TENNESSEE v. GARNER: THE ISSUE NOT ADDRESSED

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INTRODUCTION

Tennessee v. Garner[1] resolved important fourth amendment questions. However, Garner's attorneys raised a significant theoretical and operational issue that was not reached by either the United States Supreme Court or by the United States Court of Appeals for the Sixth Circuit.[2]

Garner argued that the Memphis Police Department's application of the Tennessee law permitting police to use deadly force to apprehend nondangerous, fleeing felony suspects[3] not only violated the due process clause, by allowing punishment without trial, but also resulted in a disproportionate and racially motivated impact on blacks. Quoting *Yick Wo v. Hopkins*,[4] Garner's brief to the Supreme Court stated that:

> The Memphis policy [of authorizing police to use deadly force to apprehend non-dangerous, fleeing felony suspects] runs afoul of the Constitution in another fundamental way not discussed by the court of appeals. The breadth of discretion that it confers upon individual officers is susceptible to racially motivated abuse; the materials in the offer of proof depict the policy "in actual operation, and the facts establish an administration . . . with an evil eye and an unequal hand" against blacks.[5]

Rulings by the court of appeals and the Supreme Court on the issue of racially motivated police abuse were not necessary to achieve the results sought by Garner. Still, the issue is noteworthy because it involves the extent to which the delegation to police of broad discretion may result in overt discrimination. If broad discretion in exercise of the most critical police power—the authority to take lives—translates into discrimination at the operational level, it follows that discrimination in application of deadly force and other police powers may be reduced or eliminated by carefully delineating an officer's discretion.

This article discusses the evidence offered in support of Garner's equal

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1. 105 S. Ct. 1694 (1985).
2. Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983).
3. TENN. CODE ANN. §40-7-108 (1982).
4. 118 U.S. 356, 373-74 (1886).
5. Respondent's Brief at 96, *Garner*, 105 S. Ct. at 1694.

protection arguments. It then points out the need for future assessment of the differential racial effects of the *Garner* decision and associated changes in the shooting discretion of Memphis police officers.

I
POLICE DISCRETION

A. Limiting Discretion

The courts have recently acknowledged that official discrimination and arbitrariness may be reduced by limiting discretion.[6] Over the last two decades, police and scholars have also come to believe that the probability of operational consistency and equal police treatment of citizens increase when clearly stated administrative criteria for street-level decisions supplement the laws governing officers' conduct. In 1967, the President's Commission on Law Enforcement and Administration found a virtual absence of police internal guidelines for discretion, and wrote that:

> [L]aw enforcement policy is made by the policemen . . . [who] cannot and do not arrest all the offenders they encounter. It is doubtful that they arrest most of them. A criminal code, in practice, is not a set of specific instructions to policemen but a more or less rough map of the territory in which policemen work. How an individual policeman moves around that territory depends largely on his personal discretion.[7]

In the Commission's view, laws governing police behavior merely provide broad and vague parameters within which officers may fashion their responses to street problems. Tennessee laws governing deadly force allow officers broader discretion than in most other states.[8] The absence of an internal police shooting policy or, as in the case of the Memphis Police Department when Edward Garner was shot, the existence of internal shooting policy that merely restates the law,[9] leaves officers only their own subjective criteria for deciding whether to use deadly force. Unfortunately, in these hurried and excited cir-

6. *See, e.g.* Furman v. Georgia, 408 U.S. 238 (1972).

7. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 10 (1967).

8. The Petitioner's Brief filed by the City of Memphis in *Garner* identified three categories of state laws regarding police deadly force to apprehend suspects. With the proviso that deadly force be employed only as a last resort, "common law jurisdictions" such as Tennessee permit officers to use deadly force to apprehend all fleeing felony suspects. "Forcible felony jurisdictions" permit police to use deadly force to apprehend persons suspected of crimes of violence which, in some states, include burglaries such as that suspected by the officer who shot Edward Garner. "Model Penal Code jurisdictions" operate under some variant of that document, which permits deadly force to apprehend persons suspected of having used or threatened to use deadly force in the commission of crimes, or who present a substantial risk of causing death or serious injury if not immediately apprehended. Brief for Memphis Police Department at 26-31, *Garner*, 105 S. Ct. 1694 (1985).

