



Shooting to Kill: The Ethics of Police and Military Use of Lethal Force

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Print publication date: 2016

Print ISBN-13: 9780190626136

Published to Oxford Scholarship Online: November 2016

DOI: 10.1093/acprof:oso/9780190626136.001.0001

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DOI:10.1093/acprof:oso/9780190626136.003.0005

Abstract and Keywords

In this chapter the main conditions under which police use of lethal force is morally justified are elaborated. The first two conditions—self-defense and defense of others—are the same conditions under which ordinary citizens are entitled to use lethal force. However, there is another important condition: to uphold the law. For example, a police officer may be morally justified in killing another person if that person is rightly and reasonably suspected of the crimes of serious rights violations, is attempting to avoid arrest, is armed and using those arms to avoid arrest, and if the only way to prevent the suspected offender from escaping is to kill him or her.

Keywords: police, lethal force, self-defense, defense of others, morally justified killing, rights violations, uphold the law

IN CHAPTER 3 I defined the police role in terms of (1) the collective end of protecting the legally enshrined, justifiably enforceable, moral rights of citizens from violation by fellow citizens; and (2) the use of coercive, including lethal, force in pursuing this end. Moreover, in Chapter 1 the following properties of moral rights were identified. First, moral rights generate obligations on others; for example, A's right to life generates an obligation on the part of B not to kill A. Second, moral rights are justifiably enforceable.

As we saw in Chapter 2, justifiable enforceability implies the right to use lethal force to enforce respect for the right to life. Person A has a right not to be killed by B, and so B has an obligation not to kill A. But what if B ignores his obligation and attempts to kill A? In that event, A has a right that B be prevented by

someone (either A or some other person, C) from killing A; A's right to life is justifiably enforceable. Here the means of prevention could include the use of lethal force, if it is necessary. Indeed, in the case of self-defense—as opposed to defense of others—it was argued that under certain conditions the defender might not be violating the right of his attacker not to be killed if she killed the attacker, even if it was not necessary to do so. Moreover, in the case of defense of the life of another—as opposed to self-defense—it was argued that the third party, C, may well have an *obligation* to kill B to protect A, given that it was necessary, and given that C could do so without any threat to C's own life. Consider, in this connection, a situation in which A is C's child or spouse who is being threatened by B. Arguably, C is under an obligation to A to kill B, if this is the only means of preventing B from killing A (i.e., C's child or spouse).

(p.109) So there are justifiably enforceable moral rights, and it is the central and most important purpose of police to protect legally enshrined, justifiably enforceable, moral rights. However, there are laws that do not enshrine moral rights. Many of these laws are fair and reasonable, and the conformity to them enables collective goods to be provided, such as anti-litter laws, for example. But what is the justification for their enforcement by police? The fact that they provide collective benefits, or that they are fair and reasonable, does not of itself necessarily provide an adequate justification for their enforcement. Perhaps *consent* to the enforcement of just and reasonable laws that enable the provision of collective benefits provides an adequate moral justification for such enforcement. Here there is an issue with respect to the degree and type of enforcement that might be justified in this way. Lethal force might not be justified, even if it is consented to in relation to fair and reasonable laws that enable collective benefits to be provided. Certainly recourse to lethal force—as opposed to nonlethal coercive force—is not justified in the case of many unlawful actions. Specifically, unlawful actions not regarded as serious crimes. Indeed, the validity of this point is acknowledged in those jurisdictions that have made it unlawful for police to shoot at many categories of “fleeing felons.” It is more often than not now unlawful, because it is immoral, to shoot at, say, a fleeing pickpocket.

At any rate, in this chapter I examine in some detail the moral justification for police use of lethal force and, as a consequence, the types of situations in which police use of lethal force is morally permissible.¹ Of particular interest here is my claim that police officers have an institutional moral right and duty to use lethal force that ordinary citizens do not have. Police officers have, as we have seen, an institutional moral right and duty to uphold the law. This generates an institutional moral right and duty to use lethal force to uphold the law, or at least some laws under certain circumstances.

(p.110) 4.1 The Institutional Role of Police and Police Use of Lethal Force
My argument in relation to the special institutional moral right and duty of police to use lethal force to uphold the law relies both on my normative theory of the police role and on the claim argued for in Chapter 2 that, quite independently of the existence of police services, individual persons have a natural (i.e., noninstitutional) moral right to kill in self-defense and (relatedly) a natural moral obligation to kill in defense of others. This natural right and obligation derive from the more basic natural right to life.

Notwithstanding the existence of a natural right to self-defense and a natural obligation to defend the lives of others, with the establishment of police services in modern societies the responsibility for defending oneself, and especially for protecting others, has to a large extent devolved to the police. More specifically, as we saw in Chapter 3, there is a jointly held moral obligation on the part of all citizens to protect the moral rights of fellow citizens from their fellow citizens (i.e., to provide the collective good of internal security). This latter jointly held moral obligation could, at least in principle, be discharged by an all-citizen police service. However, in contemporary liberal democratic states, there is a division of labor such that it is discharged by establishing the institution of the police and its constitutive occupational role of police officer. As a consequence, if someone's life is threatened, whether my own or someone else's, the first step should be to call the police. However, to reiterate, this in no way entails that the natural rights of ordinary citizens to self-defense and to defend the lives of others have been alienated, but rather only that they have been curtailed.

My rights-based account of the moral justification of police use of deadly force is consistent with some versions of social contract theory. For, as I have argued elsewhere, in a liberal democracy the legally enshrined, moral rights justifiably enforced by the police are, and ought to be, consented to by the population at large by virtue of having been enacted by a democratically elected legislature.² However, this contractarian aspect of my theory stands in some contrast with *some* versions of contract theory.³ **(p.111)** On my conception, the rights to self-defense and, in particular, the obligation to defend the lives of others are logically prior to police services, and indeed to government itself. Moreover, objective moral principles governing the exercise of these rights—specifically, the principles of imminence, necessity, and proportionality—are also logically prior to police services and governments. Indeed, these rights and the moral principles governing their exercise constrain, or ought to constrain, the actions of police and the laws enacted by governments. So on this conception there isn't a Hobbesian state of nature in which there are no moral rights or obligations and in which everyone is entitled to use force in accordance with his or her own rational self-interest—indeed, at his or her own subjective discretion and in accordance with his or her own subjectively chosen rules. Accordingly, persons do not renounce this morally unrestricted freedom when they come to embrace the state and, more specifically, the liberal democratic nation-state. The reason

for this is twofold. First, no one ever had, or could have had, a moral right to use force solely in their own personal interest or at their own *subjective* discretion (i.e., independently of objective reasons). Or at least no one could have had a moral right to use *lethal* force against others solely in their own personal interest or at their own subjective discretion. Second, whatever *objective* moral right to use lethal force individual persons have outside institutional settings (e.g., the natural right to kill in self-defense) they retain *in some form* in institutional settings, notwithstanding that the existence of governments and police services qualifies this right.

Note that my rights-based account in relation to the use of lethal force is consistent with citizens reasonably accepting that governments and, more specifically, the police, have a monopoly or near-monopoly in the use of coercive force within their communities, and that the police reasonably have *some additional* (institutional) moral rights and duties in relation to the use of lethal force that are not possessed by ordinary citizens. What precisely these rights and duties are is a matter discussed in some detail below. Here I simply note that citizens might reasonably grant special (institutional) moral rights to police on the basis of the need for a division of labor in relation to the protection of legally enshrined, justifiably enforceable, moral rights. However, such a division of labor is **(p.112)** consistent with citizens retaining enforcement rights, such as the right to the defense of others albeit in a qualified form. Indeed, it is because citizens retain such rights that it is permissible, indeed obligatory, that they protect themselves and others, given the unavailability of police to do so on some occasions. Moreover, the retention of these rights in the context of a division of labor serves to explain why it is that citizens have a moral duty to assist the police in the enforcement of the moral rights in question, such as a duty to assist a police officer to arrest an escaping murderer, if it is required.

