Missouri Law Review

Volume 42
Issue 3 *Summer 1977*

Article 7

Summer 1977

# Constitutional Law-Deadly Force to Arrest Nonviolent Fleeing Felons

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trative convenience. Giving an illegitimate child the procedural right to prove what cannot be proved while presuming dependency exists for other children when often it does not exist does not seem reasonable. In Missouri, the courts should not hesitate to utilize the equitable adoption doctrine to protect these children who are injured for convenience's sake.

EDWARD F. FORD III

# CONSTITUTIONAL LAW—DEADLY FORCE TO ARREST NONVIOLENT FLEEING FELONS

*Mattis v. Schnarr*[1]*

Police encountered eighteeen year old Michael Mattis and a seventeen year old companion burglarizing the office of a golf driving range. The youths fled and the two police officers gave chase. Shouts to halt were ignored. The police were losing ground. Officer Marek, believing the use of his firearm to be necessary to effect the arrest, fired one shot in the direction of Mattis. The bullet struck Mattis in the back of the head and killed him.

Missouri statutes[2] permit law enforcement officers to use deadly force[3] when reasonably necessary to effect the arrest of a fleeing felon, provided the felon is first notified he is under arrest. Michael Mattis' father brought a civil rights action[4] against both police officers, alleging that the killing violated the Cruel and Unusual Punishment, Due Process, and Equal Protection Clauses of the federal constitution. The trial court's dismissal for lack of standing[5] was reversed by the Eighth Circuit Court of Appeals.[6] On remand the trial court upheld the constitutionality of the stautes.[7] The

* After this issue went to press, this case was vacated for lack of standing *sub nom.* Ashcroft v. Mattis, 97 S. Ct. 1739 (1977) (per curiam). As the Court did not reach the merits, the constitutional questions raised in the Eighth Court opinion remain unresolved.

1. 547 F.2d 1007 (8th Cir. 1976).

2. Section 544.190, RSMo 1969, provides: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest." Section 559.040 provides that homicide is justifiable "[w]hen necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed . . . ." *See* note 9 *infra* for cases construing these statutes.

3. "Deadly force" as used herein means "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm." MODEL PENAL CODE § 3.11(2) (Proposed Official Draft, 1962).

4. 42 U.S.C. §§ 1983, 1988 (1970); § 537.080, RSMo 1969.

5. Mattis v. Kissling, Civil No. 72-Civ.(3) (E.D. Mo., Jan. 16, 1973).

6. Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974).

7. Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975).

court of appeals again reversed, holding that the statutes, as applied to a nonviolent fleeing felon, violated due process:

> We hold the statutes unconstitutional as applied to arrests in which an officer uses deadly force against a fleeing felon who has not used deadly force in the commission of the felony and whom the officer does not reasonably believe will use deadly force against the officer or others if not immediately apprehended.[8]

The Missouri statutes have been construed[9] as codifying the common law rule[10] that deadly force could be used if necessary to effect the arrest of a felony suspect, but could never be used to arrest a suspected misdemeanant. Because all common law felonies were punishable by death, the use of deadly force to effect arrest was viewed as a mere acceleration of the penal process.[11] Today this rationale is a blatant anachronism. Capital punishment is generally restricted to the most heinous felonies; moreover, many felonies unknown to the common law have been created by statute thereby broadening the scope of the privilege. Nevertheless, the common law "fleeing felon rule" remains the law in over half of the American jurisdictions.[12] Some states have attempted to ameliorate the harshness of the fleeing felon rule by applying it only to certain specified felonies.[13] Several others have adopted the Model Penal Code approach, which authorizes the use of deadly force to effect arrest in two situations: (1) where the underlying felony involved the use of deadly force, or (2) where the felon's escape would pose a substantial threat to life.[14]

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8. Mattis v. Schnarr, 547 F.2d 1007, 1009 (8th Cir. 1976).