9. The Memphis Police Department's 1975 deadly force policy directive (the earliest available to this author) states that "*[u]nder certain specified conditions*, deadly force may be exer-

cumstances, an officer's best judgments are often not equal to those that could be formulated at leisure, and in advance, by top level policy makers with the time to consider more fully the merits and ramifications of various alternative actions.[10]

B. The Denial of Discretion

That the President's Commission found a dearth of policies governing police officers' discretion was not the result of simple oversight. Instead, as Herman Goldstein has noted, the major reason for this policy vacuum was the conscious reluctance of police administrators to publish criteria for the exercise of discretion, or even to acknowledge the existence of police discretion:

> In the past, the prevalent assumption of both the police and the public was that the police had no discretion—that their job was to function in strict accordance with the law. In fostering this image of themselves as ministerial officers, doing precisely what they were mandated by law to do, the police were responding to their understanding of what was expected of them by legislatures, by the courts, and by a substantial segment of the general public. But behind this facade, in *sub rosa* fashion and with an air of illegitimacy and impropriety, the police have, of necessity, functioned in a much looser and more informal manner—making frequent choices and exercising broad discretion in order to carry out their multiple responsibilities.[11]

Thus, according to the President's Commission, the absence of guidelines concerning police officers' discretion was due partly to the administrators' reluctance to contradict openly the apparent mandates of the legislatures, the courts, and the public. Such reluctance is understandable for three reasons. First, guidelines governing police discretion might open police chiefs to accusations that their narrower interpretations of statutes and case law are evidence of usurpation of the legislative and judicial functions.

Second, police officials may fear that a written policy articulating a narrower standard than provided in state law would expose the police force to greater civil liabilities. Chiefs of police maintain that courts would base their assessments of the merits of police action on the narrower internal policy rather than the broader state standard.[12] This fear is justifiable on the part of

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cised against a fleeing felon." (emphasis in original). Nowhere, however, does it specify those certain conditions. MEMPHIS POLICE DEP'T POLICIES AND REGULATIONS 5 (1975).

10. The Police Executive Research Forum, a membership organization of police chief executives from jurisdictions with more than 100,000 residents, reports in an unpublished survey of 75 present and former members that, regardless of the provisions of state law, 74 had administratively prohibited officers from using deadly force against all fleeing felons. Police Executive Research Forum, Survey of Police Deadly Force Policies (1982) (unpublished) (on file at the offices of the New York University Review of Law & Social Change).

11. H. GOLDSTIEN, POLICING A FREE SOCIETY 93 (1978).

12. See, e.g., Peterson v. City of Long Beach, 24 Cal. 3d 238, 594 P.2d 477, 140 Cal. Rptr.

administrators whose duties include protecting the public pocketbook as well as the public itself. However, failure to promulgate meaningful discretionary guidelines for this reason reflects the disturbing view that officers should escape liability for their wrongful conduct when they violate administrative policies. It also suggests a rather naive expectation that courts will base the *civil* liability of police on whether officers' actions have violated *criminal* statutes, rather than on more general community and professional definitions of appropriate police conduct. In most instances, like medical malpractice cases, police malpractice cases involve no allegations of criminal wrongdoing by officers, and plaintiffs' attorneys take great pains to educate juries to the differences between criminal and civil liability.

The third reason for the virtual absence of written policies until recent years stems from citizens' complaints about officers' discretionary actions that are well within the bounds of *informal* policy. In such cases, police chiefs are easily able to place blame for citizens' dissatisfaction on the "failure" of the officers involved to follow the dictates of the law. Imagine a citizen who calls the police to arrest a disorderly and disrespectful group of teenagers. Subsequently this person complains to the police chief that the responding officer had merely dispersed the group without making arrests. In such a case, it is far easier for the chief to mollify the complainant by informing her that the officer would be disciplined for failing to follow the dictates of law than it is to acknowledge in writing that officers typically do not make arrests for such minor offenses. Moreover, it is far easier for the chief to admonish the individual officer than it is to explain and defend an unwritten, but institutionally approved, policy of nonenforcement.