Accordingly, I do not accept some of the main arguments that might be thought to be available to some contractarian theories of police use of deadly force. Specifically, I do not accept the claim that an individual person, A, can somehow *transfer* to others the right to *kill* B in self-defense. Here we need to keep in mind the distinction between transferring a right and delegating the exercise of a right.⁴ I take it that if I transfer a right I no longer possess it, whereas this is not the case with delegating the exercise of a right that I continue to possess. Moreover, if I transfer a right then the right has not merely been suspended. For if my right has been suspended it has not, thereby, been transferred; if my right is suspended it remains *my* right, albeit it is not in force. Non-transferable rights are often referred to as inalienable human rights, and include the right to life and the right to autonomy.⁵ These fundamental natural human rights, in particular, cannot be transferred to or from others since they are possessed, and only possessed, by virtue of properties one has as a human being.⁶

Of course, it is often the case that others do have a right to kill some agent A for things that A has done or failed to do (e.g., the right **(p.113)** to kill A in self-defense or in other defense) but in doing so they do not need to have that right transferred to them by A. Rather they possess the right independently or, in some cases, they might have the exercise of the right delegated to them. Here we need to stress the role of natural rights, especially human rights, in relation to practical moral reasoning. The first point is that the institutional and, more broadly, social activities of entering into contracts, promise-making, and consenting take place against a background assumption of natural rights and, in particular, certain *inalienable* human rights, especially the rights to life and to autonomy.⁷ Thus contracts to enter into slavery or hand over one's right to life to another are self-nullifying. Secondly, while human rights are not absolute rights, human rights nevertheless normally "trump" other considerations, such as social utility; in general, a decision to infringe a human right can only be justified by recourse to other human rights considerations. So human rights ought not to be overridden for the sake of other benefits to the community, such as social order. It should be remembered that while social order is a necessary condition for human rights being respected, it is far from sufficient. Totalitarian states are characterized by high levels of social order, notwithstanding the massive human rights violations that they involve.

On my account, to reiterate, there is a justifiably enforceable natural right to life, and this right gives rise both to a natural right to use lethal force in self-defense and a natural obligation to use lethal force to defend the lives of others. It follows that police officers, like ordinary citizens, have a right to use lethal force in self-defense and in defense of others.

However, it is widely assumed that the *only* morally acceptable justifications for police use of lethal force are self-defense and the defense of others. For example, according to the Australian National Committee on Violence's Recommendation 85.1, "Uniform laws throughout Australia regarding the use of firearms and other lethal force by police," "These laws should reflect the principle that lethal force should only be used as a last resort, involving self-defence or the defence of others."⁸ However, I argue that the matter is more complex than this, and that there is an additional moral justification for police use of deadly force; namely, to **(p.114)** uphold the law. But let us consider each of these moral justification for police use of lethal force in turn, beginning with police use of lethal force in self-defense.

4.2 Police Use of Lethal Force in Self-Defense

As we have just seen, killing in order to defend one's own life or the life of another is morally justified on the grounds that each of us has a right to life. Moreover, speaking generally,⁹ we are entitled to defend that right to life by killing an attacker under three conditions, if we do so in compliance with the three principles of imminence, necessity, and proportionality. First, there is the

condition that the attacker is intentionally trying to kill someone—either oneself or another person—and will succeed if we do not intervene effectively. Moreover, in accordance with the principle of imminence, the deadly threat needs to be imminent. We are not entitled to shoot dead an attacker whom we know is threatening us with a replica of a gun, nor can we (speaking generally) preemptively kill someone who is planning to kill us in the distant future. Nor are we entitled to kill an attacker who is only engaged in a minor assault (principle of proportionality).

The second condition is that we have no way of preserving our own or the other person's life other than by killing the attacker (principle of necessity).¹⁰ For example, we are not able to flee to safety. This condition obtains notwithstanding my commitment to FIST (fault-based internalist suspended-rights theory), according to which an attacker's right not to be killed by a defender might be suspended, notwithstanding that it is not necessary in the circumstances for the defender to kill the attacker to preserve his or her life. For, as I argued in Chapter 2, there are other moral considerations underpinning the necessity condition in cases of self-defense. Moreover, FIST is not directly concerned with cases of killing in defense of others.

The third condition is the one requiring that our attacker does not have a morally justifiable reason for trying to kill us. This is **(p.115)** straightforward in many cases, as in the case of an armed robber who attempts to kill a defender in order to get her or his money. Other cases are less straightforward. Consider a legally appointed executioner and a serial killer sentenced to death. Suppose that the executioner has a good and decisive moral justification for carrying out the death penalty in the case of the convicted serial killer. If so, then arguably the serial killer is not morally justified in trying to kill the executioner in self-defense, supposing the opportunity arose.¹¹ On the other hand, if the executioner does not have a good and decisive moral justification in such cases, then arguably the serial killer is morally justified in trying to kill the executioner in self-defense.

The killing of Mark Militano by police officers in Victoria, Australia, 1986 is evidently a case of justified killing in self-defense, and perhaps killing in defense of the lives of others. Police were following Militano and had evidence in the form of an overheard conversation, which was probably sufficient to charge him with conspiracy to commit armed robbery. Police cars converged on Militano, and one car swerved in front of Militano's vehicle, causing him to brake. Militano reached for his handgun and pointed it at one of the police officers. A number of officers then fired at Militano. Militano, apparently unharmed, ran from his car. A police officer fired a shot in the air, calling for him to stop. Militano turned, raised his pistol, and aimed at the police. Sergeant Ray Watson, the man who had overheard the conversation concerning the planned bank robbery, fired one shot from his .38 revolver. The bullet hit Militano in the head,

and minutes later he died.¹² Clearly, at the point when Watson shot Militano, the above-mentioned three conditions for justifiable killing in self-defense—and defense of the lives of others—obtained. First, Militano was intentionally trying to kill someone—either Watson or another officer—and would have probably succeeded if Watson did not intervene. Second, Watson had no way of preserving his own or the other police officers' lives other than by killing Militano. Third, Militano did not have a morally justifiable reason for trying to kill Watson or the other police officers. More specifically, in terms of our theory of self-defense, FIST, Militano's natural right not to be killed by Watson was suspended. **(p.116)** Moreover, the other important moral condition, necessity—a condition which, as already noted, is not a requirement under FIST for suspension of one's right not to be killed by a defender—did obtain in the case of Watson's lethal shooting of Militano.

The case of Gary Abdallah illustrates the distinction between *justified* killing in self-defense and *excusable* killing in self-defense. Abdallah was suspected by Victorian police of involvement in the Walsh St. (Melbourne) killings of two police officers. However, there was insufficient evidence to prosecute him. There was, however, evidence of his attempted murder of a senior policeman's son. Detectives Clifton Lockwood and Dermot Avon were sent to arrest Abdallah. It was alleged that Abdallah produced a revolver, aimed it at Lockwood, was warned by Lockwood to put it down, and was shot dead by Lockwood when he failed to do so. The revolver turned out to be an imitation gun. The police officers were charged with murder, but found not guilty. While the gun was an imitation gun, it was *reasonably believed* to have been a real gun.¹³ Accordingly, the first of the above-mentioned conditions for justifiable self-defense—that the attacker will in fact kill the defender unless the defender intervenes—can be weakened to generate a set of conditions for morally excusable self-defense. The relevant new condition is that the defender reasonably believes the attacker will kill him unless he intervenes (by killing the attacker).