9. Manson v. Wabash R.R., 338 S.W.2d 54 (Mo. 1960); State v. Nolan, 354 Mo. 980, 192 S.W.2d 1016 (1946). *See also* PROPOSED CRIMINAL CODE FOR STATE OF MISSOURI § 8.080, Comment (1973).

10. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 56 (1972). The common law rule encompasses both the criminal law of justification and the tort law of privilege.

11. *See* Petrie v. Cartwright, 114 Ky. 103, 109, 70 S.W. 297, 299 (1902); Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 361, 365 (1976) [hereinafter cited as *Deadly Force to Arrest*].

12. *See* Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975); *Deadly Force to Arrest, supra* note 11, at 368-69; Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12 WM. & MARY L. REV. 67 (1970).

13. For a list of these jurisdictions, see Mattis v. Schnarr, 547 F.2d 1007, 1012 n.10 (8th Cir. 1976).

14. Section 3.07 of the MODEL PENAL CODE, (Proposed Official Draft, 1962) provides in part:

> (b) The use of deadly force is not justifiable under this Section unless . . . the actor believes that:
>
> (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
>
> (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

The Proposed Missouri Criminal Code adds a third situation: where the person to be arrested "is attempting to escape by use of a deadly weapon." § 8.080 (3)(b)(ii). This appears to overlap with the Model Penal Code privileges.

This note will examine the relative utility of various due process principles and other constitutional limitations which arguably invalidate the fleeing felon rule.

The fourteenth amendment mandates that no state shall deprive a person of his life without due process of law. Due process in the criminal context normally means a trial and its attendant procedural safeguards.[15] However, if due process always requires a trial, an arresting officer could never kill a criminal suspect, not even in self-defense. Nobody contends for such a result. Under what circumstances, then, may a police officer kill a criminal suspect without violating due process?

The outer perimeter of permissible police conduct is set by two broad and overlapping due process principles: (1) police conduct may not "shock the conscience,"[16] and (2) police may not use excessive and unreasonable force to arrest a criminal suspect.[17] Both principles appear broad enough to invalidate the fleeing felon rule as applied to nonviolent felons, but courts have thus far declined to do so. For example, in *Jones v. Marshall*[18] the Second Circuit Court of Appeals, although indicating that the Model Penal Code approach was "preferable," refused to hold that the common law rule shocked the conscience. Similarly, in *Smith v. Jones*[19] the court held that deadly force was "not unreasonable, unnecessary, or excessive" when necessary to effect the arrest of a fleeing felon.

In *Mattis v. Schnarr* the Eighth Circuit Court of Appeals ignored both of these basic principles and effectively held that the Model Penal Code approach is required by due process. The four-judge majority reached this result by synthesizing two distinguishable due process theories.

At one point the court stated that an individual's life can be taken without a trial only when the state's interests in public safety outweigh the individual's interest in continued life.[20] Under this approach, it is the taking of life without a trial that necessitates a balancing of interests.

Most of the majority opinion, however, is premised upon the "fundamental right to life." Under the "fundamental right" theory,[21] it is the

15. Faretta v. California, 422 U.S. 806 (1975) (self-representation); Mullaney v. Wilbur, 421 U.S. 684 (1975) (proof beyond a reasonable doubt); Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Palko v. Connecticut, 302 U.S. 319 (1937) (condemnation shall be rendered only after trial); Powell v. Alabama, 287 U.S. 45 (1932) (counsel).

16. *E.g.*, Rochin v. California, 342 U.S. 165 (1952) (stomach-pumping of suspect); Screws v. United States, 325 U.S. 91 (1945) (black suspect beat to death by police).

17. *E.g.*, Conklin v. Barfield, 334 F. Supp. 475 (W.D. Mo. 1971); Jackson v. Martin, 261 F. Supp. 902 (N.D. Miss. 1966); *see* Annot., 1 A.L.R. Fed. 519 (1969).

18. 528 F.2d 132 (2d Cir. 1975).

19. 379 F. Supp. 201, 203 (M.D. Tenn. 1973), *aff'd mem.*, 497 F.2d 924 (6th Cir. 1974). However, in this case the felon placed the officer's life in danger.