Conversely, in the event that officers do enforce the law in an arbitrary or discriminatory manner, reference to its dictates would provide an easy way of justifying police motives and actions. Another hypothetical case is illustrative: the mother of a black teenager complains to the police chief that her child and his friends are routinely arrested and jailed whenever they become rambunctious and that, in similar circumstances, white teenagers are merely sent on their way. The easiest way for the police chief to answer this complaint is to refer to the law, to point to the department's philosophy and duty of firmly and fairly enforcing it, to make solicitous requests for virtually unobtainable documentation of more favorable treatment of whites, and to suggest gently that, in the absence of such documentation, charges of discrimination are groundless.

It is far simpler for the police to argue that they merely enforce, and do not make, the law, than to justify a department policy specifically tailored to

401 (1979), which held that violation of police administrative policies and rules creates a rebuttable presumption of negligence. In 1980, at its annual meeting, the International Association of Chiefs of Police passed a resolution encouraging member chiefs to promulgate administrative deadly force policies "consistent with state law." The association subsequently reversed this position when it published K. MATULIA, A BALANCE OF FORCES (1982), which offered policy recommendations considerably narrower than those found in the laws of any state.

the needs of their local jurisdictions. Fortunately, most police departments have abandoned this easy way out, and have begun to take seriously the challenge of formulating internal policies for officers' critical street decisions.[13] However, no empirical evidence is available that would reveal the degree to which such limits on discretion may reduce racially discriminatory application of police powers.

Because the changes in the Memphis Police Department's deadly force practices associated with *Garner* involve the restriction of virtually unbounded police shooting discretion, and because the case did provide considerable evidence of discriminatory police shooting *before* those limitations were imposed, Memphis will soon provide an appropriate setting for analyzing the racial effects of limiting police discretion regarding the use of deadly force. Once sufficient data are accumulated, such analyses will provide an important test of the effects of the *Garner* litigation and associated reforms, and will have implications that go far beyond the issues of deadly force.

The remainder of this article discusses the racially related evidence that was presented to the court of appeals and the Supreme Court in *Garner*, and offers suggestions about how to accomplish an analysis of such data.

II
RACE AND POLICE DEADLY FORCE

A. Race and Police Deadly Force Throughout the United States

This author prepared Garner's analyses of the association of race and police deadly force in Memphis and submitted them to the trial court in an affidavit. The analyses show that blacks were greatly overrepresented among those shot by Memphis police, a finding which, standing alone, is not surprising. Virtually every analysis of police use of deadly force shows that the percentage of those shot who are black is higher than the percentage of blacks in the population at large.[14] Such a finding, however, does not suffice to prove discrimination by either a police department or by individual officers. Assuming the absence of street-level discrimination, one would anticipate that officers respond to similar situations similarly, without regard for race. That more blacks than whites are shot can be explained theoretically as a result of the higher number of blacks than whites who expose themselves to the risk of being shot (for example, by engaging in crime or violence). This hypothesis has been verified by studies of shootings in cities other than Memphis. The

13. *See, e.g.*, Police Executive Research Forum, *supra* note 10.

14. *See* W. GELLER & K. KARALES, SPLIT SECOND DECISIONS: SHOOTINGS OF AND BY CHICAGO POLICE (1982); C. MILTON, POLICE USE OF DEADLY FORCE (1977); Fyfe, *Race and Extreme Police-Citizen Violence*, in RACE, CRIME, AND CRIMINAL JUSTICE 89-108 (L. Pope & P. McNeely eds. 1981); Harding & Fahey, *Killings by Chicago Police, 1969-1970: An Empirical Study*, 46 S. CAL. L. REV. 284 (1973); Kobler, *Police Homicide in a Democracy*, 31 J. SOC. ISSUES 163 (1975); Meyer, *Police Shootings at Minorities: The Case of Los Angeles*, 452 ANNALS 98 (1980); Blumberg, The Use of Firearms by Police Officers: The Impact of Individuals, Communities and Race (Ph.D. diss., S.U.N.Y., Albany) (1982).