I note that, consistent with FIST, Abdallah retained his right not to be killed by Lockwood, since he was not in fact a deadly threat to Lockwood. On the other hand, Lockwood also retained his right not to be killed by Abdallah, supposing Abdallah had been able at the critical point to get his hands on another gun, a real gun this time, and shoot Lockwood dead in self-defense. For Lockwood did not meet the third condition for having his right not to be killed by Abdallah suspended—namely, that he did not reasonably believe that he had a good and decisive justification for killing Abdallah. For Lockwood did reasonably, even if wrongly, believe he had such a justification—the justification of self-defense—when he formed the intention to shoot Abdallah at the point in time when Abdallah aimed his replica gun at Lockwood.

(p.117) 4.3 Police Use of Lethal Force in Defense of the Rights of Others: An Institutional (Moral) Duty

Police have a natural moral right to use lethal force in self-defense and a natural moral obligation to use lethal force in defense of the lives of others. In these respects, they are no different from ordinary citizens. But police also have an *institutionally based moral duty* to use lethal force to protect innocent lives under certain circumstances. Indeed, they can be held legally liable if they fail to take the opportunity to shoot dead an armed and dangerous criminal who then goes on to, say, take the lives of innocent citizens.

What of ordinary citizens? Do they have a moral obligation to use lethal force to protect others, at least in cases where the threat to life is immediate, is certain, and there is no alternative? As we have already argued, the answer is a qualified affirmative. The qualifications are threefold. First, the obligation of ordinary citizens to use lethal force to protect others is a general natural moral obligation and not a special institutionally based moral duty, as is the case with the police. Second, in the context of a well-ordered, contemporary, liberal democratic nation-state, this moral obligation of ordinary citizens is only triggered in the absence of police; in the first instance, it is the moral and institutional duty of police to protect threatened lives. Third, ordinary citizens ought not to be expected to go to the same lengths or take the same risks as police officers are obliged to, since they do not occupy the police role, and therefore do not have a special institutional responsibility to protect the lives of others. So the moral obligation of ordinary citizens to kill to protect others is much less stringent than the special institutionally based moral duty of police officers to do so.

In addition to the justification for using lethal force to protect the right to life (whether in self-defense or in defense of the lives of others), there is the question of a wider justification in terms of the protection of rights other than the right to life. As was argued in Chapter 1, evidently the use of lethal force can be justified to protect moral rights other than the right to life. However, in speaking of using lethal force in defense of rights, one would obviously not want to include *all* moral rights, or at least *all violations* of all moral rights. For example, property rights are arguably moral rights, but for a police officer to shoot someone dead to prevent them stealing a handbag would be morally unacceptable. So the question becomes: Are there any moral rights, apart from the right to life, **(p.118)** the protection of which would justify police use of deadly force? As we saw in Chapter 1, candidates for such rights might include a right not to be severely physically or psychologically damaged. Perhaps rape, serious child molestation, and grievous bodily harm are actions the prevention of which might justify the use of deadly force. Maybe police, in particular, are justified in shooting a fleeing serial rapist if that is the only way to ensure his arrest.

A key distinction in this regard was introduced in Chapter 1; namely, the distinction between rights to things constitutive of the self and rights to things not constitutive of the self. Such latter rights include many institutional rights, such as property rights. I suggest that, at least in the first instance, police are justified in using lethal force to protect rights to things constitutive of selfhood, including life and autonomy. Indeed, these rights are typically enshrined in the criminal law. However, they are also justified in using lethal force to protect certain other rights, which are rights to things not constitutive of selfhood. Let us consider some putative cases.

What do we want to say of the policy of the shooting on sight of cattle rustlers in the old American Wild West, in circumstances under which the property crime of cattle rustling threatened ranchers' livelihoods? Again, what are we to say about shooting looters? The shooting of looters in disaster zones or in conditions of civil unrest has been an accepted policy in many parts of the world over a long period of time. And there are the (alleged) shootings on sight of armed robber-murderers in South Africa by police. There has been a frightening increase in the robbery of businesses in South Africa by heavily armed gunmen, who sometimes shoot dead unarmed shopkeepers and others in the process of the robbery. While robbery is a property crime, it is unlike cattle rustling or looting, in that it is one which involves the deliberate use, or threat of the use, of lethal force as a means.

In relation to these cases of violations of rights not constitutive of selfhood, we need to distinguish the question of the *types* of crime that might justify the use of lethal force from the question of the *extent* of crime that might justify it. So there might be a general breakdown of law and order in some part of an otherwise well-ordered and law-abiding community. This breakdown might consist in large-scale, serious violations of moral rights.

I suggest that the conception of the police use of force needs to be complicated, but not fundamentally altered, to accommodate public order policing, as in the case of riots or communal violence. As already noted, police use of force is justified by considerations of self-defense, defense of the lives and rights of others, and in order to uphold the law (of which, more **(p.119)** in the next section). Public order policing strategies can usefully be divided into two broad groups: (1) preemptive or proactive policing, and (2) reactive policing. An example of preemptive or proactive public order policing is that typically used in large, pre-organized election rallies addressed by the leaders of political parties. Such occasions involve planned public-order policing arrangements. Accordingly, they can and should involve appropriate preset logistical arrangements, clear lines of authority and communication, experienced supervisors, and a cohort of well-trained police officers to execute the arrangements on the ground.

Reactive public order policing is typically problematic in four respects: (1) police have little or no notice of impending events; (2) there is collective violence; (3) the capacity of the police to exercise control by means of nonviolent strategies is much less than would otherwise be the case; and (4) the use of force by the police is, correspondingly, both far more likely and (potentially) more justified. Naturally, even in reactive policing of collective violence situations, coercive force needs to be used judiciously and in tandem with nonviolent strategies. Moreover, the effectiveness of reactive policing strategies is heavily dependent on the skills, experience, and leadership of the police involved.

In some instances of reactive policing of collective violence the violence is primarily directed at the police themselves (e.g., antigovernment violence). In other instances, the violence is primarily directed at another group within the community (e.g., religious violence). In all instances of reactive policing of collective violence, a crucial factor is the attitude of the community being policed to the police. Are the police seen as an occupying force or as an impartial enforcer of the law and protector of the community from criminal elements? If the latter, then there is the potential to mobilize the community to restrain those elements engaged in violence, whether that violence is directed primarily at the police or at some other group within the community. If the former, then the police face an ongoing uphill battle, especially when one considers their relatively small numbers in contexts of large-scale collective violence. Race riots in Ferguson, Missouri, in 2014, in the aftermath of the shooting dead of an unarmed black youth, Michael Brown, by a police officer, indicated that the police in many US jurisdictions are not necessarily viewed by black communities as impartial enforcers of the law.¹⁴

(p.120) Notwithstanding that there is a breakdown in police-community relations or even that the rioters and insurgents are otherwise intent on violence, the police response ought to be driven by the requirements to uphold the law, preserve the peace, and protect the moral rights (including property rights) of the citizenry. Hence the aim of the police is to disperse violent crowds, and to do so with the minimum use of force and in a discriminating manner. Here the use of tear gas can be effective. Although tear gas is not discriminating it is also not particularly injurious. Additional more discriminating methods are available to target specific individuals, such as ringleaders or those engaged in violent acts, such as missile throwers. These methods include firing nonlethal rounds that, nevertheless, incapacitate (e.g., plastic bullets).¹⁵ In this context, the apparent militarization of US law enforcement agencies in terms of their deployment of armored vehicles, machine guns, and other military hardware is cause for concern.¹⁶

There are some instances of collective violence in which police use of lethal force may be required. For example, in Ahmedabad, Gujarat, India, in 2002, hundreds, if not thousands, of Muslims were killed by Hindus, and incited to do

so by Hindu leaders; moreover, hundreds of Hindus were killed by Muslims.¹⁷ In these circumstances, police use of lethal force is justified both in terms of their own self-defense and in order to defend the lives of those being attacked. In such contexts, the distinction made in Chapter 2 between the police and the military use of force comes under some pressure. For example, effective use of lethal force by police in such circumstances might rely on a military-style authority relationship between police leaders and subordinate police officers, with the latter firing their weapons when instructed to do so by their superiors, rather than on the basis of their own individual judgments.¹⁸ On the other **(p.121)** hand, as will become evident from the discussion on military combat in Chapter 6, the principle of military necessity is not in play; so even in these extreme cases of collective violence, the justification for police use of lethal force does not collapse into the justification for the use of lethal force in military combat.

