is the critical inquiry). The court concluded that "Garner overturned 'a longstanding and widespread practice' the Supreme Court had previously not addressed, 'but which a near-unanimous body of lower court authority has[d] expressly approved.'" Id. at 1123 (quoting Johnson, 457 U.S. at 551). The Sixth Circuit distinguished the Eleventh Circuit's decision in Acoff on the basis that the Eleventh Circuit's precedent regarding the fleeing felon rule was not as clear in upholding the rule. Concentrating on the foreseeability of the result in Garner, the court concluded that the decision established a "new and unexpected principle of law by setting aside clearly established precedent" within the Sixth Circuit. Id. at 1129.


In Carter v. City of Chattanooga, the Sixth Circuit concluded that Garner should not be applied retroactively to a December 21, 1982 incident. See Carter, 850 F.2d at 1137. The court pointed out that, prior to the Court's decision in Garner, no state had abandoned the fleeing felon rule because it violated the Constitution. See id. at 1123. In addition, the Sixth Circuit noted that, prior to its decision in Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983), aff'd, Tennessee v. Garner, 471 U.S. 1 (1985), no court had held the fleeing felon rule unconstitutional under the fourth amendment. See id. The court then went on to examine the prior decisions within the Sixth Circuit that had upheld the constitutionality of the Tennessee statute. See id. at 1123-29 (evaluating Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir.), cert. denied, 434 U.S. 822 (1977); Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976); Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), cert. denied, 409 U.S. 1114 (1973) (per curiam); Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971)).

The Tenth Circuit also declined to apply Garner retroactively in Mitchell v. City of Sapulpa, 857 F.2d 713 (10th Cir. 1988) (per curiam). The court noted that, prior to the Garner decisions, no court had struck down the fleeing felon rule as violating the fourth amendment. See id. at 717-18. The court also pointed out that the Tenth Circuit had consistently judged this area of physical abuse by police officers under substantive due process standards. See id. at 718.

The Tenth Circuit found the Sixth Circuit's decision in Carter "highly persuasive." Id. It was the Sixth Circuit that first decided that the fourth amendment prohibited the use of deadly force against nonviolent fleeing felons. See Garner v. Memphis Police Dep't, 600 F.2d 52 (6th Cir. 1979) (questioning the rule's constitutionality) (Garner I); Garner v. Memphis Police Dep't, 710 F.2d 240, 247 (6th Cir. 1983), aff'd, Tennessee v. Garner, 471 U.S. 1 (1985) (holding that the rule violated the fourth amendment) (Garner II). The Sixth Circuit had decided not to apply this new rule retroactively to its own cases. See Carter, 850 F.2d at 1137. The Tenth Circuit's analysis implied that the judges that held the fleeing felon rule unconstitutional would support nonretroactive application of their decision. However, no judge in the panel decisions of Garner I and Garner II joined in the majority opinion of Carter. Three of the four judges involved in the Garner decisions dissented in Carter. Judge Merritt, who wrote the majority opinions in Garner I and Garner II, also wrote the dissent in Carter. Furthermore, in his dissent in Carter, Judge Merritt accused the majority of denying retroactive application of Garner because of its "hostility to the liberalization of the law by the Supreme Court and . . . its zeal to show
unanimous" requirement. Most of the litigation concerning the fleeing felon rule involved the reasonableness of the police officer's conduct and not the constitutionality of the rule itself.\textsuperscript{72} Therefore, the limited number of decisions concerning the constitutionality of the rule cannot be considered an extensive enough body of law to justify nonretroactivity.\textsuperscript{73} In addition, several courts did question the constitutionality of the use of deadly force to effect the arrest of any felon.\textsuperscript{74} Likewise, for years many judges and commentators had considered the fleeing felon rule "morally wrong and constitutionally suspect."\textsuperscript{75}

Furthermore, the use of deadly force to effect the arrest of any felon was not a "longstanding and widespread practice."\textsuperscript{76} Although the origins of the fleeing felon rule date back to English common law, an overwhelming majority of municipalities prohibited the use of deadly force against nonviolent felons.\textsuperscript{77} In decisions barring retroactive application because the new rule overturned a "longstanding and widespread practice," reliance by parties was consistently much more extensive.\textsuperscript{78}

that the panel decisions . . . in \textit{Garner I} and \textit{Garner II} were wrong." \textit{Carter}, 850 F.2d at 1145 (Merritt, J., dissenting).

\textsuperscript{72} See \textit{supra} note 14 and accompanying text.