disproportion of blacks shot by police in other cities has been found to correlate closely with the disproportion of those who shot or otherwise attacked police, and of those arrested for violent crimes.[15] While the numbers make it clear that race plays an important role in these phenomena, it would not be reasonable to conclude that police, institutionally or individually, have acted in a demonstrably discriminatory manner in cities studied other than Memphis. Instead, it is most reasonable to infer that the disproportion of black victims of police shooting reflects blacks' disproportionately high involvement in activities which may result in potentially violent confrontations with police, and that police respond fairly evenhandedly to these situations.

B. Race and Police Deadly Force in Memphis

Evenhandedness was not found in Memphis. The author has analyzed three sets of data to determine whether there existed racially disparate patterns in the circumstances under which Memphis police shot citizens. The first included descriptions of all incidents in which firearms were discharged by police in New York City, a jurisdiction in which, during the years involved, officers' shooting discretion was limited by substantially more restrictive laws and administrative policies than those of Tennessee and Memphis.[16] The second data set consisted of Memphis Police Department summaries of the circumstances under which officers used deadly force against property crime suspects between 1969 and 1974, as well as summary data on other uses of firearms during those years.[17] The third, submitted to the Tennessee Advisory Committee to the United States Commission on Civil Rights by the Memphis Police Department, included descriptions of all fatal shootings by Memphis police during 1969-1976.[18]

Analysis of these data disclosed that Memphis officers were far more likely to have used their guns than were officers in New York City, even though one might expect more use of firearms by police in New York because it was characterized by generally higher indices of public violence and hazard to police officers. As Table I indicates, the mean annual rates of murder and non-negligent homicide per 100,000 people during the years studied were 2.97 in Memphis and 2.75 in New York City. Moreover, the mean annual violent crime (murder/non-negligent manslaughter, rape, robbery, aggravated assault) arrest rates per 1,000 officers were 587.12 in Memphis and 1,172.95 in New York City. However, in New York during 1971-1975, the mean annual rate of firearms discharges per 1,000 officers was 19.6, as compared to a 1969-

15. *See, e.g.*, Blumberg, *supra* note 14; Fyfe, *supra* note 14; Geller & Karales, *supra* note 14.

16. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707 (1982).

17. MEMPHIS POLICE DEP'T SHOOTING REPORTS (1969-74).

18. MEMPHIS POLICE DEP'T CIVIC CRISIS-CIVIC CHALLENGE: POLICE COMMUNITY RELATIONS IN MEMPHIS (1978) (no available data for period between January 16 and December 31, 1972).

1974 Memphis mean annual rate of 33.5. In addition, the table discloses that, in relation to the frequency with which they confronted and arrested violent felony (murder, assault, rape, and robbery) suspects, Memphis police were more than three times as likely to have discharged weapons (56.98 shootings per 1,000 arrests) than were New York officers (16.71 per 1,000).

TABLE I[19]
PUBLIC VIOLENCE, POLICE HAZARD AND POLICE SHOOTING[a] IN MEMPHIS AND NEW YORK CITY

MEASURE	MEMPHIS 1969-74	NEW YORK 1971-75
Mean Annual Murder/ Non-Negligent Homicide Rate per 100,000 Population	2.97	2.75
Mean Annual Violent Felony Arrest Rate per 1,000 Officers[b]	587.12	1172.95
Number of Police Shootings	225.	2926.
Mean Annual Police Shooting Rate per 1,000 Officers	33.50	19.60
Police Shooting Rate per 1,000 Arrests	56.98	16.71

a. All firearms discharges, regardless of whether injury resulted.
b. Includes arrests for murder/non-negligent manslaughter, rape, robbery, aggravated assault.