Some instances of serious and ongoing collective violence undermine the legitimate political order and constitute a threat to national internal security. Perhaps the riots in Thailand in 2014 directed at the democratically elected government of the day are an instance of this. At any rate, to unjustifiably undermine the legitimate political order in this manner is—among other things—to indirectly violate the political rights (institutionally based moral rights) of the citizenry. It is at this point that the institutional roles of the police and that of the military meet or perhaps overlap. Nevertheless, even in these kinds of situation I suggest that the distinction between the police and the military role can be, and should be, maintained. The demarcation in question can be maintained by an institutional demarcation between granting emergency powers to police and imposing martial law. In effect, the latter, but not the former, removes operational authority from the police and places it in the hands of the military.

The various above-described collective violence scenarios involving a general breakdown in public order could conceivably justify the use, or at least the threatened use, of lethal force by police that would otherwise not be justified (e.g., a policy of shooting looters on sight). However, the typical response to such scenarios would be one in which there was a declaration of a state of emergency in a specified geographical area for a limited period of time, and the granting of special powers of enforcement to police by the government of the day, but only in that area for that period. Moreover, strict accountability measures would need to be introduced to ensure police did not abuse their new powers. However, the point to be stressed here is that the special powers in question are ones granted only to police, not to the citizenry in general. Accordingly, these special legal powers (institutional rights and duties) cannot be assimilated to natural moral rights and obligations to use lethal force.

The upshot of our discussion in this section is that the justification for the police use of lethal force in defense of the rights of others, while grounded in the natural right to use lethal force in defense of the rights of others, is nevertheless

different from that right in some important respects. In the first place, individual police officers have, by virtue of **(p.122)** their institutional role, a special moral duty to use lethal force to defend the rights of others, and this duty is considerably more stringent than the natural obligation to do so. In the second place, the circumstances under which police officers are required to discharge this special institutional moral duty to use lethal force are considerably wider than those falling within the scope of the afore-mentioned natural moral obligation. For one thing, individual police officers are required at times to use lethal force to defend an array of institutional moral rights with respect to which there are no natural obligations to use lethal force, such as the right to hold political office. For another thing, the police as an institution can legitimately be granted special emergency powers of enforcement by governments in the name of national internal security, albeit for limited periods, and, as a consequence, they can justifiably use an extent of lethal force that would otherwise not be justified (e.g., a policy of shoot on sight).

Having explicitly discussed police use of lethal force in self-defense and in defense of rights, including a right to things not constitutive of selfhood, let us now turn to the question of whether the existence of such rights could provide a third justification for police use of deadly force—the first two justifications being self-defense and the defense of the moral rights of others. In point of fact, this justification—police use of lethal force to enforce the law—has been implicit, if not explicit, in a good deal of the discussion thus far. However, conceptually at least, we can separate police use of lethal force in self-defense and in defense of the lives (and other properties constitutive of selfhood) of others, on the one hand, from police use of lethal force to enforce the law.

4.4 Police Use of Lethal Force to Enforce the Law

In order to provide an initial focus for our discussion, let us consider the following two kinds of scenarios. Instances of our first kind of scenario include an unarmed pickpocket who is fleeing a police officer with a wallet with a ten-dollar note in it, and an unarmed burglar who is making off with a million dollars' worth of someone else's goods. In both cases, the only way to prevent escape is by shooting the offender dead. Obviously, the officer is not morally entitled to shoot and kill the pickpocket for such a minor offense. Moreover, the police officer is arguably not morally entitled to shoot and kill the unarmed burglar, notwithstanding that his is a serious crime. So there are some cases in which the police are not morally **(p.123)** or, for that matter, legally entitled to use lethal force to uphold the law, notwithstanding that it is the only available means to do so.

However, evidently there are some cases in which the police are morally and legally entitled—and perhaps morally and legally obliged—to use lethal force in order to uphold the law. Some of these putative cases might reasonably be argued to be cases of killing in self-defense or in defense of others,

notwithstanding that the police are legally entitled to use lethal force to uphold the law. So let us set these aside. However, other cases involve property crimes, notwithstanding the existence of the above instances of property crimes with respect to which the use of lethal force by police is not morally (or legally) justified. Consider the case of someone who has successfully robbed a bank and gotten away with millions of dollars of other people's savings. Assume that this person is hiding out, and is armed and prepared to shoot in order to avoid capture, though if left alone with his money, he will not shoot anyone. There are two moral questions here. First, if an arrest attempt is to be made, how should it be done, and second, whether an arrest attempt should be made at all.

If an attempt is to be made, it will be a matter of deciding on the most effective method—ideally one that will minimize the risk to life. Perhaps the police should opt for a policy of containment and negotiation. Alternatively, the best option might be a surprise attack using forced entry. It may well be that in situations of this kind, police have often pursued the wrong options, and the nature of their training may come into this. Moreover, if the methods of police in some jurisdiction are not best practice, and if they should have known this, then they may well have been professionally negligent. Obviously, the negligence of a professional group in relation to situations where lives are at risk is morally unacceptable.

Further, professional negligence may be a byproduct of the ethos or culture of an organization. Perhaps members of a particular police service have developed an ethos of individual physical courage at the expense of reflection, and of “machismo” rather than concern for the consequences, and this ethos has led to a tendency for early recourse to force rather than more considered methods such as negotiation. If so, then there would be cause for concern, as well as a reason to reconsider the organizational structure and the education and training of the police service in question, including, in particular, education in the ethical principles underlying the legitimate and illegitimate use of force by police officers.

(p.124) The Victorian coroner Hal Hallenstein has taken the view that in some of the police shootings and killings in Victoria in the 1980s and 1990s, the wrong options were pursued. For example, Joshua Yap ended up in a wheelchair after being shot by a police officer, Constable Steven Tynan, when Yap—armed with a hunting knife—attempted to rob a TAB agency with an accomplice, Chee Ming Tsen—who was “armed” with an imitation revolver. Tynan had fired only after (a) he had called upon Yap and Tsen to surrender, and (b) Yap had lunged at Tynan with the knife. However, Hallenstein concluded that Tynan and fellow officer Constable Bodsworth ought not to have entered the TAB in the first place, but should have waited for assistance and opted for containment and negotiation. He said their actions were “arguably unnecessary, tactically unsound and in circumstances considered as acceptable breach of police force policy. A more

satisfactory basis of acknowledgment would have been non-exposure by police members, an active seeking of non-firearms resolution of the situation and taking into account the foreseeable risks.”¹⁹

An example where forced entry was used when containment and negotiation were arguably the best option was the shooting by Victorian police of Gerhard Alfred Sader. Four police officers, led by Sergeant Watson, raided Sader’s Melbourne bungalow at dawn. Sader was wrongly suspected of illegal possession of arms and drugs. The police had been issued with search warrants on the basis of false information from an informer known to be unreliable. As it turned out, the police used a sledgehammer to break open an external gate prior to even getting to the door of the house. This would certainly have alerted Sader. When they finally broke open Sader’s door, shouting “Police. Open up!” they stared at a figure in the darkness who later turned out to be Sader. Watson shot three times at the figure in the dark, on the grounds that he believed the person to be armed and about to shoot him. Sader was at most armed with a baseball bat.²⁰

In light of these kinds of cases, let us assume that the method most likely to minimize the risk to life is containment and negotiation. Let us also assume that this is, in fact, the method chosen. It remains true that the police are committed to apprehending the perpetrator. The police are **(p.125)** typically institutionally required—whether or not they ought to be—not to simply let a suspect go, and even in a situation of containment and negotiation, the use of lethal force may turn out to be necessary, albeit as a last resort.