\textsuperscript{73} See \textit{Carter v. City of Chattanooga}, 850 F.2d 1119, 1141 (6th Cir. 1988) (Merritt, J., dissenting), \textit{cert. denied}, 109 S. Ct. 795 (1989). In \textit{Garner} there was no clear past precedent that established the constitutionality of the fleeing felon rule. While certain circuits had upheld the fleeing felon rule, the constitutionality of the practice could not be considered "clearly established." The \textit{Garner} decision decided a "broad" question of constitutional law, not a narrow, specific question of which state statute of limitations should apply. See \textit{Carter}, 850 F.2d at 1141 (Merritt, J., dissenting). The clarity of precedent required for these questions is not the same. See \textit{Bradley v. School Board of Richmond}, 416 U.S. 696, 719 (1974) (when presented with issues of "great national concerns . . . the court must decide according to existing laws" (quoting \textit{United States v. The Schooner Peggy}, 5 U.S. 103, 110 (1801))).

\textsuperscript{74} See \textit{Garner I}, 600 F.2d 52 (6th Cir. 1979); \textit{Landrum v. Moats}, 576 F.2d 1320 (8th Cir.), \textit{cert. denied}, 439 U.S. 912 (1978); \textit{Mattis v. Schnarr}, 547 F.2d 1007 (8th Cir. 1976), \textit{vacated}, Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam); see also \textit{Haislah v. Walton}, 676 F.2d 208, 214 n.3 (6th Cir. 1982) (when apprehension of a fleeing felon is justification for use of deadly force "the exoneration of the police officer does not necessarily settle the constitutionality of his conduct or the liability of his governmental employer").


\textsuperscript{76} \textit{United States v. Johnson}, 457 U.S. 537, 551 (1982).

\textsuperscript{77} See \textit{supra} notes 6, 10 and accompanying text.

\textsuperscript{78} See, e.g., \textit{Gosa v. Mayden}, 413 U.S. 665 (1973). In \textit{Gosa}, the Supreme Court decided not to apply retroactively a decision which overturned the jurisdiction of military courts to try servicemen for offenses that are not service related. See \textit{id.} at 685. The Court stated that this "new constitutional principle . . . effected a decisional change in attitude that had prevailed for many decades." \textit{Id.} at 673. Because there was "justifiable and extensive" reliance by the military on specific rulings of the Supreme Court the new rule was applied prospectively. \textit{Id.} at 682 (emphasis added). The Court had "long and consistently" recognized that military status itself was sufficient for court-martial jurisdiction. See \textit{Kinsella v. United States ex rel. Singleton}, 361 U.S. 234, 240-41, 243 (1960); \textit{Reid v. Covert}, 354 U.S. 1, 22-23 (1957); \textit{Grafton v. United States}, 206 U.S. 333, 348 (1907); \textit{Johnson v. Sayre}, 158 U.S. 109, 114-15 (1895); \textit{Smith v. Whitney}, 116 U.S. 167, 184-85 (1886); \textit{Coleman v. Tennessee}, 97 U.S. 509 (1879); \textit{Ex parte Milligan}, 71 U.S. 2, 123 (1866). In the case of the fleeing felon rule, reliance by municipalities was not as
2. The *Garner* Decision: Clearly Foreshadowed?

The *Chevron* reliance prong also asks whether the new decision was "an issue of first impression whose resolution was not clearly foreshadowed."\(^{79}\) *Garner* did present an issue of first impression in the Supreme Court.\(^{80}\) Some authorities consider *Garner* to have been an unexpected decision,\(^{81}\) but the Supreme Court itself stated in *Garner* that the fleeing felon rule was constitutionally suspect, as evidenced by the abandonment of the rule by a large majority of police departments.\(^{82}\)

Assuming that *Garner* was not clearly foreshadowed, this alone will not bar retroactivity. Prior "first impression" decisions show that there must be some compelling reason, other than the threat of civil liability, to bar retroactive application.\(^{83}\) In these decisions the new rulings were applied prospectively, not only because they were unforeseen issues of first impression, but because retroactive application would produce substantial inequitable results or massive administrative disruptions.\(^{84}\)

Furthermore, municipal defendants should be judged under a strict standard of reliance when examining the retroactivity of a constitutional decision.\(^{85}\) In *Owen v. City of Independence*,\(^{86}\) the Supreme Court stated "extensive" nor were there any "specific" Supreme Court decisions to rely on. See Stovall v. Denno, 388 U.S. 293, 299-300 (1967) (prospective application of requirement that counsel be present at pre-trial confrontation and identification). See infra note 84 and accompanying text.

79. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). The dissent in *Carter v. City of Chattanooga*, 850 F.2d 1119 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 795 (1989), concluded that this "first impression" test should not apply to the type of retroactivity question posed by *Garner*, involving a constitutional issue and a city defendant. See *Carter*, 850 F.2d at 1142 (Merritt, J., dissenting). The majority in *Carter* held that if *Garner* "did not overrule a clearly established precedent in the Supreme Court, [the case] decided 'an issue of first impression whose resolution was not clearly foreshadowed.'" *Id.* at 1129 (quoting *Chevron*, 404 U.S. at 106).

The Tenth Circuit, in *Mitchell v. City of Sapulpa*, 857 F.2d 713, 717 (10th Cir. 1988) (per curiam), concluded the *Garner* decision was "'an issue of first impression whose resolution was not clearly foreshadowed.'" See *Mitchell*, 857 F.2d at 718 (quoting *Chevron*, 404 U.S. at 106). The court did admit that a district court within the Tenth Circuit had in fact foreseen what was to become the conclusion of the Supreme Court in *Garner*. See *id.* at 718 n.2 (referring to Jacobs v. City of Wichita, 531 F. Supp. 129 (D. Kan. 1982)).

80. See supra note 79.
81. See supra note 66 and accompanying text.
that municipalities were to be held liable for their constitutional violations “even where some constitutional development could not have been foreseen by municipal officials.” The Owen holding flows from the Court’s desire to encourage municipal officials to err on the side of protecting citizens’ constitutional rights whenever these officials have doubts about the lawfulness of their intended actions. While the Supreme Court’s decision in Owen specifically addressed the issue of qualified immunity, not retroactivity, both doctrines are concerned primarily with the reliance issue. The Owen decision demonstrates that municipalities should only be shielded from liability when they have relied on sound, clearly established legal principles. The fleeing felon rule was an outdated common law doctrine, no longer supported by any rational basis. Municipalities’ reliance on the constitutionality of the fleeing felon statute was not justified and, therefore, insufficient to pass the threshold inquiry of the Chevron test. Chevron’s second and third prongs also favor retroactive application of Garner.

B. The Purpose Prong of the Chevron Test

The second prong of the Chevron test instructs the court to examine the purposes of the new rule and determine whether retroactive application will “further or retard” those goals. Although the primary purpose of the Garner decision, to prevent the use of deadly force to effect the arrest of nonviolent felons, would not necessarily be furthered by retroactive application, lower courts typically examine a wide range of purposes when addressing the retroactivity question. In considering the Garner retroactivity question, courts have looked to the purpose of imposing liability under 42 U.S.C. § 1983.

88. See id. at 651-52.
90. See supra notes 7-9 and accompanying text.
Section 1983 actions have two purposes: first, to deter constitutional violations, and second, to provide compensation to victims of such violations. The Supreme Court has stressed the importance of imposing section 1983 liability to further the goal of deterrence. The threat of municipal liability will create an incentive for officials to protect citizens' constitutional rights. One could argue that retroactive application of Garner would provide little deterrent effect on municipalities because courts erred in upholding the fleeing felon rule. However, municipalities should not be permitted "to adopt a let's-wait-until-it's-decided approach" with respect to citizens' constitutional rights. The few municipalities that adhered to the fleeing felon rule did so despite any reasonable basis for the rule and without regard to widespread criticism of the moribund doctrine. Retroactive application of Garner would thus further the deterrence purpose of section 1983 actions by creating an incentive for municipalities to be cognizant of infringing on citizens' fundamental constitutional rights.

In addition, the threat of section 1983 liability is the only practical means of deterring municipalities from authorizing the use of excessive force in the arrest process. In most other fourth amendment retroactivity cases, the exclusionary rule removes the incentive for officials to violate constitutional rights. In claims involving excessive use of force in the arrest process, the exclusionary rule has no application. The threat of civil liability is therefore essential to deter municipalities from

95. See id. at 651-52.
96. In addressing the deterrence purpose, the Supreme Court stated in Owen:
The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Owen, 445 U.S. at 651-52 (footnotes omitted).
99. See supra notes 8-10 and accompanying text.
101. See Carter, 850 F.2d at 1144.
implementing policies that impinge upon an individual's constitutional rights.

The other purpose of section 1983 actions is to provide compensation to victims of constitutional violations.\(^{103}\) Retroactive application of *Garner* clearly furthers this purpose.\(^ {104}\) Unless *Garner* is applied retroactively, no compensation will be provided for these unconstitutional uses of deadly force.