20. 547 F.2d at 1019.

21. A statutory classification that infringes upon the exercise of a fundamental right is unconstitutional unless the state can show that it is necessary to achieve

implicit constitutional significance of life, rather than the lack of a trial, that triggers strict judicial scrutiny of the competing interests.

Both due process theories require the court to balance the interests at stake; hence, it is of little consequence which approach is followed in the fleeing felon context, where the individual is deprived of both life and trial.[22] The "fundamental right" doctrine, however, is normally associated with the Equal Protection Clause. The court in *Mattis* applied it in a due process context, citing abortion[23] and irrebuttable presumption[24] cases for the propriety of this approach. It is submitted that more tenable authority for a balancing test can be found in due process cases involving property seizures.

Although the state generally must afford a hearing to an individual before seizing his property, United States Supreme Court cases establish that a post-seizure hearing satisfies due process requirements in certain extraordinary situations where the governmental need for summary action outweighs the potential harm to the individual.[25] Because life, like property, is a protected due process interest, the same principle arguably applies to limit the situations where the state can take a person's life without a hearing. This would mean that a police officer could kill a fleeing felon

some compelling state interest. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (right to travel); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreation). *See also* notes 37-40 and accompanying text *infra*.

22. However, the theory chosen could be outcome-determinative in other situations. For example, what if a nonviolent felon who has been tried and convicted later attempts to escape from prison? Is the prison guard's privilege to use deadly force to prevent his escape now unconstitutional? Under the fundamental right to life approach, the state would have to prove that the use of deadly force is necessary to promote some compelling state interest. But if the competing interests are only balanced when there has been no trial, the guard's privilege is free from any due process problems.

23. Roe v. Wade, 410 U.S. 113 (1973).

24. Recent United States Supreme Court cases have created the doctrine that certain irrebuttable statutory presumptions violate due process. An individual adversely affected by such a presumption must be afforded an opportunity to rebut the existence of the fact conclusively presumed. In other words, the substantive rule of law created by the irrebuttable presumption is constitutionally impermissible. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973). *But cf.*, Weinberger v. Salfi, 422 U.S. 749 (1975) (restricting the irrebuttable presumption doctrine). *See also* Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

25. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of yacht smuggling marijuana); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamins); Fahey v. Mallonee, 332 U.S. 245 (1947) (seizure of assets to prevent bank failure); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of unfit food); *cf.* Mathews v. Eldridge, 424 U.S. 319 (1976) (no pre-termination hearing required for termination of Social Security disability benefits).

only when the need for summary action outweighs the felon's interest in staying alive.

The analogy, however, is not perfect. When the state takes a person's property, the owner always has an opportunity to be heard on the propriety of the seizure. In certain extraordinary situations his hearing may be postponed until after the seizure, but the important fact is that he will eventually be heard. But when the state uses deadly force to arrest a fleeing felony suspect, there is never an opportunity to be heard on the propriety of the force used. If the suspect is killed, he will never get a hearing at all; if he is not killed, his trial will only address the question of whether he committed the felony.

The constitutional impact of this distinction is unclear. There is no hearing that can remedy an erroneous deprivation of life. Arguably this means that the governmental need for summary action must be even more compelling to justify deadly force. On the other hand, it can be contended that the use of deadly force to arrest a fleeing felon really has no procedural significance at all, and that a balancing test is merely a subterfuge for substantive due process.[26]

Assuming, however, that a balancing test is proper, it must be determined what possible governmental interests can outweigh a fleeing felon's interest in being free from deadly force. Indisputably, one such governmental interest is the protection of the lives of the public. When a fleeing felon places a policeman's life in present and immediate danger, the officer has the privilege to shoot in self-defense. Similarly, if the suspect poses a present threat to the life of some third party bystander, a police officer has a "defense of others" privilege. In both cases the felon has placed life in present danger, and the state's interest in protecting life would outweigh the felon's interest in being free from deadly force.