Consider, in this connection, a gunman who, having killed his wife in their home, refuses to give himself up to police negotiators, and is preparing to escape, notwithstanding the presence of police snipers. Should he be allowed to escape, given that he is no longer a threat to anyone and the only reason not to leave him alone is that his crime will go unpunished? Martin Bryant—the man who went on a shooting spree in Port Arthur, Tasmania, on April 28, 1996, killing thirty-five innocent people with a semiautomatic rifle—should not have been allowed to escape. The above-mentioned armed professional burglar is quite different from both the wife killer and Martin Bryant. The burglar is guilty of property crimes and of seeking to avoid punishment for these crimes. In addition, he is prepared to use lethal force to prevent his arrest, but is not otherwise dangerous; if the police allow him to go free, no lives will be lost. Nor is it a matter of arresting him without loss of life at a later stage; perhaps he always carries his gun, or perhaps he is about to leave the country never to return (since extradition is not possible). In short, what is the moral justification for the use of deadly force in cases in which police confront a choice of either letting an offender go free or shooting that offender?

It might be argued that the police officer who comes upon the professional burglar should allow him to go scot-free. The police officer should do so on the grounds that by doing so his or her own life and that of the burglar will not be put at risk; and ensuring that no life is lost is more important than protecting property²¹ and seeing to it that justice is done by imprisoning the burglar for his crimes. Moreover, in a similar vein It might also be argued that the police officer should allow the wife-killer in our other scenario to go scot-free. The police officer should do so on the grounds that by doing so his or her own life and that of the wife-killer will not be put at risk; and ensuring that no additional life is lost is more important than ensuring justice is done by imprisoning the wife-killer for his crime of murder.

The arguments in favour of the police officers allowing the burglar and the wife-killer (respectively), to escape are not in my view compelling, **(p.126)** but let us up the ante. Let us assume that in a certain police jurisdiction large numbers of offenders arm themselves and threaten to kill police officers who try to arrest them for their offences. The offences in question are serious property crimes (as in the burglar scenario) and one-off serious crimes of murder, grievous bodily harm and rape (as in the wife-killer scenario). Moreover, the armed offenders in question will kill or, at least, try to kill the police officers, if the latter try to arrest them, but not if these officers simply allow the offenders to escape.

One possible police response (let us assume) to this widespread law enforcement problem is to comply with the wishes of these offenders by allowing them to escape. However, such a police practice would surely be a gross dereliction of their institutional and moral duty; it would essentially consist of a failure to enforce the law on any occasion in which an offender was prepared to use lethal force to resist arrest (in circumstances in which allowing the offender to escape did not pose a risk to the lives or limbs of police officers or third parties). In the circumstances in question such a practice would render police officers impotent in relation to a very wide range of serious crimes; as such, it is not a sustainable law enforcement practice. Evidently, police officers need to retain as a last resort the use of lethal force to enforce the law, even in small-scale, police-offender confrontations in which their resort to lethal force is not necessary to prevent loss of life or limb (either their own or that of offenders or ordinary citizens). In these sorts of case, the police are not necessarily engaged in self-defense. In many of these cases, the best thing for police officers—if they are simply acting in self-defense—would be for them to get back into their patrol cars and return to the police station. In this important respect, police are different from ordinary citizens. It is expected, indeed, legally required in many jurisdictions, that ordinary citizens take the option of fleeing if it is available; however, for the police to do so would be an abrogation of their legal and moral duty. Nor are these sorts of case necessarily cases of killing in defense of others. The lives of ordinary citizens might not be at risk. For example, an offender—such as our armed burglar—might simply want to be left alone to spend his ill-

gotten gains. Or the above-described husband who has killed his wife might cease to be a threat to anyone once he has killed his wife.

Against this it might now be argued that although the police are morally and, presumably, legally obliged to use lethal force against offenders prepared to use lethal force to avoid arrest (assuming it is necessary to do **(p.127)** so on pain of allowing the offenders to escape), the moral justification for such use of lethal force by the police is self-defense rather than, as I have suggested, to enforce the law.

Before proceeding to engage directly with this argument there are a couple of preliminary matters to be dealt with. Firstly, it is important not to conflate the type of scenario in question with a related type that is irrelevant to the argument. In these irrelevant scenarios the armed offenders will try to kill the police officers whose job it is to arrest them, *even if* these officers are prepared to allow the offenders to escape. In short, in this second type of scenario the officer's life is at risk, irrespective of whether he or she proceeds to try and effect an arrest of the offender. A moral justification for police use of lethal force in this second type of scenario may well be self-defense; but this type of scenario is *not* in question here. In the scenarios in question here the police officer has the option of allowing the offender to escape without putting his own life (or that of the offender or, for that matter, any third party) at risk.

More generally, it is important not to conflate the type of case of interest to us here with that of fleeing *dangerous* offenders (of which more below). Unlike the offenders of interest to us here, dangerous offenders in this sense are a threat to the life and limb of police officers and ordinary citizens, even if they are allowed to escape. So dangerous offenders are a *standing* threat to life and limb; the threat to life and limb that they pose cannot be removed by leaving them alone. Hence it is legally and, presumably, morally permissible to use lethal force against such dangerous offenders if they are trying to escape arrest; if they are so-called (dangerous) 'fleeing felons'.

A second preliminary point is that the argument under consideration here (that the law enforcement justification for police use of lethal force collapses into the self-defense justification) should not be confused with a related argument involving the other-defense justification. According to the latter argument, in the scenarios in question the police, even if they are not engaged in killing in self-defense are, nevertheless, necessarily killing in defense of others. As we saw above, this may well be true of *dangerous* fleeing offenders (e.g. serial killers) or offenders who will try to kill would-be arresting police officers, even if the latter would allow them to escape. However, as our burglar and wife-killing scenarios (again) illustrate, neither the lives of police officers nor those of ordinary

citizens need be at risk. So with respect to the scenarios in question the other-defense justification is not relevant.

(p.128) Let us now directly engage with the actual argument at issue; the argument that putative cases of police use of lethal force to enforce the law, such as our burglar and wife-killer scenarios, are simply cases of police using lethal force in self-defense. To reiterate: the type of case in question is that of fleeing offenders who only use lethal force, or threaten to use lethal force, to avoid arrest.

What if in these cases the police do their duty and choose *not* to allow such offenders to escape? So the police proceed to try to arrest these offenders, but in doing so they no longer have the option of using non-lethal means; so the police use lethal force. I have suggested that the police are now using lethal force to enforce the law. The alternative suggestion is that the police are using lethal force in self-defense. But at the point at which the police decide to enforce the law in the knowledge that the offender will use lethal force to resist arrest, the police are not engaged in an act of self-defense. After all, at this point the police have another option, if they are primarily interested in preserving their own lives and/or that of the offender: get back into their patrol cars and return to the police station. Accordingly, at this point the self-defense justification is not available to the police officer. It is not available since it is not necessary for the police officer to use lethal force to protect his life (or that of his fellow officers or other third party); the option of flight is available to the officer(s). However, it is necessary for the police officer to use lethal force if the officer is to enforce the law. Therefore, in these scenarios the moral justification for the police officer using lethal force is that it is necessary to do so if the law is to be enforced.

Against this it might be argued as follows. It is agreed on all hands that the police officer in question is doing his legal and moral duty in trying to arrest the offender and that the offender ought not to resist arrest. However, so the argument goes, if the offender does resist arrest by (say) shooting at the officer then the officer's action of killing the offender is self defense. For at *that* point – the point at which the offender tries to kill the officer – the offender would have killed the officer if the officer had not killed the offender first.