Although some courts have questioned the importance of the compensation purpose of section 1983 actions,\(^ {105}\) the Supreme Court has emphasized that the damages remedy is necessary to provide an incentive for aggrieved individuals to challenge the deprivation of a constitutional right not yet "clearly defined."\(^ {106}\) In addition, it is even more important to ensure that a municipality is liable for its constitutional violations because it is the very body responsible for protecting citizens' constitutional rights.\(^ {107}\) Thus, *Chevron*’s second prong also favors retroactively applying *Garner* because doing so would further the purposes of section 1983 actions.

C. *The Inequity Prong of the Chevron Test*

The final prong of the *Chevron* test provides that nonretroactivity is possible only if retroactive application would produce "substantial inequitable results."\(^ {108}\) Retroactive application of *Garner* will clearly not produce the substantial inequitable results needed to justify nonretroac-

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104. See Mitchell v. City of Sapulpa, 857 F.2d 713, 719 (10th Cir. 1988) (per curiam) (focusing on the importance of the deterrent purpose); Carter v. City of Chattanooga, 850 F.2d 1119, 1130, 1143-44 (6th Cir. 1988) (Merritt, J., dissenting) (same), cert. denied, 109 S. Ct. 795 (1989).
105. See Mitchell v. City of Sapulpa, 857 F.2d 713, 719 (10th Cir. 1988) (per curiam) (compensation to victims, while important, is not the primary purpose of section 1983 liability); Carter v. City of Chattanooga, 850 F.2d 1119, 1130 (6th Cir. 1988) (under the second *Chevron* standard the court concluded the primary purpose of imposing section 1983 liability was deterrence and that compensation to victims was "merely a consequence" of a judgment), cert. denied, 109 S. Ct. 795 (1989).
106. See Owen v. City of Independence, 445 U.S. 622, 651 n.33 (1980). With respect to the compensation purpose of section 1983 actions, the Court said "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees . . . ." *Id.* at 651.
107. See *id.* at 651 ("[T]he importance of assuring [a damage remedy's] efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed."); Adickes v. Kress & Co., 398 U.S. 144, 190-91 (1970) (same) (opinion of Brennan, J.).
108. Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971) (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)). The final prong of the *Chevron* test requires a court to weigh[] the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Id.* at 107 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (emphasis added)).
tivity. First, retroactivity will simply require municipalities to compensate victims for constitutional infringements. Second, there is no reason to believe that retroactive application of *Garner* will cause a significant financial hardship to a municipality.\(^{109}\) Finally, retroactive application of *Garner* does not involve any of the hardships or injustices typically associated with a holding of nonretroactivity.\(^{110}\)

The inequity concerns are even less compelling when the issue is the liability of a municipal defendant. There are two major equity considerations in imposing section 1983 liability.\(^{111}\) The first involves the injustice of imposing liability on an official who acted in good faith in a position requiring him to exercise discretion.\(^{112}\) This is not a concern when the defendant is a municipality because the award of damages will come from the public treasury.\(^{113}\) The second equity issue is the possibility that the threat of liability will inhibit officials from effectively executing their duties.\(^{114}\) As a practical matter, however, it is questionable whether

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109. Two courts have applied *Garner* retroactively without even addressing this concern. *See* Davis v. Little, 851 F.2d 605, 609 (2d Cir. 1988); Acoff v. Abston, 762 F.2d 1543, 1548-49 (11th Cir. 1985). A number of courts have applied *Garner* retroactively to civil litigation, implicating more widespread liability. *See supra* note 22 and cases cited therein. Even courts denying retroactivity were uncertain as to the financial effects of retroactive application of *Garner*. *See* Mitchell v. City of Sapulpa, 857 F.2d 713, 720 (10th Cir. 1988) (per curiam) ("the potential severe financial strain placed on cities by retroactivity outweighs the plaintiffs' interest in compensation") (emphasis added); Carter v. City of Chattanooga, 850 F.2d 1119, 1131 (6th Cir. 1988) (retroactive application of *Garner* "might present severe financial strain in the case of smaller municipalities.") (emphasis added), *cert. denied*, 109 S. Ct. 795 (1989). Furthermore, retroactive application of *Garner* does not create boundless liability. The Memphis police (the defendant in *Carter* and arguably one of the most frequent users of deadly force against all felons) used deadly force 114 times between 1966 and 1974 on unarmed burglary, auto theft and larceny suspects. During this period, 17 suspects were killed in Memphis by police. *See Comment, supra* note 7, at 362 n.4 ("a decision to use deadly force against a fleeing suspect is an extremely rare and tormenting choice for most policemen").