The Model Penal Code permits the arresting officer to use deadly force against a fleeing felon when the underlying felony involved the use of deadly force.[27] The Eighth Circuit Court of Appeals indicated that this was consistent with due process, and therefore must have concluded that although here the felon poses no *present* threat to life, the fact that he has endangered life in the immediate past justifies deadly force to prevent his escape.

The Model Penal Code also allows the use of deadly force to arrest a fleeing felon whose escape would create a substantial risk of future harm to life and limb.[28] The *Mattis* majority's approval of this provision stands for the proposition that society's interest in preventing future harm to life can outweigh the felon's present interest in continued life.[29] The more difficult

26. The question, after all, is not what procedures a police officer must follow to execute properly a fleeing felon. The question is what circumstances make it reasonable for the legislature to authorize deadly force.

27. *See* note 14 *supra*.

28. *See* note 14 *supra*.

29. It is difficult to conceive of many realistic situations where this provision

questions arise where the fleeing felon, as in *Mattis*, poses *no* manifest threat to life, either past, present, or future. What governmental interests, if any, can justify the use of deadly force to arrest such a person?

One possibility is the state's interest in the immediate apprehension of nonviolent felony suspects. If police cannot use deadly force to effect the arrest of nonviolent felons, some suspects will escape that otherwise would have been immediately apprehended.[30] The state's interest in the apprehension of criminals, however, is not automatically defeated when a felon successfully flees from arrest. Often apprehension is merely delayed. The possible consequences of delayed apprehension are two fold. (1) The escaped suspect may commit other crimes before he can be apprehended. (2) The prospect of easy flight from arrest may encourage other individuals to commit crimes. Both possibilities share the characteristic of being extremely difficult to predict in advance; accordingly, the need for immediate apprehension of a given nonviolent fleeing felon may or may not be compelling. Thus, the need for immediate, as opposed to delayed, apprehension is inherently speculative, and does not seem to outweigh the nonviolent suspect's interest in continued life.

A closely related governmental interest is to deter felons from fleeing arrest. It has been argued that if police could never shoot, law enforcement would be reduced to a "race . . . to the swift."[31] Such predictions, however, seem greatly exaggerated. The only felon likely to be deterred from fleeing is one who contemplates the consequences. Such a person will surely realize that if he runs, he not only looks guilty, but stands a good chance of being caught. Moreover, the felon may lack confidence in the pursuing officer's appreciation of due process. And if the state is still determined to deter felons from fleeing arrest, the traditional means of doing so is to make such conduct a separate crime,[32] rather than to permit shooting the offender dead on the spot.

The state also has a legitimate interest in having a rule that can be practicably administered by law enforcement officers. Police must make snap judgments whether to shoot, and courts should not require them to perform delicate balancing tests before pulling the trigger. To place this argument in proper perspective, however, one must realize that police must *already* run through a mental checklist: Is this a felon or a misdemeanant? Has he been notified he is under arrest? Is there any way to

would apply without overlapping with the other three privileges mentioned above. A cynic might conclude that this provision is designed to protect the officer who shoots first and seeks justification later.

30. "Apprehending" a felon by deadly force does not necessarily involve killing him. The bullet may wound, graze, or miss entirely and still effectively stop the felon. However, when the state seeks to justify deadly force, it should be required to assume that death will in fact result.

31. Comment, *The Use of Deadly Force in the Apprehension of Fugitives from Arrest*, 14 MCGILL L.J. 293, 311 (1968).

32. At common law fleeing from arrest was a minor crime.

arrest him short of deadly force? The Model Penal Code merely adds a fourth question: Is this felon a threat to life? Although this is by no means a simple question to answer, the fact that many police departments have adopted the Model Penal Code approach through internal regulations indicates that police officers do not find it all that difficult to administer.[33]

In sum, none of the governmental interests in summary deprivation of life appear to outweigh the nonviolent felon's interest in being free from deadly force. Therefore, if a balancing test is required by due process, the *Mattis* court correctly concluded that the fleeing felon rule embodied in the Missouri statute is unconstitutional.