This response is flawed in so far as the possibility of flight remains available to the police officer. Naturally, at *some* point in *some* scenarios the possibility of flight might not be available, e.g. the officer and the offender are exchanging fire and the officer is unable to flee because his leg is damaged (say) but is, nevertheless, blocking the offender's exit path. At this point in these scenarios it may well be that the officer is not aiming at arresting the **(p.129)** offender or otherwise enforcing the law but is simply trying to preserve his own life. However, this does not vitiate the claim made above that prior to such a point being reached the police officers may well be using lethal force to enforce the

law and not in self-defense, given that during this (earlier) period the option of flight remains available to the officer. Moreover, the option of officer flight or of allowing the offender to escape may well remain even after the officer and/or the offender have fired their weapons. (See below for an actual instance of this.)

I have argued that in the kinds of case in question, the police are not simply engaged in self-defense or defense of others, either in the narrow sense of preservation of life, or the wider sense of preservation of self. Rather, there is some more complex set of moral considerations here. Let us pursue these further, initially by looking at the case of the police killing of Pavel Marinoff. Marinoff was a psychopathic Bulgarian army deserter who had shot and wounded a number of police officers before being confronted by Sergeant John Kapetanovski and Senior Constable Rod MacDonald on the Hume Highway outside Melbourne.²² They pulled a van over to the side of the road, rightly believing it to be driven by Marinoff. They ordered the driver to place his hands outside the car. The driver drew his pistol, fired several shots, and drove off. He wounded both officers. However, MacDonald fired two shots from his shotgun through the rear window of the escaping car, killing Marinoff. Perhaps this was a case of killing a fleeing offender, rather than of killing in self-defense or in defense of the lives of others. After all, presumably Marinoff was at this stage simply seeking to make good his escape. Accordingly, neither the lives of the police nor the lives of others were under immediate threat. Even if this were so, it was nevertheless a morally justifiable killing of a fleeing offender. Marinoff's offenses included attempted murder and grievous bodily harm. Further, Marinoff was armed and dangerous, and constituted a threat to the lives of others, and especially the lives of the police officers. Arguably, it was the *duty* of MacDonald to shoot Marinoff.

There are various other cases of shootings of dangerous fleeing felons that can be drawn from other police services and used for illustrative purposes. For example, there are the shootings of fleeing suspected terrorists in Northern Ireland. And police have been held liable for not shooting at fleeing gunmen known to be terrorists. Another case is that of Hussein (p.130) Said, who attempted to assassinate the Israeli ambassador in England. He fired one shot, which missed, and then his gun jammed. He then took flight. He was pursued by a bodyguard, who fired a warning shot and called upon Said to give himself up. When he continued to flee, he was shot and wounded. In the ensuing court case, the bodyguard's action was held by the judge to have been illegal, since Said no longer constituted an immediate threat to the life of anyone. Evidently, bodyguards and police can find themselves between a rock and a hard place. They might be held liable for murder if they shoot, and for failure to discharge their duty if they do not.

In the United States, the fleeing felon rule under which lethal force could be used against a fleeing person suspected of a felony was curtailed by the US Supreme Court in 1985.²³ Roughly speaking, under this ruling, lethal force is legally justified only if it is necessary to prevent the escape of someone who is reasonably believed to pose a significant threat to the life or limb of the pursuing police officer or to others. Consider the recent case mentioned in the Introduction of the unarmed black youth Michael Brown. After stealing from a shop in Ferguson, Brown fled from police, was shot at by a police officer (and hit in the hand) and was finally shot dead by the police officer. Perhaps this use of lethal force might have been lawful prior to 1985, but *prima facie* it was unlawful thereafter, given that Brown was unarmed. On the other hand, there remains the issue as to whether or not the police officer might be held to have had a reasonable belief that Brown constituted a threat, since, arguably, he was moving toward the officer rather than surrendering when he was shot.²⁴ In the recent case of Walter Scott, shot dead by a police officer in North Charleston, South Carolina, there could not have been any such reasonable belief. Scott was an unarmed black person stopped by the officer. The officer shot Scott in the back multiple times as he fled, and the incident was caught on video. The officer was charged with murder.

Let us now consider the killing of Ian William Turner by Constable Wayne Sherwell.²⁵ Sherwell stopped a car driven by Turner for speeding (**p.131**) near St. Arnaud in Victoria. Turner had no identification, and in the course of conversation he aroused Sherwell's suspicions. Turner said he would look for ID in his bag, but instead pulled a sawed-off .22 rifle on Sherwell. He then took Sherwell's police revolver. Sherwell grabbed Turner's hand and a struggle ensued. During the struggle, Turner called on Sherwell to give up and simply let him go free. Sherwell disarmed Turner and, now in possession of both weapons, ordered Turner to lie on the ground and allow himself to be handcuffed. He refused to do so, calling on Sherwell to let him go. When Sherwell refused his request and tried to radio for assistance, Turner blocked his way, calling on Sherwell to shoot him. Sherwell fired his gun in the air. Turner ran to his car while Sherwell called on his radio for assistance. Turner ran back to his car and produced a sawed-off shotgun, which he pointed at Sherwell. Sherwell fired a couple of shots. Both men hid behind their respective cars. Further shots were fired by Sherwell. Turner did not fire any shots at any time. When other officers arrived at the scene, they found one of Sherwell's shots had killed Turner. Turner, it later emerged, was an armed robber.

At the point when Sherwell shot Turner, he was acting in self-defense, and his killing of Turner was justifiable on grounds of self-defense. However, I would like to consider a further issue that the case raises. It seems that throughout the whole episode, Turner had no desire to kill Sherwell, but rather acted in order to escape from Sherwell. Thus, Turner initially used the threat of deadly force preemptively in order to escape arrest, and subsequently he grabbed his

shotgun because Sherwell was holding him prisoner and using the threat of deadly force to do so. So Turner essentially threatened, but never in fact used, deadly force in order to avoid arrest. For his part, Sherwell, while prepared to *threaten* to use deadly force to prevent Turner's escape, only in fact seemed prepared to use deadly force in self-defense. In other words, if Turner had simply got into his car and driven off, Sherwell would quite possibly not have shot him. Moreover, if Turner had known that Sherwell would not have shot him other than in self-defense, Turner would not have pulled a gun on Sherwell in the first place, but would simply have driven off.

The case is an example of an offender who uses the threat of deadly force to avoid arrest. It also illustrates the distinction between killing in self-defense and killing in order to prevent an offender escaping. Moreover, it illustrates this distinction notwithstanding the fact that the offender is armed and is prepared to use deadly force to escape arrest.

(p.132) This distinction between killing in self-defense (or defense of others) and killing (or not killing) in order to prevent an offender escaping is further illustrated in the case of passive noncompliance. Consider the case involving the dangerous criminal David Martin in an underground subway in England in 1982. Cornered in the subway by armed police, Martin was persistently ordered by police to give himself up, but he refused to do so. However, he made no hostile movements against the police. The police were concerned that he might have a gun and might use it against them. Certainly his history indicated this might be so. Finally, the police decided not to shoot him, but to rush and disarm him. He was found to be unarmed.

Three points need to be noted here. First, the police risked their lives in rushing Martin. He might have been armed, and if so, he may well have shot dead one or more of the police officers. Second, if Martin had been shot dead by the police, then the police may well have been found guilty of culpable homicide. Third, if Martin had been allowed to escape, he might have harmed, even killed, innocent people, and if so, the police would have been held liable for these consequences of their action of allowing him to escape.