There was also considerable variation in the circumstances under which weapons were fired by officers in Memphis and New York City. Table II shows that three in five New York City police officers who used their guns (60.2%, or 11.8 per 1,000 annually) did so in the imminent defense of life, while only slightly more than a quarter of the Memphis police officers (28.0%, or 9.4 per 1,000 annually) fired their weapons for the same purpose. Conversely, more than half the Memphis officers (50.7%) fired to apprehend suspects, while just over one in seventeen New York officers (6.1%) did so. As a consequence, individual Memphis officers were more than fourteen times more likely than New York officers to have shot at fleeing suspects (Memphis rate = 17.0; New York City rate =1.2).[20]

19. Fyfe, *supra* note 16, at 713-14.
20. This analysis is imprecise and probably understates the propensity of Memphis and

TABLE II[21]
REASON FOR POLICE SHOOTING
IN MEMPHIS AND NEW YORK CITY

MEASURE	MEMPHIS 1969-74	NEW YORK 1971-75
Defend Life[a]	28.0% (n=63)	60.2% (1760)
rate[b]	9.4	11.8
Apprehend Suspects[c]	50.7% (114)	6.1% (179)
rate	17.0	1.2
Warning Shots	4.4% (10)	11.1% (326)
rate	1.5	2.2
Other[d]	15.9% (34)	22.6% (661)
rate	5.1	4.4
TOTAL	100.0% (225)	100.0% (2926)
RATE	33.5	19.6

a. Memphis "defend life" includes apprehensions of "violent suspects;" New York does not.
b. Rate = mean annual rate per 1,000 officers.
c. Memphis "apprehend suspects" includes only apprehensions of property crime suspects. New York includes apprehensions of property crime and violent crime suspects.
d. Includes shots to destroy injured and dangerous animals, accidental shots, suicides, and criminal shootings.

These analyses show that Memphis police officers are more likely to use their guns than officers in New York City. The data suggest that New York's more stringent guidelines may have resulted in a lower shooting rate than Memphis' policy of allowing broad discretion by its police officers. However, the data tell us nothing about whether officers in Memphis used their guns in a racially discriminatory fashion. Table III speaks more directly to that point. It analyzes Memphis police shootings of property crime suspects by race and injuries sustained, and presents injury rates by race per 1,000 property crime arrests. These data showed that blacks were more than twice as likely to be shot at during the course of property crime arrests (rate = 4.3 per 1,000 arrests) as were whites (rate = 1.8). Further, black property crime arrestees were six times as likely to have been shot and wounded as whites (rates = 0.6 and 0.1, respectively). Finally, blacks were 45 percent more likely than whites

New York City police officers to shoot at suspects fleeing from scenes of property related crimes. The Memphis "defense of life" category includes shootings to apprehend suspects of violent crimes, regardless of whether they continued to pose any threat to life at the time of the shooting. The New York "defense of life" classification includes only shootings at persons who continued to present an imminent threat at the time they were shot. Conversely, the Memphis "apprehend suspects" category includes only shootings at fleeing property crime suspects, while the comparable New York City data includes shootings at fleeing suspects in both crimes against persons and crimes against property. Were the Memphis and New York classifications more directly comparable, the differences in the shooting rates between the two cities would be more pronounced.

21. Fyfe, *supra* note 16, at 715.

to have been shot and killed during these arrests (rates = 0.63 and 0.45, respectively).

TABLE III[22]
RACE AND INJURY OF PROPERTY
CRIME SUSPECTS SHOT AT
BY MEMPHIS POLICE, 1969-1974

SUSPECT RACE	SUSPECT INJURY			
	NONE	WOUNDED	KILLED	TOTAL NUMBER SHOT AT
WHITE	13.6% (11)	7.1% (1)	23.5% (4)	14.3% (16)
rate per 1,000 officers[a]	1.6	0.1	0.6	2.4
rate per 100,000 population[b]	2.9	0.3	1.0	4.2
rate per 1,000 arrests[c]	1.2	0.1	0.5	1.8
BLACK	86.4% (70)	92.9% (13)	76.5% (13)	85.7% (96)
rate per 1,000 officers	10.4	1.9	1.9	14.3
rate per 100,000 population	28.9	5.4	5.4	39.6
rate per 1,000 arrests	3.2	0.6	0.6	4.3
TOTALS[d]	72.3% (81)	12.5% (14)	15.2% (17)	100.0% (112)
rate per 1,000 officers	12.0	2.1	2.5	16.9
rate per 100,000 population	13.0	2.2	2.7	18.0
rate per 1,000 arrests	2.6	0.5	0.5	3.6

n/a = 2
a. mean annual rate per 1,000 officers.
b. rate per 100,000 population.
c. rate per 1,000 arrests for burglary, larceny, auto larceny.
d. subcell rates may not equal totals due to rounding.