The fleeing felon rule is also subject to attack under the Equal Protection Clause. The argument is that because deadly force may be exercised to arrest felons but not to arrest misdemeanants, felons are thereby denied equal protection. The validity of such an argument turns on the applicable standard of review. There is probably a "rational basis"[34] for allowing more force to arrest felons, because escaped felons generally threaten society more than escaped misdemeanants.[35] However, if "strict scrutiny"[36] applies, the fleeing felon rule is presumptively unconstitutional. The state would have to demonstrate that the felony-misdemeanor dichotomy is necessary to achieve some compelling state interest. If the only compelling state interest is the protection of life, a rule that allows the use of deadly force against all felons, regardless of whether they threaten life, is clearly unnecessary to protect life.

The Eighth Circuit Court of Appeals in *Mattis* held that "strict scrutiny" was applicable, basing its analysis on the individual's "fundamental right to life."[37] Although the United States Supreme Court has never held that the right to life is "fundamental" in the sense of triggering strict scrutiny,[38] it recently indicated that to be fundamental, a right must be

33. For a discussion of current police firearms policies see Mattis v. Schnarr, 547 F.2d at 1015-16.

34. Under the rational basis standard of review, a statutory classification is upheld if there is any conceivable reason for the distinctions drawn. *See, e.g.*, McGinnis v. Royster, 410 U.S. 263, 270 (1973); McGowan v. Maryland, 366 U.S. 420, 426 (1961).

35. Courts which have rejected equal protection challenges to the fleeing felon rule have been none too clear on the applicable standard of review. *See* Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975); Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971). For a discussion of the possibility of a middle standard see *Deadly Force to Arrest, supra* note 11, at 378-79.

36. Under the strict scrutiny standard of review, a statutory classification is upheld only if it is proved necessary to achieve some compelling state interest. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

37. The court, however, applied the fundamental right doctrine in a due process context.

38. The *Mattis* majority cited three cases that contained language referring to the fundamental right to life, but none of these cases involved the fundamental right doctrine under the Equal Protection Clause. Screws v. United States, 325 U.S.

"explicitly or implicitly guaranteed by the Constitution."[39] The fact that both the fifth and fourteenth amendments forbid deprivation of life without due process would seem to indicate at least "implicitly" that life is constitutionally guaranteed. However, in light of recent restrictions on the fundamental rights doctrine,[40] the result is far from clear.

Of course, even if the fleeing felon rule violates equal protection, a legislature could cure all equal protection problems by simply authorizing the use of deadly force to arrest *both* felons and misdemeanants. Although this may be politically unlikely, it demonstrates that the use of deadly force to arrest nonviolent felons is really not a problem of equal protection. The real objection to the fleeing felon rule is not that felons and misdemeanants are treated differently, but that nonviolent criminal suspects are shot at all.[41]

The use of deadly force to arrest nonviolent felons has also been challenged as cruel and unusual punishment. The Eighth Circuit Court of Appeals characterized this as a "good argument" in view of the eighth amendment's mandate to judges to consider the proportionality and moral adequacies prescribed for criminal conduct.[42] However, other federal courts have thus far avoided the proportionality question by holding that the use of deadly force to effect arrest does not constitute "punishment" within the meaning of the eighth amendment.[43] These cases apparently rely on the basic principle that the state cannot legitimately punish a criminal suspect until he has been convicted by a court of law.

The fact that the state cannot legitimately punish a criminal suspect, however, does not necessarily mean that all pretrial disabilties imposed by

91, 123, 134-35 (1945) (police beating black youth to death violates due process); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (right to appointment of counsel under sixth amendment); Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886) (discrimination against aliens violates equal protection). The court also cited Roe v. Wade, 410 U.S. 113 (1973) for the proposition that a viable fetus has a fundamental right to life. *Roe v. Wade* actually held that a fetus has no right to life at all because it is not a fourteenth amendment "person." The Court did, however, indicate that if a fetus were a person, its right to life would be guaranteed by the fourteenth amendment. *Id.* at 157.

39. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

40. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (no fundamental right to education); Lindsey v. Normet, 405 U.S. 56 (1972) (no fundamental right to housing). The Eighth Circuit Court of Appeals in *Mattis* also stated that strict scrutiny applied because the Missouri statutes irrebuttably presume that all fleeing felons pose a threat to life. *But cf.* Weinberger v. Salfi, 422 U.S. 749 (1975) (restricting the irrebuttable presumption doctrine). Disproportionate racial impact was also mentioned as raising equal protection problems. *But cf.* Washington v. Davis, 96 S. Ct. 2040 (1976) (discriminatory purpose must be proved).

41. *Deadly Force to Arrest, supra* note 11, at 379.

42. Mattis v. Schnarr, 547 F.2d at 1020 n.32.

43. Mattis v. Schnarr, 404 F. Supp. 643 (E.D. Mo. 1975); Wiley v. Memphis Policy Dep't, Civil No. C-73-8 (W.D. Tenn., filed June 30, 1975), *appeal docketed*, No. 75-2321 (6th Cir. Nov. 13, 1975); Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971).

the state are immune to eighth amendment analysis. Federal courts have often used the Cruel and Unusual Punishment Clause to remedy inadequate custodial treatment of pretrial detainees.[44] Moreover, the use of deadly force to arrest criminal suspects carries strong penal overtones. When a fleeing suspect is shot dead, it is anomalous to hold that he has not been punished. He has in fact been apprehended in a manner that effectively accomplishes all that the state ever hoped to accomplish through punishment.

The trial court in *Mattis* held alternatively that if the use of deadly force to effect arrest constitutes punishment, it is not cruel and unusual when applied to nonviolent fleeing felons. The trial court based its conclusion on the fact that a majority of jurisdictions permit the use of deadly force to arrest nonviolent felons.[45] Such a statutory survey is a legitimate tool for eighth amendment analysis, but it is by no means conclusive, especially when the scope of the privilege under state law is effectively abrogated by local police regulations. The essential question is whether deadly force is disproportionate to the gravity of the offense.[46] Had Michael Mattis lived and been convicted of burglary, no court would have permitted his execution. It is just as disproportionate to sanction his death without benefit of trial. Thus, if the eighth amendment applies, it would seem to prohibit the use of deadly force to arrest a nonviolent felon.

A final basis for attacking the fleeing felon rule is the fourth amendment's proscription of unreasonable seizures. Arrest is "quintessentially a seizure."[47] In police brutality cases courts have occasionally found excessive force to constitute an unreasonable seizure.[48] However, when the force has been necessary to effect the arrest of a felon, no court has yet held the seizure to be unreasonable on the ground that it is disproportionate to the offense.[49] Considerations of proportionality, as well as a balancing of the interests at stake, would seem to be encompassed within the fourth amendment's rule of reason. Therefore, the fourth amendment is a plausible, albeit untested, tool for the advocate arguing that the use of deadly force to arrest a nonviolent felon is unconstitutional.

44. *See, e.g.*, Cox v. Turley, 506 F.2d 1347 (6th Cir. 1974); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972); Anderson v. Nosser, 438 F.2d 183 (5th Cir.), *cert. denied*, 409 U.S. 848 (1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971). *But see* Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.) (Friendly, J.), *cert. denied*, 414 U.S. 1033 (1973) (detainee beaten by jailor cannot invoke eighth amendment, but can invoke due process).

45. 404 F. Supp. 643, 650 (E.D. Mo. 1975).

46. *See* Gregg v. Georgia, 96 S. Ct. 2909 (1976).

47. United States v. Watson, 96 S. Ct. 820, 830 (1976) (Powell, J., concurring).

48. Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) (an arrest made with excessive force constitutes an unreasonable seizure); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) (policeman's gross negligence in shooting a black youth is an unreasonable seizure).

49. One court recently dismissed a fourth amendment challenge as "meritless." Wiley v. Memphis Police Dep't, Civil No. C-73-8 (W.D. Tenn. June 30, 1975), *appeal docketed*, No. 75-2321 (6th Cir. Nov. 13, 1975).