Let us now consider the police killing of Graeme Jensen. Victorian police sought to arrest Jensen for murder. In fact, he did not commit the murder. Nor did they have sufficient evidence to convict him of conspiring to rob a bank—the other matter for which he was under investigation. At most he could have been convicted of illegal possession of a firearm. Moreover, Jensen probably believed the police were out to kill him. At any rate, he tried to escape the police when they tried to arrest him. Jensen was armed and allegedly pointed his gun at officers, who first warned him and then shot at him. It later turned out that Jensen's gun was not loaded. Jensen was escaping by car when the second shot went through the rear window and killed him. By one account, Jensen was killed

in self-defense. By a second account, it was not a case of self-defence but of shooting a fleeing offender, the offense being illegal possession of an (unloaded) weapon.²⁶ On a third account, it was unlawful for police to even try to arrest him. If so, Jensen was murdered.²⁷

(p.133) At any rate, the Jensen killing raises at least two issues. In the case of Jensen, unlike Turner, the police initiated the threat of deadly force, and Jensen at most threatened deadly force for the purposes of making his escape. Moreover, the police used an extent of force that was disproportionate to the offense committed.

Let us now summarize the moral considerations that the above-described cases illustrate. First, there is the seriousness of the offense committed by the person shot dead by the police. In the case of a burglar, the crime is a violation of the right to property. While this is not a violation of a right to something constitutive of selfhood, it is a serious crime, and certainly far more serious than the petty theft involved in picking someone's pocket. In the case of Marinoff, the offense is a violation of the right to life, and far more serious still. This raises the issue of the proportionality of police use of deadly force.

Second, there is the question as to whether the offender is armed and prepared to kill in order to avoid imprisonment. Here we must distinguish between being prepared to kill to avoid arrest and, ultimately, imprisonment and being prepared to kill for other reasons, such as self-defense, revenge, or to become rich.

The following two considerations are evidently held in many liberal democratic societies to be jointly sufficient to morally justify the police use of deadly force as a last resort.²⁸ First, the offense is serious in that it is a violation of a right to something constitutive of selfhood, or if not, it is a violation of some other right of an appropriately important kind. Second, the offender is prepared to use deadly force to avoid arrest and imprisonment. Some societies appear to take this view, while at the same time being opposed to capital punishment. There is no obvious inconsistency here. On the one hand, members of liberal democratic societies generally take the view that killing is not justified as a punishment for criminals who are imprisoned, and therefore no longer able to break its laws. On the other hand, members of these same societies generally hold that police use of deadly force is justified if this is the only way to ensure that the laws against serious crimes are upheld, and in particular, if the perpetrators of serious crimes are themselves prepared to kill in order to avoid imprisonment. This last point is in need of further elaboration.

(p.134) In the kinds of cases under consideration, there are only two options confronting the police: letting the perpetrator escape, or shooting the perpetrator dead. However, what has been omitted from the argument thus far

is that the fact that these are the only options is due to the perpetrator— he is responsible for this situation, because he is forcing the choice—in our above-mentioned (Chapter 2.2) thick sense—between two evils.²⁹ The armed burglar mentioned earlier refuses to surrender himself and his stolen goods. Thus he is intentionally ruling out the third option—the morally preferable option—namely, his peaceful surrender. In that case, the burglar is morally responsible for the choice between two evils confronting the police. That is, the burglar is not only responsible for violating people’s property rights, but he is also morally responsible for attempting to prevent the police from performing their duty, and, indeed, he is morally responsible for forcing the police to choose between two evils. The two evils in question are allowing the perpetrator of a serious crime to escape, or shooting and killing that perpetrator.

This consideration may be enough to tip the scales in favor of police use of deadly force in this kind of case. If so, how would this tipping of the scales be achieved? Presumably the perpetrator would now be held to be *indirectly and in part* responsible for his own death. When a police officer shoots dead an armed bank robber who is prepared to kill in order to prevent apprehension, the police officer’s choice situation has been knowingly chosen by the burglar. Accordingly, the armed bank robber is forcing the choice in the thick sense and, this being so, can be held indirectly and in part responsible for his own death.

While police use of deadly force in these kinds of cases may well be, in principle, morally justifiable, the justification is nevertheless problematic in a number of ways. First, it places an enormous responsibility—and a corresponding opportunity for abuse—on individual members of the police force. For as we have seen, if police are entitled to kill in order to ensure that the law is upheld, then police may kill an armed bank robber even though he will not fire his gun if left alone. Moreover, in doing so they will kill this (alleged) bank robber prior to any considered judgement by a court of law that he has in fact broken the law. In such cases, it is the responsibility of the individual police officer, initially, to make the judgement that the person is an armed burglar who will kill in order to avoid **(p.135)** apprehension, and then to go on to shoot this person dead in order that he not escape.

Second, it needs to be determined which crimes committed by *armed* perpetrators are sufficiently serious to warrant police use of deadly force. I have suggested that violations of rights to things constitutive of selfhood are sufficiently serious. It still remains to be determined what other rights violations are sufficiently serious. Here it is not simply a matter of determining which rights are sufficiently morally important to warrant protection by recourse to deadly force, but also the extent of the rights violations. Perhaps a single armed shoplifter is not a legitimate target, but what about an army of armed looters threatening the economic well-being of an impoverished community?

This latter problem raises perplexing questions concerning the moral balance to be struck between, on the one hand, the right to life of a suspect, and on the other, the rights of citizens to be protected by police from serious rights violations, which nevertheless stop short of threatening their lives or elements constitutive of selfhood. Here there are a number of considerations. How extensive are these rights violations? Are these rights violations likely—if they go unchecked—to result in the violations of citizens' rights to things which are constitutive of selfhood? What moral weight, if any, is to be attached to the threat posed by those who use arms to prevent their legitimate arrest, or to the possession by the state of overriding coercive power to uphold its morally legitimate laws?

Finally, these kind of “forcing the choice” situations raises the question as to whether or not the police—and not the offender—knowingly created a situation in which they would have to kill the offender in self-defense, or at least failed to act when they knew that their inaction would lead to a situation in which they had to kill the offender in self-defense. These latter sorts of cases need to be distinguished from the ones here under consideration, namely ones in which an offender is forcing the choice upon the police of either using deadly force or allowing the offender to escape. Consider, in this connection, the following type of scenario involving the Special Investigation Section (SIS) of the Los Angeles Police Department, which targeted armed robbers during the period 1965–1992: “The most controversial of the home-baked rules is the SIS practice of standing by and watching its surveillance subjects victimize innocent citizens, then confronting offenders as they leave the scene of their crime.”³⁰ Here the **(p. 136)** SIS provided known offenders with the opportunity to commit very serious crimes by failing to arrest them for the less serious crimes they had already committed. The SIS did so in order to enable the offenders to commit the more serious crimes, and thereby either receive longer prison sentences, or be shot by the police attempting to flee the crime scene or resisting arrest.³¹

4.5 Conclusion

Let me conclude this chapter by outlining the main general conditions under which police use of deadly force might be morally justified, or at least might be morally justified if adequate police accountability can be ensured so as to prevent abuse of police powers. Note that the first two conditions—self-defense and defense of others—are in essence the same conditions under which ordinary citizens are entitled to use deadly force. The use of deadly force under a and b of condition 3 below is particular to the police, and also problematic in various ways, some already mentioned. At any rate, the use of deadly force under conditions 3a and 3b make a number of implicit assumptions. One assumption is that the extent of reasonable suspicion is such as to justify making an arrest. However, killing an alleged offender to prevent his or her escape can presumably only be justified in situations in which there is certainty, or near certainty, that the alleged offender has in fact committed the offense. A standard

of evidence higher than reasonable suspicion is required. Another assumption is that there *really are* no possible ways of preventing escape other than by using deadly force. So, for example, letting the suspected offender escape in the knowledge that there is a reasonable chance that he or she can be arrested at a later date is not an option.