Table IV shows that the greater number of those fatally shot by Memphis police during 1969-1976 (excluding the more than eleven months for which data were not retrievable) were black (twenty-six, as compared to eight whites). More relevant, however, is what Table IV shows about the actions of blacks and whites who were killed by the police. Five of the eight whites shot and killed were armed with guns and were assaultive toward officers or others, while only one quarter of the blacks (26.9%) were doing so. Conversely, only one white (12.5%) was shot and killed while unarmed and not attempting any assault, while half (50.0%, n =13) of the blacks killed were not assaultive and unarmed.[23]

22. *Id.* at 719.
23. MEMPHIS POLICE DEP'T DEADLY FORCE POLICY GENERAL ORDER 5-79 (1979).

TABLE IV[24]
ACTIONS OF PERSONS SHOT FATALLY
BY MEMPHIS POLICE, 1969-1976

VICTIM ACTIONS	VICTIM RACE		
	WHITE	BLACK	TOTAL BOTH RACES
Assaultive and armed with gun	62.5% (5)	26.9% (7)	35.3% (12)
rate[a]	1.3	2.9	1.9
Assaultive but not armed with gun	25.0% (2)	23.1% (6)	23.5% (8)
rate	0.5	2.5	1.3
Non-assaultive and unarmed	12.5% (1)	50.0% (13)	41.2% (14)
rate	0.3	5.4	2.2
TOTALS	23.5% (8)	76.5% (26)	100.0% (34)
rate	2.1	10.7	5.4

n/a = 5

a. rate per 100,000 population

CONCLUSION

It is reasonably clear that the data in these tables support the contention of the plaintiff's assertion in *Garner* of racial discrimination in the use of deadly force. However, the manner in which the Court's majority decided the case made it unnecessary to confront this empirical evidence. But the changes wrought by both *Garner* and the actions of the Memphis Police Department itself[25] raise a critical question: To what extent do law and policy reduce

24. The district court rejected these data on several grounds. First, it cited the failure to "specify the actual number of blacks arrested and/or convicted of alleged 'property crimes' as compared to whites." But all arrest data were tendered to the court, and provided the necessary information. Second, the court questioned the definition of "property crimes" used in the analysis. This definition was based on the FBI's Part I property offenses—burglary, larceny, auto larceny—and the data and characteristics supplied by the Memphis Police Department. *See, e.g.*, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES—1980, at 23, 27, 32 (1981). Finally, the court questioned the comparison of Memphis and New York shootings to effect arrests as "not precise." But, as explained in note 20, *supra*, the limits of the available data resulted in understatement of the differences between Memphis and New York City. *See* Respondent's Brief at 26-30, *Garner*, 105 S. Ct. 1694 (1985).

25. In 1979, the Memphis Police Department promulgated GENERAL ORDER 5-79, *supra*, note 23, which narrowed the "any fleeing felon" rule by limiting deadly force to arrest to situations in which officers sought "[t]o apprehend a suspect fleeing from the commission of a dangerous felony when an officer has witnessed the offense or has sufficient information to know as a virtual certainty that the suspect committed the offense." The same order defines as dangerous felonies kidnapping, murder, manslaughter, arson, criminal sexual assault, aggravated assault, robbery, burglary, and any attempt to commit these crimes.

racial discrimination in the most critical street-level police decision-making?

It is still too early to answer that question, but it is incumbent upon students of law and social change to conduct the necessary analyses to evaluate the practical impact of administrative police policy-making across the country. Since police in Memphis and elsewhere are not likely to stop using deadly force, the next several years will almost certainly provide data sufficient to do so.