112. *See id.*

113. *See id.*

114. *See id.*; *see also* Pembaur v. Cincinnati, 475 U.S. 469, 492 (1985) (Powell, J., dissenting). Justice Powell thought that retroactive application of Steagald v. United States, 451 U.S. 204 (1981), "would produce substantial inequitable results by imposing liability on local government units for law enforcement practices that were legitimate at the time they were undertaken." *Pembaur*, 475 U.S. at 494-95. Justice Powell expressed concern about the possible "chilling effect" on law enforcement practices of applying new rules of fourth amendment criminal procedure retroactively to civil cases. *See id.* at 495-96. He believed that law enforcement officials (particularly prosecutors in this case) were in a difficult position since "[t]heir affirmative duty to enforce the law vigorously often requires them to take actions that legitimately intrude on individual liberties." *Id.* at 495. Although any doubt about the constitutionality of their actions should cause government officials to "err on the side of protecting citizens' rights," *id.* (quoting Owen v. City of Independence, 445 U.S. 622, 652 (1980)), Justice Powell argued that these prosecutors
the threat of municipal liability will deter officials from effectively performing their duties, since public officials routinely make decisions that impact upon the public treasury. Moreover, the concern that a municipality will be held accountable for its constitutional violations is a proper consideration of municipal officials.116

Although it may be argued that public funds should not be used to compensate specific groups of individuals, the Supreme Court has indicated that damages imposed upon municipalities that violate individuals' constitutional rights are part of the inevitable cost of government borne by all taxpayers.117 The Supreme Court has concluded that it is fairer to place the financial burden of civil damages on the municipality, and thus on society as a whole, than to deny recovery to an individual whose constitutional rights have been violated.118 The inequity of imposing liability on a municipality seems insignificant when compared to the inequity of denying compensation for the wrongful killing of an individual.119

**CONCLUSION**

Retroactivity analysis demonstrates that the Supreme Court's decision in *Tennessee v. Garner* should be applied retroactively to civil litigation. First, there was no clear past precedent that enabled parties to justifiably rely on the outdated fleeing felon rule. The constitutionality of the rule had not been clearly established. Furthermore, the fact that the rule had been widely criticized indicated that the rule was constitutionally suspect. Second, retroactive application of *Garner* will further the purpose of section 1983 by deterring municipal infringements on constitutional

should not be deterred from enforcing the law when there is no reason to doubt the constitutionality of their actions. See id. This "unwarranted deterrence" might discourage valid law enforcement practices and hamper the criminal justice system. Id. at 495-96. In Justice Powell's opinion there was no reason for the prosecutor to question the lawfulness of his actions when the law of the Sixth Circuit had previously authorized such action. However, Justice Stevens, in his concurrence in *Pembaur*, noted that just because a circuit court's precedent disagrees with a subsequent Supreme Court ruling does not mean that the ruling is to be "presumptively nonretroactive" in that circuit. See id. at 488-89 n.3 (Stevens, J., concurring).

116. See id. at 656.
117. See id. at 654-55.
118. See id. at 655.
119. See *Carter v. City of Chattanooga*, 850 F.2d 1119, 1144-45 (6th Cir. 1988) (Merritt, J., dissenting), cert. denied, 109 S. Ct. 795 (1989). Ironically, the Sixth Circuit, in denying retroactive application of *Garner*, stressed the inequity of retroactive application. See *Carter*, 850 F.2d at 1123 ("The underlying concern expressed in these cases is the inequity and harshness retroactive application of a new rule of law would impose on parties who had no significant reason to doubt the validity or constitutionality of a statute or practice."). Under the third *Chevron* standard, the court concluded it would be inequitable to impose liability "on local government units for law enforcement practices that were legitimate at the time they were undertaken." Id. at 1131 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 494-95 (1985) (Powell, J., dissenting)). In the court's opinion, a municipality should not be concerned about possible civil liability when exercising its police powers pursuant to a valid state statute. See id.
rights and providing compensation to victims of constitutional violations. Finally, retroactivity of *Garner* will not produce the substantial inequitable results that are required to bar retroactive application. It will merely require municipalities to compensate victims of their constitutional violations.

Municipalities that implemented the fleeing felon rule did so without regard to the widespread criticism of the rule and its lack of a justifiable rationale. Retroactivity analysis concludes that these municipalities cannot shield themselves from liability for their infringement on the fourth amendment right protected in the *Garner* holding.

*John G. Crowley*