1. *Self-Defense*: A police officer is morally entitled to kill another person if that person is trying to kill, maim, or otherwise threaten the life of the **(p.137)** officer (or other constitutive features of his or her selfhood), and will succeed unless the officer kills the person first.
2. *Defense of Others*: A police officer is morally entitled—and may be morally obliged—to kill another person if that person is trying to kill, maim, or otherwise threaten the selfhood of some third person(s), and will succeed unless the officer kills the would-be offender first.
3. *Uphold the Law*: (a) Fleeing felons. A police officer is, or might be, morally entitled—and may be morally obliged—to kill another person if that person (whether armed or unarmed) is rightly and reasonably suspected of the crimes of killing, maiming, or otherwise threatening the selfhood of some third person(s), is attempting to avoid arrest, and if the only way to prevent the suspected offender escaping is to kill her or him. (b) Armed suspects. A police officer is, or might be, morally entitled—and may be morally obliged—to kill another person if that person is rightly and reasonably suspected of the crimes of serious rights violations, is attempting to avoid arrest, is armed and using those arms to avoid arrest, and if the only way to prevent the suspected offender from escaping is to kill him or her.
4. *Deterrence in States of Emergency*: A police officer is, or might be, morally entitled—and may be morally obliged—to kill another person if (a) that person is rightly and reasonably suspected of a type of crime that is so widespread in an existing state of emergency as to constitute a serious threat to fundamental rights of citizens; (b) deadly force is the only available deterrence in the circumstances of this particular state of emergency; (c) that person is attempting to avoid arrest; (d) the only way to prevent the suspected offender escaping is to kill her or him; (e) perpetrators of the type of crime in question have been warned that they will be shot dead under conditions a, c, and d; and (f) the policy specified in conditions a–e has been adopted under a state of emergency for a specified time-limited period and in a specified geographically limited area.

Notes:

- (1.) Earlier versions of the material in this chapter appeared in Seumas Miller, *Issues in Police Ethics* (Wagga Wagga, Australia: Keon Publications, 1996), Chapter 3; Seumas Miller, John Blackler, and Andrew Alexandra, *Police Ethics*

(Sydney: Allen and Unwin, 1997), Chapter 6; Miller, "Shootings by Police in Victoria"; Miller and Blackler, *Ethical Issues in Policing*, Chapter 3.

(2.) Miller and Blackler, *Ethical Issues in Policing*, Chapter 1.

(3.) While some contractarians would concede retention of the right to self-defense, they may well not do so in relation to the right to defend others. Thus, according to Hobbes, "A Covenant not to defend my self from force, by force, is alwayes voyd" (Thomas Hobbes, *Leviathan*, Chapter 14, any edition). For one influential recent contractarian view, see Reiman, "The Social Contract and the Police Use of Deadly Force," 237-249. See also Kleinig, *The Ethics of Policing*, 109.

(4.) One can, of course, transfer to others the right to such things as one's property, and one can transfer the right to enforce contracts one has entered into. Moreover, a third party may have an independent right to use lethal force to enforce a contract, e.g. if lives would be put a risk if the contract is not fulfilled. Further one can *delegate* the exercise of some rights, as opposed to transferring the rights themselves, including the exercise of rights to enforce by means of lethal force. But I am denying that one can transfer the right to use lethal force to enforce such contracts.

(5.) Inalienable rights are not necessarily absolute rights; the right to life is inalienable, but it does not follow that it is absolute. The existence of a right to self-defense demonstrates that the right to life is not absolute.

(6.) This is consistent with human rights underpinning various institutional rights, these institutional rights varying from one institutional setting to another, and with there being room for collective discretionary decision-making in relation to the precise character of such institutionalized human rights. For example, the human right to autonomy can underpin a variety of different voting arrangements.

(7.) Although an inalienable right cannot be *transferred* to another person, as already mentioned, its exercise might be able to be *delegated* to another person.

(8.) National Committee on Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990).

(9.) There are, of course, exceptions, such as a standing and unavoidable lethal threat that might justify a preemptive strike. Moreover, I am here setting aside cases of ongoing collective violence such as wars. I address the matter of war in Chapter 6.

(10.) As already noted, the principle of necessity operates in a different manner in cases of collective violence, such as war. See especially Chapter 6.

(11.) But see Teichman, "Self-Defence."

(12.) Tom Noble, *Untold Violence: Crime in Melbourne Today* (Melbourne: John Kerr, 1989), 142-143.

(13.) Hal Hallenstein, *Investigation into the Death of Gary John Abdallah: Inquest Findings* (Melbourne, Australia: State Coroner's Office, 1994).

(14.) Jon Swain and Amanda Holpuch, "Ferguson Police: A Stark Illustration of Newly Militarised US Law Enforcement," *The Guardian*, August 15, 2014, <http://www.theguardian.com/world/2014/aug/14/ferguson-police-military-restraints-violence-weaponry-missouri>.

(15.) Plastic bullets can be lethal (e.g., if fired at very close range). However, they are, at least in principle, nonlethal weapons and, in any case, should not be used to disperse nonviolent crowds or against members of violent crowds not actually engaged in violent acts. See P. A. J. Waddington, *The Strong Arm of the Law: Armed and Public Order Policing* (Oxford: Clarendon, 1991), Chapter 6.

(16.) Waddington, *The Strong Arm of the Law*, Chapter 6.

(17.) Rafiq Zakaria, *Communal Rage in Secular India* (Mumbai, India: Popular Prakasham, 2002), 20-24. See also Seumas Miller, Sankar Sen, Prakash Mishra, and John Blackler, *Ethical Issues in Policing in India* (Hyderabad, India: National Police Academy, 2008).

(18.) In fact, in India there is a sharp institutional division between ordinary police and the armed police used to quell community violence; the latter are a separate paramilitary force.

(19.) Hal Hallenstein, *Investigation into the Death of Hai Foong Yap: Coroner's Findings* (Melbourne, Australia: State Coroner's Office, 1994), 164.

(20.) Hal Hallenstein, *Investigation into the Death of Gerhard Alfred Paul Sader* (Melbourne, Australia: State Coroner's Office, 1994).

(21.) I am assuming the theft of the items in question will not lead to the death or near death of the property owners, e.g. by depriving them of the means to buy food.

(22.) See John Silvester, Andrew Rule, and Owen Davies, *The Silent War: Behind the Police Killings That Shook Australia* (Sydney: Floradale, 1995), 3.

(23.) See US Supreme Court, "*Tennessee v. Garner*," in (eds.) Daryl Close and N. Meier *Morality in Criminal Justice: An Introduction to Ethics* (Boston: Wadsworth, 1995), 366-379.

(24.) “What happened in Ferguson?” *International New York Times* http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0

(25.) Silvester, Rule, and Davies, *The Silent War*, 125–130.

(26.) Silvester, Rule and Davies, *The Silent War*, 37.

(27.) Police were in fact charged with his murder but were not convicted.

(28.) However, this view is evidently controversial. It appears to be inconsistent with that advanced, for example, by Jerome Skolnick and J. Fyfe in *Above the Law: Police and the Excessive Use of Force* (New York: Free Press, 1993).

(29.) For discussion of the notion of forcing the choice, see Chapter 2.2.

(30.) Skolnick and Fyfe, *Above the Law*, p. 146.

(31.) The police might argue that in some of these situations they would be unable to convict these offenders of any serious crimes, due to the difficulties of, for example, proving a conspiracy to commit an armed robbery, or even to prove attempted armed robbery. Accordingly—the argument might run—they had to choose between increasing the risk to life and limb (their chosen option), or allowing armed robbers to either get off scot-free (when they failed to be convicted of (say) conspiracy to conduct an armed robbery), or simply be convicted of minor offenses, such as, say, car theft.

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